Employment Law Manager

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From Attorney Helene Horn Figman

Time for an Employment Law Audit

As companies toast the new year, now is a good time to assess where they can operate more efficiently, more profitably or with lower risk in the months ahead.

The new year promises to be one of the most challenging ever faced by business owners and managers. However, an employee law audit is one way you can flag potential problems early. This is a proactive measure that can reveal what, if any, employment law issues may need attention. You then have the opportunity to resolve these issues before government agencies or disgruntled employees take action.

Items covered in an employee law audit include:

- Legal compliance with federal and state statutes
- Health Insurance Reform Act requirements
- Fair Labor Standards Act regulations governing fair wage and overtime
- Maintenance of personnel records pursuant to the Massachusetts Personnel Records Act
- Employment applications
- Personnel manuals
- Job descriptions
- Privacy of medical records
- Termination documents
- Drug testing, background checks

About Attorney Figman

A member of the Massachusetts Bar for 28 years, Helene Horn Figman has combined a successful employment law practice with an active involvement in business consulting and agency law. She has successfully litigated before all courts in Massachusetts and the United States District Court. She has represented corporations and individuals before M.C.A.D., E.E.O.C., Civil Service Commission, Division of Unemployment Assistance, and the Social Security Administration. Her background includes management of her own law firm, appointments as a visiting lecturer in contracts and labor law at Bridgewater State College, and four years as an administrative hearings officer for the Massachusetts Commission Against Discrimination.

"You're Fired!" — Not the Best Way to Downsize

It's a Donald Trump trademark. But is it the best way to let an employee go?

Hopefully, you would tell someone the bad news in far less hostile, and more carefully considered, language.

There are all types of terminations and they all come with various legal repercussions. Suppose you want to let an employee go due to an economic downturn. Is this a "layoff"? Are you planning to reduce your workforce by a significant number of employees? Perhaps it really is a "reduction in force."

Suppose you have an employee who is chronically late. Does that trigger a termination "for cause"? The words you assign to a termination can impact unemployment benefits and expose you to charges of wrongful discharge or discrimination.

Before You Act, Analyze

If you do need to reduce your staff by a significant percentage, you should seek professional assistance in putting together your reduction in force plan. To avoid discriminatory results, a good first step is a careful analysis of which functions you wish to cut. You will need to look at your employees' job functions and the relative importance of certain departments to your company's success.

Downsizing often requires legal compliance with state and federal laws, like the Fair Labor Standards Act and COBRA. You may wish to offer separation agreements. In particular, if you have a worker out on FMLA (Family and Medical Leave Act), the situation may call for special consideration.

The appearance of age bias is another potential pitfall. If you terminate a group of low-performers that includes a disproportionate number of employees over age 40, that may expose you to claims of age discrimination.

Termination for Cause

When terminating an individual "for cause", you should have documentation in the employee's personnel file. This type of termination is not usually a surprise. Normally, the employee has been warned of conduct that is in violation of your policies and you should be able to demonstrate that you do have uniformly enforced personnel policies.

If you are just plain annoyed or disappointed with an employee's performance, that termination is usually not "for cause."

What About Unemployment Benefits?

Whether an individual can collect unemployment benefits is up to the Division of Unemployment Assistance. The criteria the DUA considers includes if (1) the employee voluntarily quit the job; (2) the employee's conduct was willful misconduct against the employing unit's interests; or (3) the employee violated a "uniformly enforced rule." A truthful answer to the Division of Unemployment Assistance is the best answer. For example, if you terminate an employee for chronic tardiness, then you should say that in the employer's statement on the unemployment benefits form. Don't create another reason just because you do not have a written rule about tardiness. You may be able to show that the employee knew that prompt arrival at the workplace was expected and that chronic tardiness would lead to termination.

At conclusion of employment another issue you'll need to navigate is how much money you owe when the employee leaves. Employers must comply with state and federal laws when making final payments for wages, earned but unused vacations (PTO), bonuses, commissions and outstanding expenses. In Massachusetts, failure to make prompt and proper payments will subject you to a payment of treble damages.

Exempt or Non-Exempt ... How Do You Know and Does It Matter?

Overtime pay is a hot topic and wage and hour settlements are at an all-time high. The problem for employers: how to determine which positions are "exempt" and which are "non-exempt."

The Fair Labor Standards Act (FLSA) regulates overtime pay. The overtime provisions cover employees categorized as non-exempt. Those include most hourly employees, including clerical and blue-collar workers performing non-management routine work. Any employee earning less than $455 per week is non-exempt and must receive overtime for all hours over 40 in any given week.

Exempt employees are those not governed by the provisions regulating overtime pay. Professionals, such as doctors, lawyers, architects, and archeologists fall into this category. Exempt employees also include highly compensated employees who earn $100,000 per year or more and regularly perform duties at an executive level.

The major problem in determining non-exempt or exempt status is found in middle management white-collar positions. The old theory was that if an employee held the title of manager and supervised a few people, the management employee was "exempt." However, that is not always the case. For an employee to qualify for an administrative exemption, he must have primary duties, which include, but are not limited to:

- The exercise of discretion and independent judgment
- Making significant business recommendations
- Drafting and/or carrying out policies, developing long range goals
- Representing the company in matters of fiscal or legal importance

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Assigning an employee to the wrong category can prove costly. To avoid costly mistakes, an internal audit of job classification and responsibilities — performed in partnership with competent legal counsel — is crucial.

Why offer an Employment Contract?

Business owners hear the word "contract" and think, "I'm getting locked into something with this employee." After all, the Commonwealth of Massachusetts has an "at-will" employment system. So, why would you want a written contract?

Well, consider this: Contracts are useful to clearly set forth the terms of the employment and YOUR expectations. Specifics such as how a bonus will be calculated, or whether a bonus is purely discretionary, are also important to put in writing.

An employment contract also provides a vehicle for presenting your new employee with a non-compete agreement. The beginning of employment is the time to present a non-compete. Once the person has worked for your business for a few years, issuing a non-compete is difficult and would require additional "consideration" (money). An employment agreement can also set forth confidentiality and trade secret protection. You may wish to have a contract that requires the employee to provide you with notice, if he or she will be leaving your employ. You might also, in turn, have a provision where you provide notice but reserve the right to issue pay in lieu of notice.

Since good communication with your employees is the key to effective human resources management, you can think of the employment agreement as one of the first steps to clearly communicate the specifics of the employee / employer relationship.

Happy New Year!

From the law offices of
Helene Horn Figman