

## A FEW NEW YEAR'S RESOLUTIONS FOR YOUR DEALERSHIP

Publication  
Feb 1, 2013

This is the time of year when most of us have made – and maybe already broken – our own personal New Year's resolutions. It's also a good time to take stock of your dealership and resolve to do the things that need to be done, but have been pushed to the back burner by the crisis of the day. The following is a listing of ten areas where many dealerships continue to run into employee-related problems year after year. We recommend that you include them on your list of Resolutions for 2013.

A word of advice: don't try to do them all at once. Pick one a month, beginning in March, and get it done. Then, by the end of 2013, you will have made your dealership less vulnerable to lawsuits and a better place to work!

### **RESOLVE TO:**

#### ***1. UPDATE YOUR EMPLOYEE HANDBOOK***

Many dealerships are still using handbooks that have grown old and no longer reflect the dealership's current policies, or worse, do not contain comprehensive policies addressing Family and Medical Leave, social media, conflicts of interest, religious harassment, etc. Handbooks need to be reviewed periodically and revised to keep up with the latest challenges.

#### ***2. UPDATE YOUR SALES PAY PLAN***

A pay plan – whether written or oral – is a binding legal contract. Therefore, it is critical that your sales pay plan explains exactly how you will calculate a salesperson's commissions. A pay plan that simply says you will pay "25% of front-

end gross” or which fails to itemize each of the items that are not included in the commission calculation is a ticket to the courtroom.

Dealerships all across the country continue to be sued because they failed to disclose a “pack” or did not make it clear that the commission calculation does not include holdback. In court, the pay plan will be construed against the party who drafted it – the dealership.

Here is how to test your sales pay plan: give it to your neighbor and ask him or her to explain to you how your sales people are paid. If your neighbor is confused by it, a juror will be, too. If that is the case, fix it ASAP.

### ***3. CHECK ON YOUR OVERALL WAGE-HOUR COMPLIANCE***

For decades, dealerships have gotten away with not paying proper overtime because the laws are complicated and employees did not know that they were not getting all that the law requires. This is especially true in states where the minimum wage is higher than the federal law or where the federal overtime exemptions are not available under state law.

In recent years, the U.S. Labor Department (DOL) has become increasingly active in investigating dealership compliance. Couple that with the growing number of plaintiff’s attorneys who specialize in wage-hour lawsuits, and you can see why dealerships are now at serious risk of lawsuits – which are generally not covered by insurance. A quick wage-hour audit – checking your compliance with both federal and state laws – will ensure that you are paying everyone properly and not running up a large back wage liability for your dealership.

### ***4. FINE TUNE YOUR “NO HARASSMENT POLICY”***

While the number of sex harassment charges has declined over the last couple of years, charges alleging other forms of harassment – including religious harassment and national-origin harassment – have been increasing. Make sure that your policy covers all forms of harassment prohibited by federal and state laws, and includes a specific reporting procedure as well as a back-up reporting procedure. Then reissue it to all employees. Be sure to remind your managers to be alert to all forms of harassment, not just sexual harassment.

### ***5. TAKE A CLOSE LOOK AT YOUR “INDEPENDENT CONTRACTORS”***

Both federal and state agencies are on the lookout for “misclassification” of employees as independent contractors. In fact, a number of states have signed agreements with the DOL and the IRS to share information when any of them identify

individuals who are improperly classified as “independent contractors.” Just calling someone an “independent contractor” does not make them one.

Dealerships using an outside contractor to handle detail work can even be held liable for the *contractor’s* wage-hour violations if the dealer exercises any control over the contractor’s employees (hiring, scheduling, directing, firing, etc.). So dealerships need to understand the tests used to determine if an individual is an employee or independent contractor. Take a look at the IRS Form 1099s that you will issue this month. Are they truly independent business people? Frankly, we rarely see bona fide “independent contractors” at dealerships. Remember: if you are wrong about the proper classification, your dealership can be liable for unpaid employment and income taxes.

## ***6. TRAIN (OR RETRAIN) YOUR MANAGERS***

Many discrimination charges and lawsuits are the direct result of a manager doing something wrong or failing to act when he or she should have. Either way, the dealership will be held legally liable for the actions (or inaction) of any individual it places in a manager position. As a result, more and more dealerships are realizing that the first step in avoiding employment-related claims is to make sure that all of their managers are trained how to hire and terminate properly, how to deal with harassment complaints, how to deal with religious accommodation and how to properly counsel an employee about poor performance.

How many new managers have you hired since you did your last training? Most managers want to follow the law and do the right thing. But we have reached the point where the laws are so complicated that a manager may not be able to figure out “the right thing” on his or her own. So they need to be trained.

## ***7. CLEAN UP YOUR NEW EMPLOYEE PACKAGE***

Many dealerships have new employees sign a stack of policies and memos along with the Employee Handbook during their orientation. Some of those policies were probably adopted years before on an ad hoc basis. Often these policies are out-of-date or even conflict with the current employee handbook. While a number of documents such as W-4s, I-9s and insurance forms must be signed by the employee, many of these individual policies can and should be included in the handbook. One signature at the back of the handbook is just as binding as a signature at the bottom of each separate policy.

## ***8. ADOPT AN ARBITRATION POLICY FOR EMPLOYEE DISPUTES***

Arbitration is simply a contractual agreement between the dealership and each employee that if they have a dispute of any kind, they will settle it through arbitration rather than in court. An arbitration policy gives a dealership an alternative to going before a jury of the employee's peers, where the outcome will likely favor the employee rather than the dealership. While arbitration is not a substitute for good management practices or a solution to every employment problem, it does provide an effective alternative to our slow and expensive court system.

### ***9. "UNION PROOF" YOUR SERVICE DEPARTMENT***

Unions have been on the decline for many years. But that has just made them more intent on organizing new employees whose jobs cannot be sent overseas...like automobile technicians. The Machinist Union (IAM&AW), which represents technicians across the country, has a website which allows a disgruntled technician to start organizing your dealership literally with the click of a mouse. Dealerships can head off organizing problems by taking a few simple steps to ensure good communications with technicians and to address problems that cause technicians to contact unions.

### ***10. ENSURE YOUR MANAGERS UNDERSTAND "FAMILY AND MEDICAL LEAVE"***

Many dealership managers still do not understand the requirements of the FMLA. As a result, they often fail to properly designate the leave in writing when an employee goes out. Then when the managers finally decide to replace an employee, they are surprised to learn that their hands are tied and they must hold the employee's job and pay the group health insurance for 12 more weeks. Managers need to understand the importance of proper compliance with this law. This is not just something the Office needs to know.

If you would like help in carrying out any of these "resolutions," please call any Fisher Phillips office and ask to speak with a member of our Dealership Practice Group.

---

For more information contact the author at [JDonovan@fisherphillips.com](mailto:JDonovan@fisherphillips.com) or 404.231.1400.