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The Costs of Employment Litigation and the Benefits of Litigation Prevention and Employment Audits

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The economic and non-economic business justifications for reviewing your company's employment practices are plentiful. Litigation for employment and labor based claims subject the corporate treasury to the risk of paying damages, including punitive damages and substantial attorney fees for both the employee's and the company's counsel. The non-economic costs of employment litigation that can be independently taxing and not as measurable include current employee-witnesses spending significant time talking with the employer's attorney(s), giving depositions or attending court proceedings in connection with the litigation instead of spending time conducting the business of the employer. In addition, the employer is required to gather and produce every document potentially relating to the plaintiff's employment with the employer, including electronically stored documents (which can be an expensive and onerous burden for which the company may not be prepared). Finally, in some cases (particularly involving EEOC lawsuits), employment practice changes may actually be compelled through a consent decree.

With a modest investment of time and money, an employer can create and implement appropriate policies and practices concerning all facets of the employment relationship (e.g., interviewing, hiring, personal conduct of employees, social media, privacy concerns, and disciplining and terminating employees). Social media and employee privacy issues as well as workplace retaliation are areas particularly ripe for an explosion of litigation. The tangible benefits that can be achieved from reviewing and, as appropriate, implementing or modifying current policies and practices include improved employee relations, increased productivity and a reduction in litigation.

Proactive measures from the start until the end of the employment relationship are the best way to avoid these expenses. Here are some basic ideas to consider, which can be implemented with the assistance of counsel familiar with the policies and law.

Prior to interviewing potential employees, employers should have their applications reviewed to be sure they are legally compliant and avoid elicitation of inappropriate information from potential employees (e.g., the potential employee's age, information that could lead the employer to learn about the potential employee's age, or any other information relating to a legally protected status). For those within the organization conducting employee interviews, there should be training regarding permissible and impermissible questions to ask or avoid during interviews. For example, interviewers should be trained in avoiding questions that could elicit information relating to a potential employee's age, national origin, religion, disabilities, or any other potentially protected status.

Employers should have job descriptions for each category of employee that include the following information:

1. An accurate reflection of the educational and practical requirements of the position.
2. An accurate reflection of the essential functions of the position.
3. Supervisory authority, if any, of the position.
4. The category of employee to which the position reports.
5. Whether the position is exempt or non-exempt.
6. The employee's signature acknowledging receipt of the job description.

Review of job descriptions can be particularly important if jobs have changed in any meaningful way, which can be a relatively typical phenomenon. Moreover, if the company conducts employee performance reviews, it is important to have an accurate and objective statement of the work that is being evaluated.

On a related note, employer's too often assume that job titles, job descriptions or simply categorizing an employee as "salaried" automatically enables the employer to categorize employee as exempt, thus avoiding overtime pay. This is not the case. The Fair Labor Standards Act and the Department of Labor have very specific guidelines for classifying employees as exempt or non-exempt and failure to comply with those guidelines can result in unnecessary litigation expenses, paying employees for unpaid overtime, civil penalties, and paying the attorney fees of the suing employee(s). This is a problem that can be avoided with proper analysis prior to categorizing an employee as exempt or non-exempt.

With respect to handbooks, employers should have employee handbooks that provide for proper avenues of complaint for employees concerned with discrimination, retaliation, harassment, and any other employment-related issues. Where an employer has proper avenues of complaint for employees – avenues that:

1. Allow employees to avoid complaining to the alleged wrongdoer.
2. Allow the employee to complain to a hierarchy of employees if the problem is not investigated and addressed.

The employer can create a proper defense to discrimination and harassment lawsuits should the employee fail to use the available avenues of complaint.

Likewise, employment handbooks should have proper procedures to enable employees with disabilities to request and engage the employer about obtaining reasonable accommodations. While the Americans with Disabilities Act applies to employers with 15 or more employees, many state laws apply similar or identical standards to much smaller employers. Where an employee requests an accommodation for a disability, the employer must engage the employee and work with him/her to resolve the issue in question. Ignoring the requested accommodation or simply concluding that the requested accommodation is "unreasonable" without making honest and good faith efforts to work with the employee to find a reasonable accommodation

can lead to a lawsuit.

In addition to discrimination policies and complaint mechanisms, the handbook and other separate written policies represent the employer's best opportunity to put employees on notice of various other employment policies and rules, including progressive discipline, drug testing, leave and other benefits or terms and conditions of employment. Social media and privacy policies are becoming more and more appropriate for purposes of outlining an employee's expectations concerning use of employer-owned electronic devices. Clear communication of these myriad topics to the employee can create a better understanding between the employer and employee during employment, aid in the administration of discipline and be an invaluable piece of evidence should litigation occur.

All employers with payrolls approaching 50 employees or more must be cognizant of the Family Medical Leave Act ("FMLA"). If an employer has 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including joint employers and successors of covered employers, the employer must provide up to 12 weeks of unpaid leave to qualifying employees (and 26 weeks of unpaid leave to qualifying employees who must care for a family member injured on active duty in the military). Furthermore, employers subject to the FMLA must provide written notice of its application to employees and must have procedures in place to meet the applicable deadlines relating to the employer's response to requests for such leave. Failure to properly honor a request for such leave, failure to comply with the deadlines relating to such requests, or retaliating against an employee for requesting or exercising his/her right to such leave can result in violations of the law and ultimately lead to unnecessary lawsuits. However, proper written policies and training for employees supervising the application of FMLA leave can prevent such lawsuits from ever arising.

Employers should be sure to keep separate personnel files and medical files relating to employees. Comingling all documents relating to an employee's employment can result in an inference that an employer considered improper medical information when making an employment decision. All documents relating to an employee's medical history (e.g., doctor notes, FMLA forms, requests for accommodations due to disabilities, etc.) should be kept separate and apart from personnel files and only select employees should have access to those documents to avoid their consideration when making an employment decision.

If an individual is alleged to have discriminated against, harassed, or retaliated against another employee, the alleged wrongdoer, if possible, should not have any influence over or provide information resulting in an adverse employment action against the complaining employee. A growing area of litigation has arisen over the past few years that implicates a new theory of liability commonly referred to as the "cat's paw" theory. Where an alleged discriminator, harasser, or retaliator is permitted to provide information leading to an adverse employment action against the complaining employee, his/her wrongful conduct can be implicated to the employer even if he/she is not the ultimate decisionmaker. By allowing an alleged wrongdoer to influence an adverse employment action against the complaining employee, the employer creates unnecessary liability and business expense.

The bottom line is there are a myriad of employment laws and regulations that require the employer's attention. Compliance with those laws and regulations and the adoption of proper procedures for hiring, disciplining, reviewing, and terminating employees can avoid litigation following whatever employment decision is made. While litigation is never totally avoidable, compliance with laws, regulations and best practices relating to employment decisions is the best and most cost-efficient defense to potential litigation or actual litigation.