



Practical Policies Can Preempt HR Problems

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How many times have employment litigators reviewed the plaintiff's personnel file and thought that an otherwise challenging case could be much more readily dispatched at the summary judgment stage, "if only?" If only that key document had been prepared (or dated and signed). If only the company could show what alternatives it considered before denying the plaintiff's request for accommodation. If only the decision-makers had taken into account the plaintiff's recent complaint. Or, if only the supervisor had reviewed the pertinent facts with human resources before terminating the plaintiff.

Despite the continually evolving landscape of employment law, fundamental "if only" issues often play a more important role in litigation than the knowledge and skill that defense lawyers can apply after the facts have unfolded and litigation has begun. Even if the ultimate outcome is the same, defense attorneys can serve their clients well by helping them identify, implement and consistently follow just a few basic practices. Doing so can help clients drastically reduce costs, disruptions and anxiety associated with employment lawsuits.

The first and perhaps most effective practice is to ensure that the company maintains a strong, well-trained human resources leader who is consulted on all employment decisions, not just basic compliance and recruiting. Besides the hiring process, an HR leader must play a meaningful role in, at minimum, setting and monitoring pay scales and classifications; responding to leave requests; administering discipline and terminations; and reviewing employee requests for accommodations and/or complaints.

The steps discussed thus far all deal primarily with investigating alleged wrongdoing and/or taking an adverse employment action. Two other areas, however, are continuing to become more prevalent. Thus, both the Fair Labor Standards Act and the Americans with Disabilities Act merit special mention.

First, FLSA actions remain one of the fastest growing areas of employment litigation, particularly when it comes to collective actions. Therefore, it is again critical for an HR leader to continually remind supervisors and emphasize some fundamental facts. Under the law and especially in the view of an aggressive Wage and Hour Division of the U.S. Department of Labor, employers bear the burden of establishing that an employee is "exempt" from the minimum wage and overtime provisions of the FLSA.

Second, both the ADA and the FMLA are complicated, accompanied by hundreds of pages of regulations. Again, employers have an affirmative duty to provide certain benefits under both of these acts and to make further appropriate inquiries when an employee provides enough information to suggest that these laws may be implicated.

Finally, whether it is the Equal Employment Opportunity Commission, Wage and Hour Division, Occupational Safety and Health Administration or another government agency, companies should proceed cautiously when responding to inquiries or investigations. Although many companies prepare their own EEOC position statements, for example, it is important to obtain some level of legal counsel or review before submitting them, along with any exhibits.

To sum up, employers face an uncertain and somewhat inhospitable legal environment, both now and in the foreseeable future. Nevertheless, these basic practices, which embody fundamental HR "best practices," can be invaluable in reducing their costs and exposure arising from employment claims.

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