Compliance Risks In Human Resources

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Agenda

Discuss HR Compliance Risk
Discuss significant enforcement and compliance risks

- Hiring
- Immigration
- Postings
- Policies and Practices
- Performance/
- Employee Management
- Wage and Hour

- Benefits
- Compensation
- Reporting
- Leave and Disability Management
- OSHA and Workplace Safety
- Recordkeeping
- Discipline
- Termination
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Human Resource Risks
HR Compliance Risks

• The employer-employee relationship is highly regulated.
• Risk of violating the laws and regulations may be substantial
• Costs of failing to comply with employment laws is significant
Hiring
Hiring: Job Descriptions

• Although ADA doesn't require written job descriptions, having a written job description before advertising or interviewing applicants is strong evidence of whether a particular job function is considered an essential function.

Risks:
• No job descriptions
• Outdated don’t match actual requirements of the position
Hiring: Job Postings

Advertising the job opening

Risks:
• Not using variety of job boards
• Language - discrimination
Hiring: Applications

Risks
• Discriminatory Questions
• Ban the Box
• Salary History
Hiring – Interviews

Risks:
• Inconsistent questions/off track discussions
• Discriminatory Questions
• Reasonable accommodations
Hiring – Background Checks

• Background checks are generally considered "consumer reports" under the federal Fair Credit Reporting Act (FCRA).
• There are both civil and statutory penalties for failing to comply with the FCRA's procedural requirements.
• Increase in the state and local regulations related to background checks/credit checks.
Hiring – Social Media

• Many employers are using social media in their hiring process.

Risks
• Discrimination
• Requiring passwords
Hiring – Pre-Employment Tests

• Intelligence tests
• Personality tests
• Emotional tests

Although not prohibited, employer must ensure that these tests are valid and are not designed to filter out applicants based on any protected status.
Hiring: Recruitment & Applicant Tracking

• System that allows for time savings and organized way to handle the hiring process.

Risks:
• Global challenges
• Security – breach
• Parse/filters should not have adverse impact on protected class.
Hiring: Offer Letters

• Many employers provide offer letters.

Risks:
• EAW
• Expiration
• Contingencies
• Pay
• Exempt/non-exempt
Hiring – Onboarding

Risks
• New Hire Requirements
• Timeliness
• Payment
• Signature
Immigration
Immigration – Form I-9

Employers must:

• Verify the identity and employment authorization of each person hired after Nov. 6, 1986.
• Complete and retain Form I-9, Employment Eligibility Verification, for each employee who is required to complete the form.

IRCA Paperwork Violation

Min. 220. Max. 2,191.
Unlawful employment of aliens, first order (per unauthorized alien)

Min. 548. Max. 4,384
Enforcement increased
Immigration – E-Verify

• In certain cases of suspected misuse, abuse, and/or fraud, E-Verify participants may be referred to agencies that investigate illegal employer activities. Federal contractors could face debarment.

• States that require E-Verify may also penalize employers. Penalties include, but are not limited to, loss of business license, loss of government contracts, loss of tax credits and permanent debarment from doing business in the state.
Immigration – Visas

• Some employment visa’s impose significant employer responsibilities and substantial risks if requirements not followed.

• For Example H-1B
  • Job location changes – new LCA needed
  • Fee charges generally do not comply with LCA
  • Temporary Layoff and H-1B
  • Employers promoting an H-1B worker – new LCA needed
  • Termination – must notify USCIS
Workplace Postings
Workplace Postings

• Some statutes and regulations require that notices be provided to employees and/or posted in the workplace.

• Some posters are also required to be placed where they can be seen by applicants.

• Not all employers are required to post specific notice(s).
Policies and Practices
Policies: Handbooks

It is a best practice to have employee handbooks for any size business. It reviews expectations and communicates policies to employees.

Risks
- Discriminatory language
- Vague policies
- Outdated policies
- Missing policies
- EAW
Education and Training

Education and training programs should be implemented.

Documentation of materials covered and attendance should be maintained.
Performance Management
Performance Management: Goal Setting

Best practice to set reasonable performance goals for employees.

Risk:
- Unethical behavior
- Over focus on tasks
- Neglecting other tasks
Performance Management: Reviews

Risks

• Intentional and unintentional Discrimination

• Varying or inconsistent performance standards or ratings

• Negative evaluations without data/documentation to back up
Employee Management
Employee Management: Retention

Some employers are using AI to monitor employee engagement and determine who is likely to leave.

Risks:
• Using past data to predict future performance.
• Discriminatory design
Wage and Hour
Wage and Hour:
Misclassification Exempt/Non-exempt

• Employees who are not subject to all provisions of the FLSA are referred to as “exempt employees.” White-collar employees (executive, administrative, professional, outside sales, and certain skilled computer employees) are exempt from both minimum wage and overtime provisions. White collar exempt employees:
  ▪ generally must receive a minimum weekly salary as outlined in the federal regulations,
  ▪ must meet the job duties test for one of the “white-collar” exemptions, and
  ▪ generally must be paid on a salary or fee basis.

• Because exemptions are narrowly defined, employers are encouraged to review exact terms and conditions on the DOL website or by contacting the local U.S. DOL.
Wage and Hour: Misclassification
Independent Contractor

• Worker classification may be defined differently under different laws and enforced differently by different government agencies.

• Classification potentially affects payroll, wages, taxes, eligibility for workers’ compensation and unemployment insurance benefits, eligibility for company benefits, and protection under federal, state, and local laws.

• Agency guidance has recently changed.
Wage and Hour: Wage Payment

Risks:
• Failure to pay correct wages and OT
• Improper wage deductions
• Improper determination of hours worked
• Off-the-clock work
• Meals and rest breaks
Wage and Hour: Type & Timing of Payment

Risks

• Inappropriate Pay periods
• Failure to pay timely
  • Final Pay
• Direct Deposit authorization
• Payroll Card authorization
Benefits
Benefits: Health Insurance

Many employers offer health insurance to attract and retain talent.

Risks:
- If covered by ERISA, must meet those requirements
- Different jurisdictional laws
- Possible ACA/ESR penalties (large employers)
Benefits: Section 125 Plans

Section 125 Plan allows employees to pay for benefits (health insurance premiums, FSA, other covered plans) on a pretax basis.

Risks:
• Pre-tax deductions may be disallowed back to the beginning
• IRS assessment of unpaid back taxes plus interest and penalties
• Possible daily Department of Labor fines.
Benefits: Retirement Savings

Many employers offer retirement plans to attract and retain talent.

Risks:

- late payment of employee deferrals
- Incorrect calculations due to misunderstanding of what is compensation
- Not following rules – who is eligible, break in service, etc
Compensation
Compensation

• Equal Pay
• There are tools to help employers determine if they are at risk for equal pay violation

Risks:
• Equal pay violation
• Discrimination
Reporting
Reporting: EEO-1

The Employer Information Report EEO-1, otherwise known as the EEO-1 Report, is required to be filed with the U.S. Equal Employment Opportunity Commission's EEO-1 Joint Reporting Committee.

Risks:
• Lawsuit
• Imprisonment
• Debarment from contracts
Reporting: OSHA Accident and Illness

• Many employers are required to keep a record of serious work-related injuries and illnesses.

Risks:
• Substantial OSHA penalties
Leave & Disability Management
Leave & Disability Management: FMLA

- A federal law designed to help employees balance their work and family responsibilities by allowing them to take reasonable job-protected, unpaid leave for certain family and medical reasons.
- Employees who feel their rights under the FMLA have been violated have the right to file a complaint with the Secretary of Labor or file a private lawsuit.
Leave & Disability Management: Paid Family Leave

• Certain jurisdictions have implemented paid family leave. The requirements vary by law/regulation.

Risks:
• Reinstatement
• Lost wages
• Attorney’s fees
• Civil penalties
Leave & Disability Management: Paid Sick Leave

• Many states and local jurisdictions require paid sick leave.
• There are no federal laws that require employers to provide paid sick leave for their employees.

Risks:
• Monetary penalties
• Civil action
Leave & Disability Management: Military Leave

- Most states and the federal government require military leave

Risks
- Back wages
- Benefits
- Interest
- Liquidated damages
Leave & Disability Management: Voting Leave

• Many jurisdictions require employers to allow time off to vote. Some jurisdictions require this time be paid.

Risks:
• Exempt employee deductions
• Monetary penalties
Leave & Disability Management: 
Jury Duty Leave

• Most states and some localities prohibit employers from taking adverse action against an employee for serving on a jury.

Risks:
• imprisonment
• Monetary fines
Recordkeeping
Recordkeeping and Retention

• Over 2 dozen laws that impact recordkeeping and retention of employment records.

Risks
• Records not kept
• Inappropriate access
• Location of storage
• Kept too long
Discipline
Discipline

• Design disciplinary program for employee misconduct or poor performance.
• Implement program consistently

Risks
• Discrimination
• EAW
Termination
Termination

Employers and employees end the employment relationship for a variety of reasons.

Risks:
• Discrimination
• Wrongful Termination
• Lawsuits
Conducting HR Audits
Agenda

• Discuss types of and components of HR Audits
• Discuss HR Audit Best Practices
• Determine areas/products/practices/procedures in need of modification
• Review use of HR Audit findings
HR Self Audit Best Practice

- Determine Scope of Audit
- Develop Audit Plan
- Gather data/ interview appropriate employees
- Analyze data

- Produce Report
- Create action plan based on findings
- Evaluate effectiveness of implemented actions
Using Outside Legal Counsel for Audits

• Can provide legal advice on all legal questions
• Can act as a “Subject Matter Experts” in various areas.
• Can offer information on external enforcement and liability environment

• Can lead or assist with necessary investigations
• Can assist and or complete risk assessments, gaps analyses, possibly under attorney-client privilege
Hiring

- Do you have completed job descriptions prior to posting openings?
- Are your job postings compliant with nondiscrimination, equal employment opportunity, and disability regulations?
- Do your job descriptions help you comply with the Americans with Disabilities Act (ADA) by setting forth essential job functions and duties?
- Do you use a structured interview checklist with legally permissible interview questions?
- Do you have candidates complete an employment application?
- Do you conduct background checks or drug testing?
- Are the tests and assessments you conduct job-related and validated based on actual job performance?
Immigration

• Determine if an electronic Form I-9 system is appropriate
• Develop a transparent process for audit
• Review enforcement agency guidance on conducting internal Form I-9 audits.
• Review all Form I-9’s

• Determine if they were completed timely. If certain hiring managers are making errors, retrain them.
• Correct forms that can be corrected
• Purge documents that do not have to be retained.
Workplace Postings

• Do you know what required notices you need to provide to your employees and in what languages?

• Ensure correct and current versions of posters are up

• Are postings where both applicants and employees can view?
Policies and Procedures

• Have statements made on job application forms, offer letters, and other personnel action forms been reviewed to determine if they are consistent with statements made in the employee handbook?
• Is English the second language of some employees or font size large enough to read?
• Is the handbook legally reviewed? How often?
• Is handbook compliant with federal and state rules for the areas where your company operates?
• Are all employees required to sign a receipt of employee handbook acknowledgement form and are these forms kept in employees’ personnel files?
• Required policies and best practice policies included?
Performance Management

• Do you have a standard process for measuring and reviewing performance with employees?
• Has design of the process been reviewed by legal counsel?
• Does process include goal setting, performance reviews and performance improvement plans?
• Are employee goals SMART?

• Is feedback continuous?
• Is process documented?
• Is process implemented consistently?
Wage & Hour

• Review compensation information, job duties, actual work performed, interviews with the manager or supervisor, and other information to determine jobs classified as exempt correctly

• Review ICs to determine they are not employees

• Are paying employees in compliance with federal, state and local wage and hour laws?

• Are you aware of all the laws and regulations that apply in the jurisdictions in which you operate?

• Do you accurately track time worked, including meal and rest periods?
Benefits

• Do you have Summary Plan Descriptions for the required plans and have they been distributed?
• Plan being operating according to plan document provisions?
• Are your benefit plans clearly communicated to eligible employees?
• Do your plans that are subject to IRS Section 125 (Cafeteria Plans) or Employee Retirement Income Security Act (ERISA) meet the design, notification, nondiscrimination, and recordkeeping requirements of those plans?
• Is your process for participants eligible for health care continuation through the Consolidated Omnibus Budget Reconciliation Act (COBRA) defined and followed timely?
Compensation

• Do you have a method to determine compensation and benefits?
• Do you write position descriptions, seek employee input and develop consensus for position descriptions?
• Do you have a consistent job evaluation system?

• Are positions where women and minorities work evaluated according to the same standards as jobs where men or non-minorities work?
• Do you look at workers with substantially similar levels of experience and education who hold jobs calling for substantially similar degrees of skill, effort, responsibility and working conditions, even though job titles may be different?
Reporting

• What reports are required?
• Do they have to be submitted or only retained?
• Are they completed/submitted timely?
• Is needed data tracked?
• Are reports accurate?
• Are reports submitted correctly?

• Do you maintain your annual OSHA log to record all employee work-related illnesses and injuries?
• Do you maintain and limit access to self identification documents for EEO-1 and VETS 4212 filing?
Leave and Disability Management

• Do you have a policy about managing various leaves of absence, pregnancy disability, military leaves or other types of special time off needs?
• Is process to request time consistent?
• Are managers trained on leaves and protections?
• Do you track each leave to ensure all benefits available to employee are utilized?

• Are employees notified of balances available?
• Are all required documents provided to employees timely?
• Does time and attendance system track appropriate data and is that data shared with leave management staff?
• Are return to work forms completed when necessary? Are they always required?
OSHA and Workplace Safety

• Do you have a designated safety officer?
• Do you have a safety training program?
• Have you complied with all OSHA and notification requirements related to your industry?
• Are managers trained on how to handle an OSHA audit?
• Do you have an emergency response and communications plan?
• Do you have your process and communications in place for employees and managers to immediately report all occupational injuries?
• Do you document compliance with requirements?
Recordkeeping

• Do you know what types of personnel records to maintain in your files?

• Do you know how long to maintain your personnel records?

• Are your personnel files (cloud or paper) secure, with limited access to those who have a legitimate business need to have access?
Discipline

• Do you have an established process and managers trained to ensure that company standards are being followed prior to disciplining an employee?

• Do you include a second level of review prior to taking disciplinary action?

• Do you document all disciplinary action?

• Is disciplinary action applied consistently?

• Are PIP written to protect EAW?

• Are best practices followed for disciplinary meetings?
Termination

• Do you have an established process and managers trained to ensure that company standards are being followed prior to terminating a

• Do you have a process in place
  • Required paperwork/notifications
  • Return of company property
  • Exit interviews
  • Access removed physical/virtual

• Are best practices followed for termination meeting?
After the Audit

- Implement plan to address gaps
- Determine date to revisit to determine if deficiencies have been corrected and risks mitigated
- Train staff as needed to implement new procedures/processes
- Outsource certain functions if necessary/cost effective
- Determine if insurance would be helpful or appropriate
- Determine if more in depth audits of certain areas are needed and determine schedule for those audits
Questions
Thank you!

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