

THE TOP 10 EMPLOYMENT-RELATED MISTAKES THAT AUTOMOBILE DEALERS MAKE...AND MAY NOT RECOGNIZE

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Automobile dealers, like most employers, make every effort to treat their employees fairly and consistently while competing in a demanding, fast-paced industry. Although many of the issues overlap and recur, their most common mistakes generally fall into one of two broad categories: "over-reaching" or performing too many "kind deeds." The "Over-reaching" category is discussed first and includes auto dealers' attempts to address issues through policies or practices that are too-broad and therefore, either ineffective or possibly even illegal. The second category is the more familiar "kind deeds," that of course rarely go unpunished. To avoid mistakes in this classification, dealers must define their policies or expectations more precisely and enforce them consistently.

Whether the mistake falls into either category, well-intentioned dealers may find the results equally painful. However, by recognizing their existence, you can take simple measures to avoid both kinds of errors.

The Top 10 Employment-Related Mistakes that automobile dealers may be making:

OVER-REACHING

1. Creating meaningless employee classifications that run afoul of ERISA requirements.

Many dealers use labels such as part-time or casual in describing employees' eligibility for many welfare plans including insurance, pension or retirement plans, and paid

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time off plans. However, regardless of whatever labels or distinctions the dealer may assign to a group of employees, the Employee Retirement Income Security Act (ERISA) may mandate that employees should be eligible to participate. For example, employees who work at least one thousand hours in a year and meet the same age and/or vesting requirements of their "full-time" counterparts generally may not be excluded from participation in a pension plan because the employer has assigned them to a category deemed not eligible for benefits. Distinctions that form the basis of benefit eligibility must be clear and meaningful to be valid.

You should also be aware of the fiduciary duty of your benefits plan administrator, and the fact that the dealership could be held accountable for statements in employee handbooks or other documents that may be found to confer greater benefits than set out in the plan document. As a rule, benefit plans should be governed by a plan document; other materials, such as employee handbooks, should refer employees to the plan document or summary plan description.

2. Taking adverse employment action in the face of protected concerted activity by non-union employees.

All employees enjoy certain protections under the National Labor Relations Act (NLRA), including the right to engage in concerted activities for mutual aid or protection.

Accordingly, a dealer who disciplines a pair of workers who refuse to perform what they assert is a dangerous or unreasonable assignment may have committed an unfair labor practice, subjecting the dealership to sanctions.

Likewise, you should proceed very cautiously before taking any kind of adverse action against a small group of employees who stage a "sick-out" in protest of any working conditions. In fact, even a single employee who purports to be speaking on behalf of fellow employees is likely to be protected by the NLRA. Although a chronic workplace "complainer" may not actually speak for any other employees, be aware that the NLRA affects non-union as well as unionized settings and consider whether an employee's activity is "concerted" and protected before taking any adverse action.

3. Using overly aggressive interviewing or hiring practices that may violate the ADA or result in incomplete screenings.

The Americans with Disabilities Act (ADA) plays a broad and

important role that dealers must recognize in the hiring process. A covered employer may not discriminate against a qualified individual with a disability in regard to, among other things, job application procedures and hiring. Accordingly, you may not make inquiries about a job candidate's medical history or disabilities before extending a job offer, even in circumstances when the disability is obvious. Some employers inadvertently violate the ADA by asking a job applicant questions such as how many days he or she missed during the previous year due to illness, so individuals who conduct job interviews should be trained and the list of questions used in the interviews should be carefully reviewed. Furthermore, the timing of job offers and pre-employment physicals must be coordinated so that inquiries about the employee's medical history and condition are obtained only after making a conditional offer of employment.

Dealers should also ensure that they have written job descriptions, identifying the essential functions of each job because the job's essential functions must be used to analyze an employer's obligations under the ADA if a job candidate turns out to qualify as a disabled individual. For example, if using the telephone is identified as an essential function of a job, you should try to find a "reasonable accommodation" if an applicant who is "disabled" under the Act is otherwise qualified, but has a hearing impairment.

Finally, given the tedious steps involved, supervisors or managers may be tempted to cut corners in the hiring process and either make job offers before background checks are completed or before pre-employment drug screen results are received. In either situation, you run the risk of finding out that someone who you have invested in as an employee has misrepresented his work history, or even worse, is a convicted criminal or drug abuser. In almost all cases, you are better served by completing all of the prescreening necessary before allowing an employee to report to work.

4. Taking disciplinary action against employees before conducting thorough investigations. Almost like trying to "unring a bell," it is exceptionally difficult for a dealership to reverse its decision after firing an employee, even if you determine that the termination was unwarranted. Under the emotional strain of a difficult situation, perceptions may become distorted or exaggerated. Even if the ultimate decision-maker in the termination analysis witnessed the

events, dealers will often benefit from taking the time to investigate and get both sides a story before firing an employee. Moreover, it is not unusual for initial fact-finding after an incident to be less than one hundred percent accurate, so it only makes sense for employers to consider such important decisions as terminations carefully, keeping their options open before committing themselves to an action characterized by such finality.

5. Implementing overly broad policies or employment agreements.

An overbroad policy that unduly restricts employees' outside interpersonal relationships or other outside activities or creates undue financial consequences for an employee could be problematic. Policies should be linked to the dealership's legitimate business needs and their reach should extend no farther than necessary to protect those interests. For example, many employers prohibit a supervisory employee from dating his or her subordinates, but you should carefully consider whether a blanket no-dating policy among all your employees is reasonable. And be particularly careful in making deductions from an employee's wages. Employees' expenses for uniform purchase and upkeep or the tools of their trade should never result in their receiving less than minimum wage during a pay period.

By the same token, a dealership that wishes to protect its interests may want to create employment agreements containing noncompete or nonsolicitation provisions, but the agreements generally must be reasonable in terms of the length of time they are effective, their geographic reach and the specific conduct prohibited. For example, an employee's agreement not to go work anywhere in the state for a competitor after leaving the dealership would be invalid in many states (including Louisiana) if the dealership does not do business across the entire state. In some states, your legitimate business interests might be more effectively protected by agreements that include provisions not to solicit former customers or confidentiality clauses that safeguard customers lists, pricing policies or other sensitive information.

KIND DEEDS

6. Failure to adequately maintain time records for certain employees.

Although salespeople, “partsmen” and qualifying mechanics are exempt from the *overtime* requirements of the Fair Labor Standards Act (FLSA), they are not exempt from the Act’s *minimum wage* requirements. Dealers must verify that affected employees receive at the least the federal minimum wage (currently \$5.15 an hour) in every pay period. You can fulfill this obligation only by ensuring that accurate time records are maintained by the covered employees. This may be the single most common mistake encountered in dealerships around the country. In addition to maintaining these records, you should implement a system which ensures that the impacted employees certify their time records as accurate each day. Although the applicable rules are complex, these simple steps can improve operations and save tremendous amounts of time and money in the event the dealership is audited for FLSA compliance.

7. Failing to train supervisors to address performance problems, disciplinary issues or terminations in a timely, honest and consistent fashion.

This topic covers an extremely wide range of issues, but may be summarized by citing the general rule that a dealer is normally liable for the acts or omissions of its supervisors and managers, who are its agents. Whether you are defending against a discrimination, harassment or retaliation claim, first line supervisors very often play a central role in the case. Therefore, it is critical to regularly remind supervisors of their many management responsibilities, including the delivery of feedback to employees that is timely and accurate. No one enjoys delivering bad news to employees, but delayed performance evaluations or disciplinary actions can be very costly in terms of morale and productivity, as well as serving to undermine the company’s credibility in a lawsuit.

Belated action can be devastating if a supervisor knows about potentially discriminatory or harassing activity against another employee, but fails to intervene. Since the dealership will be charged with the knowledge of its supervisors, those individuals must at least be regularly reminded to report promptly any offensive behavior.

Remind your supervisors of the importance of consistency in their treatment of employees. For example, leniency toward one poor performer could easily be cast as unlawful discrimination against another. Finally, anyone involved in terminating employees should receive regular training in how to handle such situations. While preserving the dignity

of the individual being fired, the supervisor who actually delivers the termination message must be honest in explaining the reason for the firing. That is because an employer's false explanation for a termination in a discrimination case is considered a "pretext" and could provide the plaintiff with enough ammunition to present his claim to a jury. Given the often sympathetic nature of juries toward employee plaintiffs, dealers would be well served to ensure that termination decisions are accurately presented to the fired employee in the first place.

8. Failure to document explanations to employees of their role in helping to prevent unlawful harassment and discrimination in the workplace.

In a landmark 1998 sexual harassment decision, the Supreme Court set forth an affirmative defense that may protect dealers against such claims. First, an employer must show that it exercised reasonable care to prevent and promptly correct any harassing behavior. Second, you must prove that the complaining employee unreasonably failed to take advantage of the preventive or corrective opportunities provided. To protect yourself, make sure the dealership has an effective and responsive anti-harassment policy in place. Perhaps more importantly, be able to prove that the suing employee was unreasonable in not invoking the policy's protection. Sexual harassment plaintiffs will often claim they were unaware of their employer's anti-harassment policy, so it is critical for you to be able to demonstrate that you promulgated and enforced your policy, providing a copy or notice of the policy to every individual employee. This simple step, combined with the manager training discussed above, will tremendously improve a company's position in defending itself against harassment or discrimination claims.

9. Failure to control the process of providing employment references on current and former employees.

In a perfect example of how kind deeds don't go unpunished, well meaning dealership employees may see nothing wrong with giving detailed, glowing references when asked about former co-workers who were reliable and productive. When asked about a known poor performer, the same employee may say nothing, but even this seemingly innocent scenario could put both the employee and the dealership at risk. Having been "damned by faint praise" in comparison to other former employees, the disgruntled former employee may sue the dealer and the person who provided the reference for defamation. On the other hand, if

a dealer gives nothing but positive references regarding former employees, it could be liable for a negligent referral claim if it withholds knowledge of the former employee's recognized dangerous behaviors.

Although many states, including Louisiana, now have statutes specifically enacted to protect employers in the exchange of employment references, those laws are sometimes incomplete or unclear, and failure to comply with their particular requirements could invalidate any protection the statutes purport to provide. For dealers attempting to navigate these murky waters, the first answer is to adopt and promulgate a policy that allows only authorized individuals to provide references on former employees. The policy could also specify precisely what information will be provided or establish a mechanism in which a departing employee agrees to particular disclosures. No matter the specific contents of your dealership's policy, it is important to limit the individuals authorized to give references and to make sure that those individuals are properly trained.

10. Failing to take reasonable steps to protect your assets.

Dealers can take a number of additional steps to make their workplaces more secure, not only in terms of physical safety but also in safeguarding equipment and information as well as protecting employees from harassment. The Occupational Safety and Health Administration (OSHA) has thus far issued only guidelines and recommendations addressing workplace violence, but every dealer's safety program should include policies that clearly establish zero tolerance for any sort of violence on the premises, including at a minimum striking or threatening other individuals. You should also adopt policies which prohibit employees from bringing weapons to work and make it clear that work areas, lockers and packages are subject to inspection at the discretion of the dealership. All employers should maintain their vigilance regarding additional precautions that should be taken as workplace circumstances change. For example, many companies have changed their mail handling procedures as a result of the recent Anthrax incidents.

You should also promulgate policies making it clear that computers, email and internet usage are subject to monitoring, and inform employees not to expect such communications to be private. In today's environment, monitoring of email can help detect and prevent sexual harassment, thefts, lost productivity and a variety of other potential problems. Policies should likewise establish that

company telephones, copy and facsimile machines should only be used in connection with the dealership's business activities. Individuals who drive company vehicles should be required to wear seatbelts, prohibited from using cell phones or other such devices while driving, and their driving records should be checked before they are allowed to operate the vehicles.

Finally, as mentioned above, valid confidentiality agreements may be obtained, as well as promises not to solicit dealership customers or even promises not to work for a competitor, within reasonable limits. However, such agreements are subject to state laws which vary widely. You should consult with counsel regarding issues in particular states.

CONCLUSION

Operating an automobile dealership is complex and demanding, with management of employee issues becoming increasingly complicated. Like walking through a mine field, many of the dangers are not obvious until they explode. However, by reviewing and considering this list of 10 frequent mistakes that are not always apparent, you can improve your business operations and significantly improve your protection against unpleasant surprises.