

## Six Post-Recession Strategies to Minimize Employment Risks

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When the economy fell apart, companies immediately began scrambling to cut costs anywhere they could. One of the easiest ways to save money was to eliminate programs that did not generate revenue for the bottom line, putting human resources and training budgets on the chopping block for many organizations.

As the country begins to see signs of an improving economy, employers would be wise to reconsider many of those budget cuts. The revenue-generator litmus test starts to look short-sighted when you factor in potential litigation costs, which never help the bottom line and can often be avoided with proactive efforts.

This article explores six preemptive strategies that employers need to consider to minimize the risk of employment liability going forward.

### *Invest in Supervisory Skills Training*

Employees today expect to be (and should be) treated with dignity and respect. Being an effective supervisor requires the skill to develop relationships with employees. If employees trust their supervisor and believe they are treated properly, the risks of low production, employment litigation, and union organizing drop dramatically. Investing in supervisory skills training can improve employee relations, increase performance, and ultimately have a positive effect on the company's bottom line.

Sometimes it is the "best" supervisor that needs the training. Companies are always pleased with supervisors who can achieve or exceed the goals established for them, especially in this economy. Unfortunately, if the supervisor obtains these results by berating employees or by requiring unquestioning compliance with his every directive, the short-term results may be wiped out by the long-term costs his behavior generates.

Another common mistake is to promote a very good employee into a supervisory position, even though the employee has no supervisory experience. Problems arise because the new supervisor understands the technical aspects of the work he is overseeing, but he lacks the skill set required to effectively manage the employees.

These are just a few examples of why supervisory skills training has always been highly recommended by human resources professionals and employment lawyers as a means of minimizing liability. Unfortunately, over the last few years, this is exactly the type of training that has often been postponed or eliminated.

Many types of supervisory training can be beneficial. In particular, employers should return to supervisor training focusing on two specific areas: supervisory skills and employment law. Supervisory skills training helps supervisors learn performance management, team development, effective communication, interpersonal skills and time

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management techniques. This is an investment that can pay off immediately through improved employee relations — it will also continue to generate a return on investment as the company develops future leaders for the organization.

Employment law training is relevant because the average supervisor is being asked to do more and more with less time. While no one would suggest trying to turn supervisors into human resources professionals or employment lawyers, supervisors and managers must be able to spot the red flags that could lead to problems. Supervisors often find themselves addressing issues that could implicate the recently amended Americans with Disabilities Act (ADA), the new regulations for the Family and Medical Leave Act (FMLA), and many other new federal and state laws. In short, supervisors' lack of knowledge in these areas may be a recipe for litigation.

Training should be designed to provide examples of how these legal issues could arise in the day-to-day supervision of employees. By reminding supervisors and managers of the possibility of individual liability for many employment-related claims, employers can underscore the common interest of avoiding litigation. Moreover, once the supervisors understand the legal issues involved, they realize that the constant requests for consistency and documentation are not just exercises the human resources department dreams up to make their lives more difficult!

#### *Conduct A Pay Practices Audit*

Depending on the timeframe considered, estimates are that Fair Labor Standards Act (FLSA) and wage payment litigation has increased between 300 percent and 1,000 percent in recent years. Hardly a day goes by without new reports of the most recent multi-million dollar verdicts or settlements related to these types of claims. A review of court dockets also indicates that these increasing lawsuits include

claims by both “exempt” employees and “nonexempt” employees.

Many of these pay-related lawsuits are brought in the form of collective action lawsuits under the FLSA or class action lawsuits under state wage payment laws, or both. There are three reasons for the dramatic increase in this type of litigation. First, employees have an increased understanding of these and other laws as a result of reading about them on the Internet. Second, when a company makes a mistake in how it pays one employee, it is usually making the same mistake for many employees. This makes the claim ideal for a class action. Third, and perhaps most importantly, these statutes often provide for mandatory attorneys' fees and costs, along with liquidated damages (i.e. double damages). In other words, even if the company's legal slip-up only results in a few dollars for each employee, the plaintiff's attorney will likely get his full fees and expenses paid by the company.

The U.S. Department of Labor (U.S. DOL) has also increased its efforts to ensure compliance with the FLSA. In addition to increased audits, the U.S. DOL has developed a regulatory agenda that will include new enforcement strategies, such as “Plan/Prevent/Protect.” While the details have not been announced, generally this would require employers to create and implement a plan for identifying and remediating potential legal violations. The stated objective is not that employers simply have a paper document representing the plan, but instead, upon being audited, the employers would be required to demonstrate that they have the plan implemented successfully. Additional U.S. DOL proposals include requirements that employers have documentation explaining the rationale for FLSA exemptions, independent contractor designations, etc. and that these must be shared with the affected workers.

The increased litigation, along with the U.S. DOL's aggressive plans, provide good reason for employers to audit their pay practices now, before

a government investigation or a plaintiff's attorney points out mistakes that may have been made.

#### *Update Policies and Procedures*

Over the last several years, major changes have been made to employment laws. The ADA has been amended to significantly increase the likelihood that employees are categorized as disabled under the law. As a result, supervisors and managers are likely to find themselves addressing performance in light of disabilities, while at the same time engaging in the interactive process to provide reasonable accommodations for the disabilities.

The FMLA also has new regulations. Most employers believe this is already one of the most difficult laws for compliance, and the new regulations impose new notice obligations on employers. Without a comprehensive procedure for doing so, the likelihood of compliance is doubtful.

Most employers have also seen examples of how their policies and procedures have not kept up with changes in technology. For example, two years ago, most employers would not have concerned themselves with the impact of social networking on the workplace. Now, some companies use social networking as part of their customer service or marketing efforts. Additionally, statistics indicate that a substantial number of employees use social networking websites for personal use. For example, Facebook has over 500 million users who spend over 700 billion minutes per month on that social networking site. This means that companies need to develop social networking policies that help the employer determine whether employees are speaking on behalf of the company or themselves, and set some guidelines for each.

Finally, states are continuing to legislate in the area of employment law. Some states have laws regarding breaks and meal periods; others have adopted their own versions of the FMLA, and the list goes on. Without a focused effort to comply

with these policies and procedures, multi-state organizations face significant potential liability when violations occur.

#### *Prepare For Union Organizing Under A New Set Of Rules*

While the Employee Free Choice Act (EFCA) does not have much hope of passing the current Congress, it appears that the National Labor Relations Board (NLRB) is taking steps to make it easier for employees to unionize.

For example, the NLRB is considering offsite, electronic voting outside of the secret ballot process. It is also believed that the NLRB is considering ways to significantly shorten the election process, which reduces an employer's ability to respond effectively when union activity begins. Recent indications are that the NLRB may also be looking for an opportunity to require private employers to provide union organizers with onsite access to employees. In short, since Congress has failed to act, most labor law experts expect the NLRB to change rules and issue decisions that will accomplish many of the same objectives outlined in EFCA.

While the economy has been down, many industries saw a drop in union organizing. As a result, some companies may have been lulled into a belief that unions are no longer a threat. With these anticipated changes on the horizon, companies that are serious about remaining union-free need to be sure that they are addressing and resolving issues that typically lead to union organizing.

#### *Take The Pulse Of Employees*

Whether it is the company's objective to minimize the risk of potential litigation, avoid union organizing, or generally enjoy the benefits of positive employee relations, management must constantly strive to remove the issues that lead to common problems. Companies need to get better

at identifying issues before they become a lawsuit or the rallying cry of a union organizer. To do this, companies need to regularly gauge the morale of their employees and address the issues that are negatively affecting it.

There are many tools available for measuring employee sentiments. The key is to find one that works well, stick with it, and demonstrate by action to employees that you take their issues seriously and are trying to address them. For example, some companies conduct monthly pulse surveys of their employees to determine the issues affecting them. These are not complicated hundred question surveys. These are 5 to 10 question surveys that provide quick insight into what is going on during a particular snapshot of time. Other companies employ more traditional survey methods that help identify problems and issues. Using these effectively requires a quick study of the results and prompt action to address the issues identified. Nothing upsets employees more than an employer conducting a survey, asking what their problems are, and then ignoring the results.

Those companies that systematically listen to their employees and respond to their concerns are in the best position to minimize the costs that can result from poor employee relations.

#### *Say "Thank You"*

Even before the economic downturn, most companies were demanding more of their employees. Almost every business is working to find a way to deliver a higher quality product or service at a lower cost. In the last few years, employers have maintained these high expectations, but in many cases have implemented pay cuts, mandatory furloughs, and other cost-saving measures that directly affect employees' pocketbooks. If the reasons for these steps have been communicated effectively, employees probably understand why the changes were necessary. But more and more,

busy supervisors and managers are forgetting to say "thank you" to employees for helping them survive.

The suggestion is not that companies need to plan elaborate parties or give extravagant gifts to their employees. Instead, companies need to find a way to demonstrate to their employees that they appreciate their hard work and dedication, and in many cases, the sacrifices employees have made to help the company stay in business. Sometimes, simply saying "thank you" is enough, but smart employers will say it several times and in several different ways to be sure the message is heard.

Unfortunately, no silver bullet exists to escape the potential liability associated with employment. Avoiding liability requires a sustained effort to equip supervisors with the skills they need combined with an unrelenting dedication to positive employee relations. The strategies outlined above are not one-time actions — instead, these tips should become part of an ongoing effort. While it is difficult to measure expenses that are avoided, it only takes one million dollar lawsuit to realize the benefits that have been forgone.

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