

# 20 Important Things HR Professionals Should Know

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# Introduction

- Human Resource Professionals
  - Wear many hats
  - Pre-employment through post-termination
  - 20 important things
  - Not an exhaustive list

# 1. “Employee” v. “Contractor”

- “Employee”
  - Company Controls
    - Gives training, instructions, oversight
    - Provides work space, equipment, insurance
    - Pays by the hour or a weekly salary
    - Reimburses for work-related expenses
    - Provides company benefits
    - Pays half of FICA and deducts for income taxes (W-2)

# “Employee” v. “Contractor”

- “Contractor”
  - Independent
    - Receives no training and no daily oversight
    - Provides own work space, equipment insurance
    - Paid by the job – a fee
    - Expenses should be part of the fee
    - No benefits (no workers’ comp, etc.)
    - Pays all own taxes (1099)

# Why Classification Matters

- IRS
- State department of revenue
- Lost benefits
- DOL – Backpay for minimum wage and overtime pay; failure to keep required records
- Unemployment and workers' comp coverage

## 2. Do's and Don'ts of Hiring Employees

- Train supervisors who interview:
  - Interview is not a social occasion;
  - It's a business meeting
    - Ask only job-related questions

# Do's and Don'ts of Hiring Employees

- Okay topics: Must be job-related
  - Experience
  - Education
  - Skills
  - Challenging areas
  - Most significant accomplishment
  - Etc.

# Do's and Don'ts of Hiring Employees

- Not okay topics:
  - Children; child care
  - Native language
  - Marital status; “maiden” name
  - Spouse's name or where spouse works
  - Citizenship; place of birth; parent info
  - Age, race, religion, nationality



# Do's and Don'ts of Hiring Employees

- What about “disability” questions:
  - Not: “Are you able to perform the job functions with or without reasonable accommodation?”
  - Okay to ask: An applicant’s ability to perform the essential functions if asked of everyone being interviewed for the same job

# 3. What “At Will” Employment Really Means

- “Termination for any reason or no reason with or without cause and with or without prior notice”
  - No promised length of employment
  - Does not overrule
    - Statutory and other legal protections such as disability accommodation, discrimination and retaliation

# What “At Will” Employment Really Means

- “Cause” vs. “Reason”
  - Cause
    - No independent definition
    - Defined by employment agreement or employment policy
  - Reason
    - The “why” behind the action
      - Poor attendance, poor performance, poor attitude, etc.

# What “At Will” Employment Really Means

- Can be destroyed by
  - Written or verbal promise
    - Offer letter or employment agreement
    - Employee Handbook policy
      - “You will receive a 2-week notice of termination”
      - “You must provide a 2-week notice of resignation”
    - Manager/supervisor says:
      - “We would never let you go” or “You have a permanent job”

# 4. The “Better” or “Best” Law Always Applies

- Federal v. State v. Local
  - Examples include
    - Minimum wage and overtime pay
    - Paid sick leave
    - Exempt v. non-exempt definitions
    - Meal period requirements
    - Break time requirements
    - Parenting leave

# 5. “Exempt” v. “Non-Exempt”

- Non-Exempt – Default
  - Minimum wage, OT, and time record
- Exempt
  - No minimum wage, OT, or time record
  - White collar – Most common
    - Paid on a “salary basis” or, if allowed, a “fee”
    - Duties - Executive, Professional, Administrative, Outside Sales

# “Exempt” v. “Non-Exempt”

- Exempt
  - Many other types for some
    - High level computer workers
    - Agricultural employees
    - Automotive dealership employees
    - Fair or amusement park employees
    - Newspaper, radio and television employees
    - Etc.

# 6. Wage Disclosure

## Key Takeaways

- Wage Disclosure Requirements:
  - Communicate required information through (a) offer letter or (b) MNDOLI form
  - ***Initial*** disclosure must be acknowledged by employee in writing



# Wage Disclosure

## Key Takeaways

- Wage Disclosure requirements continued:
  - Management and exempt employees are included in notice requirements
  - Electronic signature okay but email alone does not satisfy requirement of “initial wage notice”

# Wage Disclosure

## Key Takeaways

- Wage Disclosure requirements continued:
  - Signed and dated wage notice must be kept in employee's personnel record

# Wage Disclosure

## Key Takeaways

- Recordkeeping Requirements:
  - Employers **must** maintain required records (see Minn. Stat. 177.30 and morning presentation)
  - **Be sure to review**: statute has been amended to require retention of more records

# Wage Disclosure

- **Remember wage disclosure under WESA:**
  - Employees may discuss their wages (but not disclose to a competitor)
  - Employers ***may not*** take adverse action against employee who discuss their wages or wages of other employees

# 7. Follow the “Need to Know” Rule

- Share personnel information only with those who “need to know”
  - Those who investigate
  - Those who analyze
  - Those who make decisions
  - Those who implement decisions
    - Proper purpose, occasion and motive

# Follow the “Need to Know” Rule

- “Curiosity” is not a “need to know”
- Train management to follow the same rule
- Be ready to deflect questions you must not answer:
  - “We do not discuss employee personnel issues outside those who need to know.”

# Follow the “Need to Know” Rule

- Why it matters:
  - Invasion of privacy
  - Defamation
  - Lost trust and credibility

# 8. Treat Employee Pay Legally and Carefully

- Follow applicable state direct deposit rules
- Follow state final paycheck rules
- Follow state rules regarding frequency of paychecks
- Always give prospective notice of a compensation change



# Treat Employee Pay Legally and Carefully

- Be consistent when making pay reductions
  - When transfer employee for business reasons
  - When transfer employees for disability accommodation reasons
- If significant reduction, do incrementally over time

# 9. How to Make Written Discipline Effective

- Do
  - Document the facts
  - Identify the problem with the current conduct, performance, attendance, etc.
  - Specify the needed changes
  - State the need for “immediate and sustained change/improvement”

# How to Make Written Discipline Effective

- Do
  - State the consequences for failure
  - Offer assistance as reasonable
  - Require employee to sign the notice
  - Give a copy to the employee
  - Put original in the personnel file

# How to Make Written Discipline Effective

- Do not
  - Use a 30, 60, 90-day “probation” period
  - Promise “I will meet with you weekly”
  - Label the behavior
    - “You came to work drunk”
    - “You lied”
    - “You stole the package”

# 10. What Triggers the Reasonable Accommodation Process/Requirement

- No “magic” words
- Employee request
  - Written request not required
  - If to management, they should refer to HR

# What Triggers the Reasonable Accommodation Process/Requirement

- Observed employee difficulties suggesting a physical or mental impairment

# What Triggers the Reasonable Accommodation Process/Requirement

- Upon a request or observed difficulty:
  - Interactive process
    - Meet with employee
    - Keep questions/discussion job related

# What Triggers the Reasonable Accommodation Process/Requirement

- Interactive process
  - If limitation is not obvious, request medical certification
  - Document all interactions
  - Give copy to employee; keep original in a confidential file
  - Interactive – Meet/talk with employee



# What Triggers the Reasonable Accommodation Process/Requirement

- Interactive process
  - Process – Ongoing
  - Remember: Obligation is to provide reasonable accommodation to a qualified disabled employee unless it causes the company undue hardship

# What Triggers the Reasonable Accommodation Process/Requirement

- Interactive process
  - Undue hardship
    - High threshold
    - Try, try, try
    - Document all actions, attempts, etc.

# 11. Applicable Leave Law Requirements

- Federal Family and Medical Leave Act (“FMLA”)
  - Covered Company – 50 or more employees in each of 20 or more calendar weeks this calendar year or last

# Applicable Leave Law Requirements

- Federal Family and Medical Leave Act (“FMLA”)
  - Eligible Employee
    - 12 cumulative months of employment
    - 1,250 worked hours in preceding 12 months
    - Site has 50 employees within 75 miles

# Applicable Leave Law Requirements

- FMLA key basics
  - 12 or 26 workweeks of job-protected unpaid leave for covered reasons in the designated 12-month period
    - NO discipline, discharge or negative comments or actions for use of FMLA leave

# Applicable Leave Law Requirements

- FMLA key basics
  - Employer pays its share of health and dental insurance coverage; no COBRA
  - Reinstatement to the same or equivalent job unless exception applies

# Applicable Leave Law Requirements

- Covered reasons:
  - Birth, adoption or placement of a child
  - “Serious health condition” of employee or employee’s spouse, child or parent
  - Qualifying military exigency leave
  - Injured servicemember leave (26 weeks)

# Applicable Leave Law Requirements

- Counting methods:
  - Calendar or other “fixed year”
  - Fixed 12 months from employee’s first day of use
  - Rolling 12-month period looking back from each day of use



# Applicable Leave Law Requirements

- Do not forget any applicable state leave
  - Pregnancy or parenting
  - Sick
  - Safety (domestic abuse, sexual assault, stalking)
  - Jury duty
  - Child's school activities
  - Other

# 12. Requirements for an Effective Employee Handbook

- Includes at least the following:
  - At-will statement
  - Effective disclaimer – Not a “contract”
    - Conspicuous
      - Noticeable
      - Appropriate size type
      - Bold and underlined
      - Preferably at the beginning of the handbook

# Requirements for an Effective Employee Handbook

- Includes at least the following;
  - EEO policy
  - Reasonable accommodation policy
  - FMLA policy if covered employer
  - Anti-harassment policy
  - But no probation policy
    - Undermines at-will status

# Requirements for an Effective Employee Handbook

- Includes at least the following:
  - Flexible discipline and discharge policy
  - Reservation of the right to amend or modify the handbook's provisions (except not the employment at-will policy unless in writing signed by an authorized company officer)
  - Other policies required by federal or state statute

# Requirements for an Effective Employee Handbook

- Includes at least the following:
  - Employee acknowledgment of receipt of the handbook and of the at-will policy
  - Signed and dated
  - Original in each employee's personnel file

# 13. Anti-Harassment Strategy

- Updated policy
  - Prohibits harassment against all EEO categories
  - Identifies examples of prohibited conduct
  - Identifies 2 or more people to receive a complaint
  - Encourages employees to report
  - Encourages telling the offender to stop

# Anti-Harassment Strategy

- Updated policy
  - Identifies potential consequences/corrective action for inappropriate behavior
  - Requires cooperation in an investigation
  - Prohibits retaliation
- Periodic training
  - For management and for all employees

# Anti-Harassment Strategy

- Commitment from the top officials
  - Published statement
  - Participation in training sessions
  - Other?
- Investigation strategy
  - Prompt
  - Appropriate - Who, What, When, Where, How



# 14. How Retaliation Claims Arise

- Three key elements:
  - Protected activity
  - Negative employment action
  - Causation
- Most common problem for employers:
  - Timing of the negative employment action

# How Retaliation Claims Arise

- Some types of protected activities:
  - Harassment complaint
  - Discrimination complaint
  - Workers' comp claim
  - OSHA complaint
  - Wage complaint
  - FMLA leave

# How Retaliation Claims Arise

- Some types of protected activities:
  - Request for accommodation
  - Protected concerted activity
  - Complaint regarding regulatory compliance
  - Being pregnant/needing pregnancy leave
  - Military leave
  - Voting or jury duty leave

# 15. Beware of Protected Concerted Activity

- Applies in union and non-union work force
- Protected by the National Labor Relations Act – Section 7

# Beware of Protected Concerted Activity

- In brief summary
  - Two or more employees addressing their pay, safety, and other terms and conditions of employment, etc.
  - One employee addressing pay, safety and other terms and conditions of employment, etc. on behalf of other employees

# 16. As HR, You Are a Management Employee

- Complain up the chain of command, never down
- Establish professional boundaries
- Keep an open door
- Remember “need to know”

# 17. Develop Efficient Working Relationship with Your Employment Attorney

- Qualities of the relationship;
  - Good “chemistry”
  - Attorney can meet your deadlines but be realistic and flexible if possible
  - Always identify when response is needed

# Develop Efficient Working Relationship with Your Employment Attorney

- Steps to efficiency:
  - Provide all relevant facts
  - Provide the applicable paper record
  - Provide applicable policies
  - Provide history/prior practice



# Develop Efficient Working Relationship with Your Employment Attorney

- Steps to efficiency:
  - Short call before taking action may save lots of time/dollars later
  - Ensure the attorney and the company are on the same page as to fees

# 18. Train Management on Critical Employment Legal Requirements

- Harassment prevention/response
- FMLA and other leave protections
- Disability accommodation obligations
- Need to know rules

# Train Management on Critical Employment Legal Requirements

- Protected concerted activity
- Recordkeeping for hourly employees
  - No working off-the-clock

# 19. Unions and Employee Rights

- **National Labor Relations Act, Section 7 provides for employee rights:**
  - of self organization to form, join or assist labor organizations
  - to bargain collectively through representatives of their own choosing; and

# Unions and Employee Rights

- **National Labor Relations Act, Section 7 provides for employee rights, continued:**
  - to engage in other concerted activities for purpose of collective bargaining

# Unions and Employee Rights

- **Rules for hiring:**
  - Employers **may not** refuse to hire on basis of union activities, membership or support
  - Employers **may not** ask job applicants questions related to applicant's union membership or willingness to work for a non-union employer

# Unions and Employee Rights

- **Review your policies:**
  - No solicitation rules: A policy against solicitation must be evenly applied and not unlawfully discriminate against union solicitation
  - No talk rules: Must be neutrally applied

# Unions and Employee Rights

- **Review your policies:**
  - No access rules: Must be neutrally applied
  - Email and bulletin boards: equal access
  - No removal/discard of union literature if other literature is allowed to stay



# 20. When to Use a Release Agreement

- What is it?
  - A written document/contract given to a separating employee by which the employee releases all allowed legal claims and that is supported by independent consideration to which the employee is not otherwise entitled
  - Must meet all federal, state and local requirements to be enforceable

# When to Use a Release Agreement

- Some of the legal requirements:
  - Federal:
    - If employee is 40 or older and being terminated as a one-person separation: 21 calendar days to think about signing and 7 calendar days to revoke after signing
    - If employee is 40 or older and being terminated as part of a group of two people or more: 45 calendar days to think about signing and 7 calendar days to revoke after signing

# When to Use a Release Agreement

- Some of the legal requirements:
  - Minnesota:
    - 15 calendar days to revoke after signing
  - Requirements of other states vary
  - Legal counsel should be consulted to ensure compliance with the many applicable legal requirements

# When to Use a Release Agreement

- When to consider using:
  - Contentious separation
  - Employee already has alleged wrongdoing
  - Employer is aware of legal risks that arose during the employment
  - Group layoff and will be providing some severance/separation pay

# When to Use a Release Agreement

- Important factors:
  - How much severance/separation pay to offer
  - Whether to offer any other consideration
    - Some cost shifting of COBRA premiums?
    - Outplacement costs?
    - Other?

# When to Use a Release Agreement

- Important factors:
  - Does the amount of severance/separation pay or other benefits justify a release agreement?
  - Will the release agreement document itself be a “red flag” for the employee?

# Presenters



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