Top 10 Items
Every Employer Should Audit

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AGENDA
(1) Applications for Employment
(2) I-9 Forms
(3) Handbooks
(4) Background Check Processes/Procedures
(5) Independent Contractors
(6) Job Descriptions
(7) Wage & Hour – “Hours Worked”
(8) Employment Practices Liability Insurance
(9) Interviewing & Performance Evaluations
(10) Confidentiality and Non-Competition Agreements
No. 1

Applications for Employment

Applications

- Are there inconsistencies with:
  - Handbook?
  - Ban the Box Law?
- Is employment conditioned upon:
  - Truthful & complete application information;
  - Willingness to accept any job assignment; and
  - At-will employment status?
No. 2

I-9 FORMS

I-9 FORMS

- Most recent version of the I-9
- Section 1 – Employee Information
  - Sign & date
  - Address (not a P.O. Box)
- Section 2 – Employee Documents
  - Provide the list (don't require certain documents)
  - No expired documents
- Section 3 – Re-verification
- Audits
  - Keep I-9 forms separate from personnel files
  - Amendment procedures
I-9 FORMS

- Retain I-9 forms for the longer of:
  - 3 years from the date the work commences, or
  - 1 year from the date employment terminates
- E-Verify
  - In addition to the I-9
  - Voluntary except for:
    - Federal contractors (contracts above $100k)
    - State of MN contractors (contracts above $50k)

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No. 3

HANDBOOKS
EMPLOYEE HANDBOOK

- When auditing the handbook, consider:
  - Employer size
  - States in which employer is operating
  - Unionized locations
  - Recent legislation
- Handbook acknowledgement:
  - Signed at the time of hire and each time the handbook is updated

No. 4

BACKGROUND CHECK PROCESSES/PROCEDURES
BACKGROUND CHECKS

- On April 25, 2012, the EEOC issued guidance on employers’ use of background checks.
- The EEOC will presume a background check violates Title VII if it disproportionally affects a protected class.

BACKGROUND CHECKS

- Employers can conduct “targeted” background checks by reviewing the following:
  - The nature of the crime;
  - The time elapsed and likelihood of recidivism; and
  - The nature of the job.
No. 5

INDEPENDENT CONTRACTOR CLASSIFICATION ISSUES

LEGAL ISSUES

- Tax Withholding
  - Internal Revenue Service
  - State Departments of Revenue
- DOL
- EEOC
- NLRA
- OSHA
- State Departments of Labor
- Unemployment Insurance
- Workers’ Compensation Insurance
On September 19, 2011, the DOL and IRS entered into a “Memorandum of Understanding”, a joint initiative to improve compliance with DOL and IRS laws and regulations.

The initiative's objectives included:

- Expand the IRS-DOL partnership launched in the Questionable Employment Tax Practices program
- Reduce the employment tax portion of the tax gap
- Increase compliance with federal employment and unemployment tax requirements
- Increase compliance with federal labor laws enforced by the DOL
- Reduce fraudulent filing
- Reduce abusive employment/unemployment tax scheme
- Reduce worker misclassification
GENERAL RULES

BEHAVIORAL CONTROL

- Does the worker or the service recipient determine how a particular job will be completed? Consider:
  - Instructions the business gives the worker.
  - Training the business gives the worker.
**FINANCIAL CONTROL**

- Does the worker or the service recipient have financial control over the relationship, or are the worker and the service recipient financially separate? Consider:
  - The extent to which the worker has unreimbursed business expenses.
  - The extent of the worker’s investment.
  - The extent to which the worker makes services available to the relevant market.
  - How the business pays the worker.
  - The extent to which the worker can realize a profit or incur a loss.

**RELATIONSHIP OF THE PARTIES**

- Based upon the facts and circumstances, does it appear as though the parties are engaged in an employment relationship? Consider:
  - Written contracts describing the relationship the parties intended to create.
  - Whether the business provides the worker with employee type benefits, such as insurance, a pension plan, vacation pay or sick pay.
  - The permanency of the relationship.
  - The extent to which services performed by the worker are a key aspect of the regular business of the business of the company.
No. 6

JOB DESCRIPTIONS

- Each job description should contain:
  - Position title
  - Date prepared/last reviewed
  - Department/supervisor
  - FLSA status
  - Hours and days of the week
  - Position overview
  - Essential job duties
    - Include attendance
  - Other duties as assigned
  - Skills required
  - Education and experience
  - Signatures (include safe harbor for salaried employees)
No. 7

WAGE & HOUR – “HOURS WORKED”

WAGE & HOUR IN THE NEWS

- Since 2000, FLSA claims filed by plaintiff attorneys have increased by more than 77%.

- Since 2010, the DOL has added 250 new field investigators (this is a staff increase of more than one-third).

- In 2010, the DOL launched its “We Can Help” campaign using public service messages to get the word out.
  - The campaign is “an effort to educate workers across the United States of their rights under the law.”
**HOURS WORKED**

- Post/Preliminary Work
- Lunch Breaks
- Remote Access
- Exempt v. Non-Exempt

**EXEMPTIONS – GENERAL RULE**

- Nonexempt employees must be paid for all hours worked in a workweek. For hours worked over 40 in the workweek, nonexempt employees must be paid overtime. Generally, 1.5 times the regular rate.
- To be exempt from paying overtime under the FLSA, generally a position must satisfy the following requirements:
  - Pay more than $455.00/week ($23,660/year);
  - Paid on a salary basis; and
  - Performs exempt job duties.
**EXEMPTIONS**

- Executive
- Administrative
- Professional
- Highly Compensated Employees
- Computer Employee
- Outside Sales

**BASIC AUDIT PROCEDURES**

- Create an updated organizational chart;
- Identify all employees paid as nonexempt and eliminate from audit;
- Identify all employees paid as exempt who **clearly** meet an exemption and eliminate from audit;
- Review, create and/or update job descriptions for remaining positions;
- Conduct a fact-specific analysis to determine if the remaining “exempt” employees meet an exemption criteria (should only be a handful of employees).
No. 8

Insurance (EPLI)

EPLI

- Designed to insure against employment claims;

- Various levels of coverage and deductibles;

- Consider “Choice of Counsel” provisions.
No. 9

INTERVIEWING & PERFORMANCE EVALUATIONS

NO MANAGER TRAINING?

"Of course it isn’t a case of sexual discrimination. We just don’t think you’re the right man for the job."
INTERVIEWING

- Questions should be based on factors related to job qualifications such as:
  - Job-related skills and licensure
  - Work experience
  - Education
  - Academic and personal achievement
  - Attitude toward work and coworkers
  - Job-related personal habits (i.e., timeliness, courtesy, etc.)
- Race, color, creed, religion, national origin, ancestry, sex, union membership or support, sexual orientation, marital status, receipt of welfare, disability or age cannot play a role in any employment decision.

PERFORMANCE EVALUATIONS

- Common characteristics that weaken performance evaluations:
  - Untimely
  - Inconsistent with discipline/performance
  - Overbroad
  - Excessively subjective
  - Dangerously stereotypical
  - Not reviewed with employee
  - Inadequate developmental plan (if appropriate)
  - Failure to have the employee acknowledge poor performance
CONFIDENTIALITY AND NON-COMPETITION AGREEMENTS

Confidentiality Considerations

- NLRA considerations
- State law considerations
- Defining “confidential” information
- Reasonable precautions to protect information?
Non-Competition Considerations

- State law considerations
- Geographic Restrictions
- Temporal Restrictions
- Reasonableness to Employee
- Protectable Interest

QUESTIONS?
Thank You!

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