Is It Time To Recall Some Of Your HR Policies?

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Factory recalls have become a fact of life for those who sell and drive vehicles. The scenarios have a common theme: a vehicle part does not operate as designed or is determined to present a possible risk of failure. Once there is enough evidence to suggest a problem or potential problem exists, the recall process begins.

While the risks and potential harms pale in comparison to vehicle recalls, some employer policies should be similarly recalled and replaced. Some policies no longer work as designed because of subsequent changes to certain laws. Other policies and practices thought to be sufficient when implemented have not been as effective in application as they could be. Still other policies would benefit from a few overdue improvements that you didn't consider at the time of drafting. A few examples follow:

Employment Applications And New Hire Packets
If you have not revised your employment applications recently, it may be time for a recall. In recent years, several state and local governments have passed laws restricting the types of questions you can ask applicants before making a conditional job offer.

Because of "ban the box" laws, you may be restricted from asking questions regarding an applicant's criminal history. These laws are designed to secure jobs for more people by either delaying the point in time you can ask an applicant about their criminal past, or prohibiting you from asking altogether. A total of 26 states and over 150 cities and counties currently have such a law, and those numbers continue to grow.

Moreover, some jurisdictions prohibit employers from asking how much money an applicant made at prior jobs; New York City recently passed such a law. If you operate in one of these jurisdictions and your application still includes questions about a criminal record or salary history, a recall is necessary.

FCRA Disclosures And Adverse Action Letters
The recalls don't stop with the application. Did you know you must obtain an applicant's written authorization before having a third party run a search on the applicant's criminal or motor vehicle background? To be lawful under the Fair Credit Reporting Act (FCRA), that authorization must be on a standalone document that contains a "clear and conspicuous disclosure" and cannot include additional requirements not permitted under the law. Additionally, dealers must send pre-adverse

and adverse action letters where the results of the background check may be used as grounds to refuse to hire an applicant or terminate an employee. It's time to review your forms even if the company performing your background checks has provided them for use.

Reasonable Accommodation Policy
Almost without exception, an employer's "equal employment opportunity" pledge includes disability as a protected status. As the law has developed under the Americans with Disabilities Act (ADA), the most commonly contested issue in these cases is whether the employer provided, or even considered providing, a reasonable accommodation for an employee's physical or mental impairment.

Having a written accommodation policy not only sets forth the obligations and roles of both you and your employees in these situations, but also signals to the world that you understand your obligations under the law. Of course, you still must fulfill those obligations, but having an up-to-date policy is a necessary first step.

Leave Policy
Speaking of the ADA and reasonable accommodations, unpaid leave may be an option to consider as a reasonable accommodation. In fact, the federal Equal Employment Opportunity Commission (EEOC) has taken the position that 12 months of unpaid leave may not be unreasonable on its face.

Many leave policies, however, do not contemplate the possibility of granting extended leave beyond the Family and Medical Leave (FMLA) period as a reasonable accommodation. Some policies even have predetermined limits on the amount of leave the employer will provide beyond any FMLA obligations. Under the ADA, however, leave requests must be considered on a case-by-case basis, and you might run afoul of the statute by instituting a one-size-fits-all policy. If your leave policy does not contemplate this requirement, it may be time to recall it.

Employee Reimbursement Policy
Many dealerships require employees to reimburse them for vehicle damage and lost or broken tools or equipment. Such policies often authorize payroll deductions. Policies of this type are subject to state and federal law that may limit or prohibit certain deductions. If you have a reimbursement policy, we suggest bringing it in for a tune-up to ensure it complies with law.

Post-Accident Drug Testing Policy
Common in most workplaces is the requirement that employees automatically submit to a post-accident drug test. The Occupational Safety and Health Administration (OSHA) implemented a new rule in December 2016 that prohibits such testing unless there is cause to believe the employee was under the influence of drugs or alcohol at the time of the accident. Automatic post-accident testing policies need to be recalled.

No-Harassment Policy

Although most dealerships now have formal no-harassment policies, a couple of common recall issues may still exist. For example, many policies require employees to report harassment to their supervisor. While it typically makes sense to have an established chain-of-command system, the reality is that many frontline supervisors and managers are not qualified to address harassment concerns, or are themselves the subject of the complaint. A better approach is to have employees bypass their immediate supervisor when reporting such problems, or at least provide an alternative reporting plan for employees who would rather not approach the supervisor or are not satisfied with the supervisor's response.

The other common recall issue relates to the additional protected categories of sexual orientation and gender identity. In states where these categories are not specifically protected by state law, many dealers have not included them in their no-harassment policy. Recently, several courts ruled that harassment based on these characteristics is a form of sex harassment, so revisions to your policy might be warranted.

For more information, contact the author at TCoffey@fisherphillips.com or 404-240-4222.

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Tillman Y. Coffey
Partner
404.240.4222
Email

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