



Most Important Employment Documents

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Employment litigation can be expensive and time-consuming. An employer's success or failure in defending itself can turn on the law or the facts. Employers cannot do too much to change the law that applies to any given case. But, experience shows that employers can do a lot to shape the facts and to improve their position in employment litigation. Most of the time, this shaping of the facts depends on the documentation. Moreover, while the particular facts may be different from case to case, the same types of documents are at issue in almost every employment law case.

The documents likely to have the most impact on an employer's case are:

1. Applications for employment;
2. Employee handbooks;
3. Job Descriptions;
4. Performance evaluations;
5. Disciplinary warnings; and
6. Responses to administrative claims.

Sure, other documents may be relevant to particular cases, and the relevance and importance of documents may vary, but these six documents are almost always included among documents requested and produced in employment litigation.

As employers anticipate crises and develop contingency plans in advance, they should also anticipate that these six documents will be relevant to future employment law claims. As the saying goes: "forewarned is forearmed." Thus, employers should take action to make sure that these documents always put the employer in the best position to defend itself.

Getting into that best position begins with creating forms that are in compliance with applicable employment laws. For example, in almost every instance, the forms for these critical documents should include some indication that the employer is an equal opportunity employer. They should contain appropriate disclaimers and not ask questions or make statements that indicate an unlawful discriminatory bias or which may violate applicable laws.

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Laws and legal interpretations are constantly changing. Employers should periodically review their form documents to make sure they reflect compliance at all times with the then-current laws. Annual review of such documents is advisable, but more frequent review may be necessary if new laws or interpretations emerge.

In completing inquiries on these form documents, employers should make sure that the responses indicate compliance with all applicable laws and do not show a violation of civil rights or other laws. Statements on the forms need to be complete, truthful, credible, understandable and legible. It is amazing how often critical documents are not legible or understandable! Employers need to make sure that these forms are provided and/or completed consistently and for each and every employee. Lastly, these critical documents should be retained and preserved in accordance with applicable record retention laws and policies.

In addition to paying attention to how each document is prepared, employers also need to have a broad perspective and understanding about how a particular document compares to other documents prepared with respect to the same employee. For example, if a performance evaluation says an employee is consistently exceeding expectations and then a disciplinary warning refers to the employee's consistently unsatisfactory performance, the employer will not look credible and will have some explaining to do.

Similarly, employers also need to have a broad perspective and understanding about how a particular document compares to other documents prepared with respect to other employees. For example, if one employee is disciplined for a particular act of misconduct in a particular way, the employer needs to ensure that documents indicate that other employees who committed the same act of misconduct were disciplined in the same manner. Inconsistent treatment of individuals in different protected classes is one of the most damaging pieces of evidence in employment litigation.

To conclude, employers can go a long way to preventing or at least minimizing their exposure to employment law claims by using and creating documents that manifest compliance with all applicable labor and employment laws. Attention to just a few of the most critical documents used in the employment relationship will go a long way toward helping employers achieve this goal.

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