COMMON MISTAKES EMPLOYERS MAKE

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Overview
- Not addressing Employee Complaints Properly/Failing to Investigate
- Inconsistent Corrective Action
- Misclassification of Employees
- Overtime
- Not Providing Breaks
- Inefficient Hiring Practices
- Improper Response to Sexual Harassment
- Interactive Process
- Not Terminating Toxic Employees
- Not Understanding the Requirements of State/Federal Law

NOT ADDRESSING EMPLOYEE COMPLAINTS PROPERLY/FAILING TO INVESTIGATE

- Accept that conflict and complaints will happen.
- It is important how the employer responds to the complaint.
- Have an updated Employee Handbook.
Employee Handbook

- Your rule book.
- It is more for you and your protection than for the employee.
- If there is a violation of a policy, you can cite to that policy when you discipline or terminate.
- You must have a section that tells employees where and how to complain.

“I need to talk to you”

- The employer’s reaction sets the stage for how it will be resolved.
- Be friendly and open to talking.
  - Do not get defensive.
  - Treat every complaint seriously.
  - Be sincere.
  - Schedule a time to talk within 24 hours.
- Have at least 2 modes of receiving complaints.

After the Complaint

- Ask them to submit the complaint in writing - email or memo.
- Thank the employee and reassure them that they did the right thing.
- Show empathy and concern.
- Employees want to be heard and validated.
- Remind the employee not to vent to other employees.
- Assure the employee that you will look into it further.
- Once you have a resolution, let them know that you handled it and to contact you if there are any further issues.
Investigations

• Knowing when to launch a formal or informal investigation is critical.
• If there are any claims of:
  • Discrimination
  • Harassment
  • Health and safety violations
  • Workplace violence or threats
  • Drug or alcohol use
  • Violations of employer rules
  • Theft or fraud
  • Other criminal activity

Why is Doing an Investigation so Important?

• To determine if allegations of misconduct have merit.
• Find out who was involved.
• Determine what disciplinary or other measures should be taken against wrongdoers to prevent recurrence and limit employer liability.
• To make it at least look to any possible plaintiff’s attorney and judge/jury that you took proactive steps to fix the problem.

Conducting an Investigation

• Interview
  • Person making the complaint
  • Person who is being complained about
  • Witnesses
Who Should Investigate?

- Advantage to outside person: employees are often more comfortable speaking to an outsider
- Attorney or in-house?
- Client Privilege
- Paramedic Story v. The Hugger Story

MISCLASSIFICATION OF EMPLOYEES

- Exempt v. Non-Exempt AND Employees v. Independent Contractors
- Exempt Employees
  - Not eligible for overtime
  - Meal and rest period requirements
  - Uniform requirements

2 Part Test

- First Part:
  - California Law Code §515 - exempt workers must earn a salary two times the minimum wage.
- Second Part:
  - Duties test - does the employee have authority over their own schedule and work projects?
  - 3 exemptions they must fall into:
    - Administrative
    - Professional
    - Executive
Independent Contractors v. Employees

- Old Borello test
- Dynamex
- AB5

Dynamex: When classifying workers, you must consider ALL of these three things:

1. The worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
2. The worker performs work that is outside the usual course of the hiring entity’s business; and
3. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

AB5

- Passed September 2019, effective January 1, 2020
- Codified Dynamex with many carved out exceptions.
- Jobs given special treatment.
- If you have Independent Contractors in your company, be aware!
- Cost of violation is high.
Overtime

- Non-exempt employee working more than 8 hours receives time and a half.
- More than 12 hours receives double time.
- Does not apply to alternative work schedules (four 10-hour days).
- Properly document and input employee’s time.
- Burden is on the employer to provide accurate records.
- Add overtime written preauthorization policy to your handbook.
- Have employees sign off saying that they were paid for all overtime and breaks.

Not Providing breaks

- An employee is entitled to two 10-minute breaks and one 30-minute lunch.
- If employee works less than 6 hours, they can waive their meal period.
- Employee must have their meal period by the end of their 5th hour.

Inefficient Hiring Practices

- Invest energy and time into making sure it’s the right fit.
- Conduct a background check AFTER there has been a conditional offer of employment.
- Thorough job interviews.
Job Descriptions

- Insert the job description into the offer letter.
- Make sure it is legally compliant.
- In an interview, use the job description as a foundation to ask questions.
- Helpful if employee goes out on disability and returns with restrictions.
- Helps classify employees as exempt or nonexempt.

Improper Response to Sexual Harassment

- Biggest problem is dismissing the complaint improperly.
- The #MeToo movement prompted several changes in the law in California.
  - Since 2019, companies of 5 or more must have training.
  - You must comply with this law by 12/31/2020.
- Training starts a dialogue and open forum.

Sexual Harassment Complaints

- Separate the victim and the harasser.
- Conduct an investigation.
- Take disciplinary action or terminate depending on the circumstances of the case.
Interactive Process

- The California Fair Employment and Housing Act ("FEHA")
- FEHA and ADA (Americans with Disabilities Act) require that employers provide "reasonable accommodations to employees who are temporarily unable to perform the "essential functions" of their job. (Gov. Code § 12940(m))
- Engage in the interactive process once there is a need for accommodation.
- Ongoing continuous process-it is not a one and done.

Interactive Process (Continued)

- As long as the accommodation does not cause an undue hardship on the employer, then it is required that the employer allow for such accommodations.
- The more effort and dialogue, the stronger the case for employer if litigation were to ensue.
- Train your HR professionals.

Not Terminating Toxic Employees

Characteristics of Toxic Employees
- General negative attitude
- Unwillingness to take responsibility
- Gossip
- Wastes time shopping online or surfing the web
- Unprofessional or inappropriate communications
- Bullies or harasses coworkers
Not Terminating Toxic Employees

• Document everything.
• Assuming at-will status, you can terminate any employee for any reason.
• Problem:
  • They can say the employer terminated them because of their gender, religion, or disability.
• Solution:
  • Document everything. Do performance evaluations, draft disciplinary notices, write everything down.
  • This evidences exactly why they were terminated.

Performance Management System

• A good system acts as a mirror of the employee’s performance.
• Mirror can be distorted for many reasons including:
  • Feedback that comes back long after the fact.
  • Vague language that does not help the employee understand the issue.
  • Conflicting information with other supervisors or even with the same supervisor.
• Creating a record of problems goes a long way to avoid litigation.
• When an employee is red-flagged, it is better to offer a severance agreement.

Not Understanding the Requirements of State/Federal Law

• Employers have the burden of knowing everything.
• One misstep could cost you serious money in penalties and fines.
• Highly advisable to get a third party consultant to ensure that HR is properly trained on any relevant updates.
• Each company has its own exposures and risks.