SHUTTERSTOCK

Brief Answers To Frequently Asked Employment-Related Questions

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With potential deregulation at the federal level and variance among the states, keeping up with employment law can be challenging. Here are some brief answers to employment-related questions frequently asked by corporate counsel.

I want to obtain a background check from a third-party vendor relating to an applicant for employment. Can I do so without the applicant's permission?

Under the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681, et seq., employers may not obtain background checks prepared by third parties to evaluate applicants for employment (or for promotion, reassignment or retention) unless they:

1. Provide the applicant with a "clear and conspicuous" written disclosure that a background check may be obtained, and

2. Obtain the applicant's written authorization.

The FCRA also mandates that employers take certain steps if they are considering taking action based on a background check, and if they take such action. Employers considering obtaining and using background checks should seek advice from legal counsel to ensure that they are in compliance with the FCRA.

Why should I have a written anti-harassment policy?

Both federal and state law prohibit workplace harassment based on a protected class; this includes, but is not limited to age, sex, race, religion, national origin and disability. *See* 42 U.S.C. § 2000e-2(a)(1); 29 U.S.C. § 623(a)(1); 42 U.S.C. § 12112; NRS 613.310. Thus, it is critical that every employer have a written anti-harassment policy in order to ensure effective prevention and correction of harassing behavior.

The EEOC's guidelines suggest that the following key elements be included in any anti-harassment policy:

- A clear explanation of prohibited conduct;
- Assurance that employees will be protected against retaliation;
- A clear complaint process that provides a prompt, thorough and impartial investigation;
- Assurance that the employer will protect confidentiality to the extent possible; and
- Assurance that immediate and appropriate corrective action will be taken when it is determined that harassment has occurred.

Having a policy that *at a minimum* incorporates these elements is a good first step. However, it is not enough. Employers must ensure that their policies are communicated to every employee and that supervisors receive training on handling these claims. If done properly, a defending employer may raise the *Faragher/Ellerth* defense in litigation.[1] This defense requires that:

1. The employer exercised reasonable care to promptly prevent and correct harassing behavior, and
2. The employee unreasonably failed to take advantage of any preventive or corrective opportunities.

While it may seem costly or burdensome to establish and effectively implement anti-harassment policies, not doing so can prove more costly in the long run.

FLSA allows for pay deductions due to disciplinary suspensions of "one or more full days" following infractions of major safety rules or workplace conduct. 29 C.F.R. § 541.602(b)(4), (5). Most state laws follow the FLSA or do not address these deductions.

What exemptions exist in the minimum wage and overtime laws?

Federal exemptions are described in the Fair Labor Standards Act (FLSA), 29 U.S.C. § 213, and the U.S. Department of Labor's regulations, 29 C.F.R. Part 541. Nevada exemptions are described in NRS 608 and NAC 608. Employees must be exempt under both federal and state law. Where conflict exists between federal and state law, the law that imposes the higher standard (favoring the employee) should be applied.

Exemptions include:

- **Executive Exemption:** when the employee's primary duty is management of the enterprise, or a department or subdivision thereof
- **Administrative Exemption:** for employees performing non-manual work directly related to the running or servicing of the business
- **Professional Exemption:** for employees performing duties that require advanced learning or creativity. *See also* NRS 608.0116 (a professional is engaged in "the practice of law or any of the professions regulated by chapters 623 to 645, inclusive, 645G and 656A of NRS").

Each exemption is nuanced. Other exemptions exist for computer employees, outside salespersons, taxi and limousine drivers, casual babysitters, domestic services employees who reside in the home, etc., and penalties for misclassifying exempt vs. non-exempt employees (or employees vs. independent contractors) are significant. As such, it is good practice to periodically review personnel job functions, compensation and record keeping in order to ensure proper classification, as these decisions are often very fact-specific.

Can I suspend an exempt employee with no pay without converting the employee into a non-exempt employee?

Generally, executive, administrative or professional employees should receive a full salary if they perform any work during the workweek. However, the FLSA allows for pay deductions due to disciplinary suspensions of "one or more full days" following infractions of major safety rules or workplace conduct. 29 C.F.R. § 541.602(b)(4), (5). Most state laws follow the FLSA or do not address these deductions.

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Employers must be careful, however. Improper deductions can result in the loss of exempt status for the employee and other similar employees. Employers must also ensure that suspensions or deductions are not based on any discriminatory policy or motive.

Brief Answers To Frequently Asked Employment-Related Questions

I received a charge of discrimination from the EEOC; what should I do?

In short, you should:

1. Follow the instructions in the charge notice;
2. Protect the employee who filed the charge from retaliation;
3. Ensure that potentially relevant documents and information are retained; and
4. Consider how to resolve the charge, if possible.

A charge of discrimination notifies you that a discrimination complaint has been filed. It often requests information and asks for a position statement, which is your opportunity to tell your side of the story. The EEOC investigator may also request interviews with witnesses or visit your business. In some cases, voluntary mediation through the EEOC will also be available at no cost.

If the EEOC does not find reasonable cause supporting the charge, it will dismiss the charge and inform the charging party of his or her right to file a lawsuit. If reasonable cause is found, the EEOC will invite resolution through its conciliation process, which is voluntary and consists of negotiations aimed at developing an appropriate remedy for the discrimination. Thereafter, if the charge is not resolved, the EEOC may file a lawsuit itself, or it may give the charging party the right to sue. Outside counsel may help you through the charge process, but it is not required.

Should I revise non-compete agreements in light of the recent changes in Nevada law?

Despite the changes in Nevada law over the last year, non-compete agreements are enforceable in Nevada. However, they are subject to careful scrutiny and enforceable only if:

1. Used to prohibit competition with, or becoming employed by a competitor of, the employer;
2. Supported by valuable consideration;
3. Do not impose restraints greater than required to protect the employer;
4. Do not impose undue hardship on the employee; and
5. The restrictions are appropriate in relation to the consideration given.

In light of these requirements, employers should periodically review non-compete agreements, especially to make sure they are reasonable in relation to the consideration given.

When an employee quits, can I deduct amounts owed to the business from the final paycheck, and when do I have to issue the final check?

If an employee quits, you must pay him or her on the regular pay date or seven days after he or she quits, whichever comes first. If an employer discharges an employee, the employee must be paid immediately.

Deductions permitted, if authorized by law, are for contributions to a benefit program (health insurance, etc.), or those specifically authorized in writing by the employee. Employers should have a reasonable basis to believe that the employee is responsible for the amount being deducted, and the deduction cannot result in a non-exempt employee being paid less than minimum wage.

I don't have a unionized workforce; why do I need to worry about the National Labor Relations Act (NRLA)?

The NLRA protects the rights of employees to participate in unions, collectively bargain, strike, and take concerted action for mutual aid and protection, among other things. Thus, non-union employers that prevent or discourage these rights may be in violation of the NLRA. For example, employers must be careful not to discourage communications (even through work email or social media), between two or more employees relating to wage issues or employment conditions.

It is wise to review handbooks, agreements, and policies on a regular basis to make sure nothing gives the appearance of chilling these employee rights. In addition, caution should be exercised concerning efforts to keep wages secret, overbroad non-disparagement clauses and class-action waivers.[2] NL

1. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).
2. The U.S. Supreme Court recently granted certiorari to decide whether employers violate the NLRA when arbitration agreements include class-action waivers.

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