



# Avoiding Employment Law / Employee Relations Pitfalls

## Employee Relations Pitfalls

**Lack of Policies and Procedures:** *Before* a company hires its fifth employee, it should have some sort of *written* policies and procedures. While most companies wouldn't think of operating without a bookkeeping function, the majority do not think about putting employment policies in writing until after at least one negative incident involving the behavior of an employee.

**An Absence of Job Descriptions:** No one likes to write them, certainly no one likes to keep them updated, but the job description is a valuable *tool*. It describes the responsibilities of the incumbent in a job. (It should also describe the accountabilities, but rarely does.)

The job description should also be related to performance appraisal. How can an individual's performance be evaluated if the manager doesn't know what the employee is *supposed* to be doing?

**Misclassifying Employees:** What seems commonplace to someone who's been in Human Resources for 30 years is obviously not common knowledge in smaller businesses -- the difference between an exempt and a nonexempt employee. The federal Fair Labor Standards Act, enacted in 1938, defines the difference between the two types of employees and gives the *six criteria* which must be met *simultaneously* for an employee to be exempt in one of three classifications (Executive, Administrative, and Professional) from the Act.

Misclassifying an employee as an independent contractor is perhaps more serious because the IRS usually takes the view that the company had done so as a subterfuge from paying income and employment taxes. There are anywhere from six to 20 criteria for truly being an independent contractor -- depending upon which state and which federal or state agency you're talking to. If one criterion stands out, however, it is this: an independent contractor can and does work for more than one company.

**Inconsistency:** Inconsistencies in applying policies and procedures can be the ruination of whatever structure a company has established. While many still adhere to the dictum that "rank has its privileges," sometimes the "privileged" give special consideration to their own subordinates. The VP of Engineering, for example, who allows his or her subordinates to be late while the VP of Accounting wants to dock his or her subordinates for being 10 minutes tardy, undermines all departments' attempts to be equitable in enforcing policy.

Furthermore, inconsistencies and preferential treatment such as this can lead to claims of discrimination. Admittedly, it is a tightrope, but it is one which must be walked. Treat all employees fairly and with equity: it is better to be consistently strong than weak.



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**Documentation:** Forget what has been said for the past 20 years: the business world does run on paper. Aside from what normally goes into an employee's file -- and, yes, there should be a file -- be certain that there are the following documents: Application for Employment, any performance reviews and consultation reports, attendance records, and any agreements that have been signed by the employee such as trade secrets or nondisclosure agreements.

Any time that an employee must be disciplined should be documented. Initially, the document can be a handwritten note, but if the offense is sufficiently severe, a "formal" warning or consultation report should be completed, a meeting held with the employee describing the specific offense(s), and the form should be signed by the employee. (The employee should be allowed to rebut the report, but always have the individual sign the original even if s/he wants to write in a disclaimer.)

If the employee does something positive and worthy of mention that, too, should become part of the file. (We have designed a form, the "Occurrence Memo," which has both positive and negative actions listed.) The combination of such memos, always dated, makes evaluation of performance and positive or negative actions so much easier.

**Waiting too Long to Discharge:** Though it is usually in the best interests of a company to see that an employee succeed, there is also a time to cut one's losses. You can limit the company's liability by following a progressive discipline process, but you do not have to go through the three or four normal steps (counseling, probation, suspension, termination) over a long period of time. If you have done everything to "save" an individual, but the behavior remains, it is time to terminate the employment relationship.

These are some of the ways in which a company can limit its employment liabilities. Succinctly, preventative actions are positive actions.

### **No Sexual harassment policy:**

**Steve Phillips (ESPN), David Letterman, Mark Sanford, Steve McNair,**

There are two types of sexual harassment claims:

- **Quid pro quo:** Literally, "this for that." Here, the victim is forced to have sex to obtain a job benefit.
- **Hostile work environment:** In this case, the employee is subject to unwanted sexual advances, physical conduct, or improper language poisons the work environment such that it becomes an abusive workplace.



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## **Failure to Educate & Train**

Assuming adults should know better or one time will be sufficient.

New hire orientation, sexual harassment, diversity and inclusion, customer service, team building, new technology. Best investment!!!!!!!!!!

## **Employee Laws you need to know**

1. **Title VII of the Civil Rights Act of 1964.** Prohibits discrimination on the basis of race, color, religion, national origin, and sex. It also prohibits sex discrimination on the basis of pregnancy and sexual harassment. (15 employees)
2. **The Equal Pay Act of 1963.** Prohibits employers from paying different wages to men and women who perform essentially the same work under similar working conditions. (2 or more)
3. **The Americans with Disabilities Act.** Prohibits discrimination against persons with disabilities. (15 employees)
4. **The Age Discrimination in Employment Act (ADEA).** Prohibits discrimination against individuals who are age 40 or above. (20 employees)
5. **OSHA Records** – Safety / medical records (10 employees)
6. **FMLA** – Unpaid medical leave (50 employees)
7. **EEO / OFCCP** – Required reporting 100 / 50 for Federal Contractors
8. **COBRA** – Group health insurance (20 employees)

All personnel records and confidential employee data maintained by should be destroyed by shredding after retention dates have passed; this pertains to all records as stated above.



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**Employee information records are maintained in separate personnel files as noted:**

- 1) Pre-employment information,
- 2) I-9 forms,
- 3) Benefit plan and employee medical records,
- 4) Health and safety records,
- 5) General employees' personnel records. Government compliance reports should be maintained in reverse chronological sequence and filed independent of employee information.

## *Pre-employment Records*

**Resumes/applications and related employment materials including interview records/notes:**

- For applicants not hired 2 years
- For employees 4 years after date of termination
- Background checks, drug test results, driving records, company employment verifications, letters of reference, and related documents
- For applicants not hired 2 years
- For employees 4 years after termination

## *Employee Records*

- Terminated employee I-9 Forms - the later of three years from date of hire or one year following termination of employment.
- Compensation, job history and timekeeping records 4 years after termination
- FMLA/USERRA and related leave records 4 years after termination
- Performance appraisal/disciplinary action records 4 years after termination
- Benefit records 6 years after termination
- Disputed issues (records relating to issues 2 years after resolution of dispute, involving external agencies or parties, wage charge, or suit hour investigation by DOL, EEOC charge, arbitrations, court actions, etc)
- OSHA & employee safety records 5 years after termination
- Workers Compensation claims 30 years after date of injury/illness



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## ***Compliance Reports/Records***

- State New Hire reports 1 year after report filed
- EEO-1/VETS-100 4 years after report filed
- Annual Affirmative Action plans 2 years after close of AAP year
- OSHA 300/300A 5 years after posting
- 5500 6 years after report filed
- Federal/State tax reports 4 years after report filed

## **FINAL TIPS**

### ***First:***

Find out if these new/pending amendments, regulations or laws apply to your organization (and they probably do). The size of your workforce, government contracts, etc. all play a part in determining what laws apply to you.

### ***Second:***

Ensure your human resource staff or designated representative is trained to communicate and administer the new changes.

### ***Third:***

Hire a consultant to conduct an annual human resource audit. Just as you would not live without the trusted services from your CPA firm for your financials, an hr audit will help identify, correct and reduce employment risk / exposure.