Employment Soundbites

September 2006

This week, we attended an "Employment Law Update." This was a meeting for employment lawyers and HR professionals to discuss (and sometimes "cuss") the latest happenings in the world of employment law. The good news is that there are not many shocking new developments. Our fairly conservative Fifth Circuit has thrown employers no major curve balls lately, and by now, most employers have heard about and digested the Supreme Court's retaliation whammy in the *Burlington Northern* case (see June 2006 newsletter). As a consequence, most of the issues we discussed at the meeting were practical ideas and solutions for common problems that affect your workplace. Here are some of the issues and helpful hints we talked about:

1. Breaking Bad Behavior: A number of HR professionals at the meeting expressed frustration at continuing bad behavior by employees that is not covered by a policy or that is covered by a policy that has not been recently enforced. The most common examples given were dress code violations. Some employers were under the impression that they could not institute a new policy covering the existing bad behavior or that they could not begin enforcing a dormant policy. Not true. Our advice, however, is to give the employees notice that a policy is being instituted or revived. Obtain proof of this notice in the form of a written acknowledgment signed by the employee. Give the employees a reasonable amount of time to begin complying with the policy. Then enforce your policy on a consistent basis.
2. Monitoring Non-DOT Drivers: Many employers have a policy covering their drivers who are subject to DOT regulations but have nothing to cover non-DOT drivers. This would include anyone who drives a company car or their own car while conducting company business. Generally, an employer is liable for the torts of its employees committed in the scope of their employment, yet many employers send these employees out on the road without checking their driving history. The employer doesn't know if the employee has DUIs or even a valid driver's license. At a minimum, the employer should institute a policy that sets standards for these drivers and that allows the employer to check the driver's history on a periodic basis.
3. Management Training: The seminar moderators emphasized the importance of manager training on the company's anti-harassment policy. This is something that many busy employers put off. Don't be guilty of this. The first deposition question by the plaintiff's lawyer to your manager will ask him to describe the company's harassment training. The second question will ask him to describe what the company's anti-harassment policy says. Close your eyes and visualize several of your managers in the deposition hotseat. How would they answer those questions? If your vision scares you, begin your training now.
4. Performance Evaluations. Evaluations can be the most helpful piece of evidence to a plaintiff's lawyer because they often provide a sugar-coated version of the employee's performance. Managers are people, and people, by nature, don't like to criticize others to their face. Some managers hope that by putting a positive spin on the problem, the employee will feel better about himself and perform better. A common scenario, however, is that an employee is terminated for poor performance; he sues for discrimination; and you discover (after the fact) that he has a string of positive evaluations in his file. The truth is, if managers are not going to be brutally honest on the evaluation, it is better not to do them. More on this topic in our next newsletter.
5. Fair Labor Standards Act. This topic generated the most discussion from the group. Most were aware that there is an increasing number of high-dollar class action FLSA actions. A common problem that can generate large damage awards is the classification of individuals (or whole groups) as independent contractors when they are really employees under the DOL's "economic realities" test. This is a detailed 7-factor test that the DOL investigator will apply to the "independent contractor" to determine if he is really an employee. If you have independent contractors, analyze the reality of their employment situation with this test and correct the situation now. Of course, another common FLSA issue is the exempt/nonexempt classification of employees. If you have not already performed an FLSA audit of your employees, do so now with the 2004 FLSA regulations. And remember, the DOL investigator will interview the employees and ask what they actually do on a daily basis. A job description that describes exempt duties will not save the employer if it differs from what the employee actually does. Practical advice - If you have an employee whose exempt classification might be at all questionable, have that employee keep accurate time records. [Don't record this time on the paycheck or it may appear that you are not paying the individual on a salaried basis - one of the requirements for exempt status.] If the DOL later disagrees with your classification, you will at least have accurate time records to show how much overtime, if any, the individual actually worked. Otherwise, the DOL will likely take the employee's word as to his hours.

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