Rapidly Growing Your Workforce Carries Risk

Insights
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Last month, Samsung announced it plans to hire 1,000 artificial intelligence researchers as part of a $20 billion investment in artificial intelligence and other emerging technologies over the next three years. If past experience is any indication, the emergence of these new technologies is likely to spur rapid workforce growth in a host of companies. While Samsung may be large enough to absorb 1,000 new employees without much trouble, other companies facing rapid growth may unwittingly set themselves up for legal problems down the road. Here are a few tips for lessening such growing pains.

Be accessible
The Americans with Disabilities Act and state anti-discrimination laws prohibit discrimination against applicants and employees based on disability and may require accommodation of disabilities. Ensure that job announcements and online application systems are accessible to persons with disabilities. Confirm that interview locations are physically accessible. Be prepared to provide accommodations by assigning staff to arrange and approve requests in a timely fashion.

Disability and medical inquiries may be made only after an employer extends a conditional job offer. Once an offer has been made, an employer may ask whether the applicant can perform the job and to describe or demonstrate how they would perform the job, with or without reasonable accommodation, if the questions are asked of all persons entering the job category.

Keep your policies current
When was the last time your employment application form and employee handbook were reviewed? We generally recommend a review every year or two to capture legal developments and ensure compliance because laws change. For example, there is a movement afoot to "ban the box": states are adopting laws that prohibit employers from asking the yes or no question of whether an applicant has ever been convicted of a crime. Another example of the changing legal landscape concerns equal employment opportunity statements that list the forms of prohibited discrimination. Although federal courts are conflicted over whether discrimination laws prohibit discrimination based on sexual orientation, many state laws and local ordinances now prohibit it. Paid leave requirements also are being adopted by an increasing number of states and local governments. Even the National Labor Relations Board gets into the act by declaring that certain policies interfere with employees' right to join together to try to improve terms and conditions of employment. Policies written or modified without legal review may codify errors, and failing to stay current when growing your workforce only multiplies the potential problems.

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Correctly classify your workers

Use caution when classifying workers as independent contractors. Many agencies on the state and federal level have a stake in whether workers are misclassified as it deprives them of tax money (e.g. unemployment, workers' compensation). Thus, they are motivated to identify misclassifications and to share that information with other agencies. Mistakes can be quite costly for an employer.

Complicating the matter is the lack of a single definition of what constitutes an independent contractor. Some agencies use a 20-factor test, others use an "economic reality" test. Using certain language in a written agreement creates a rebuttable presumption of independent contractor status under some laws. Whatever the factors at play, such agreements should be in writing and reflect the factors, not contradict them.

Correctly classifying employees as exempt or nonexempt from minimum wage and overtime requirements is vitally important as failing to pay overtime can also be costly. Many employers mistakenly believe that all employees who are paid a salary are exempt. It is not that simple. The duties an employee actually performs (not the job title) determine whether or not the employee is exempt. If the duties test is met, the employee must also be paid on a salary basis. The most commonly-used exemptions are the "white collar" exemptions for executive, administrative, professional and sales employees. Regulations set out the required duties for each of these exemptions and must be considered when creating new positions. Remember that an employee's actual duties may change over time, so periodically audit your classifications of existing employees.

Use restrictive covenants carefully

Companies use restrictive covenants to protect their businesses from harm when employees are in a position to do harm by using information gained through their employment with the company to compete with it, solicit employees or customers, or disclose confidential or trade secret information. Employees engaged in artificial intelligence and other emerging technologies may be prime candidates for restrictive covenants. But employees have a right to earn a living and because of perceived unequal bargaining power between employers and employees, restrictive covenants are disfavored. Contracts that lessen competition are against public policy, so to be enforceable, covenants must be strictly limited as to time, geographic area, and the scope of the company's business interest to be protected. One size does not fit all. Tailor your agreements to the employee in question and the ways in which they could potentially harm your company.

States are increasingly scrutinizing restrictive covenants to limit their enforcement against low wage workers. Under some state laws, noncompetition agreements may not be enforceable against certain types of employees such as non-management employees or workers in public health and safety. Continued employment may or may not be sufficient consideration in exchange for an agreement; an employer may be required to offer something more. Agreements may not be allowed to specify that the law of a state other than the state in which the employee works applies or that cases need to be litigated in a different state. Make sure that any agreement you use is up to date and compliant with applicable state law.

Also receiving increased scrutiny are "no poach" agreements which typically involve two or more employers agreeing not to hire one another's employees. Employers like the agreements because they serve to protect their investment in training and enable them to retain talent. Opponents believe such agreements harm the economy because they limit job opportunities and earning potential. They also raise antitrust concerns. The Sherman Act prohibits entities from entering into agreements that unreasonably restrain trade. Several years ago, the U.S. Department of Justice filed lawsuits against large technology companies claiming such agreements are *per se* illegal. The department has since issued guidance stating that it will criminally pursue violators. Companies should not enter into written or oral no poach agreements.

Conclusion

These are just a few of the myriad considerations when employers hire a large number of employees in a short time. Employing personnel or an attorney with a strong human resources foundation and up-to-date knowledge of employment law is necessary to avoid compounding errors. You should also regularly review your company's employment-related practices to ensure they are up-to-date. Our Employment Practices Review Checklist is a great tool for conducting periodic reviews of human resources policies, practices and procedures.

If you have questions or concerns regarding the risks of rapidly growing your workforce and how to mitigate them, contact Sue Schaecher or any member of our Autonomous Vehicles Practice Group.

Related People

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