Conducting a Human Resources Audit: A Primer

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The astonishing $176.1 million *Texaco* settlement in 1996 has surely made at least a few executives and human resource professionals cringe at the thought of being found in the same circumstances. There can be no doubt that the record settlement has made some companies question what employment-related specters are haunting their organizations, ready and waiting to appear in the form of a litigation nightmare. It can also be reasoned that more than a few employers would like to take measures to exorcise the employment-related demons lurking in their houses, but are not sure of the rituals or processes.

This primer should prove helpful to all employers that are committed to having solid and lawful employment and labor relations polices and practices. Whether you are flying by the seat of your pants or believe you have sophisticated human resources programs already in place, all organizations can benefit from a human resources audit. This is because a human resources audit is the only systematic way that an employer can examine its human resource function *in toto*, identify problem areas, and then take prompt, effective corrective action on its own terms.

While it is impossible to anticipate all of the practical or substantive issues that will arise in the course of conducting a human resources audit, this column provides the employer with a guide to navigating this process. It first discusses the rationale for conducting a human resources audit and methods for protecting the confidentiality of the audit process. It then identifies and discusses the most common problem areas of human resources management and employment law, from the hiring process through termination.

The Reasons for Conducting a Human Resources Audit

Human resources audits are conducted to provide the employer with a systematic way of determining whether it is complying with federal, state, and local laws, regulations, and ordinances relating to the employment relationship and labor relations. Because of the myriad of laws and regulations governing the employment relationship, from its inception at the interviewing and hiring process, through and after termination, it is extremely important that an employer examine its policies and practices to ensure that it is not unnecessarily exposing itself to costly charges and lawsuits. Like a financial audit, which is often undertaken yearly to determine an employer's Financial state and well-being, an annual or periodic human resources audit will allow an employer to proactively identify and correct employment-related problems. It will also help avoid the costly process of having those problems brought to the employer's attention by, and corrected via, the government or plaintiff individuals.

A Very Expensive Example of the Importance of an Audit

The recent *Texaco* settlement serves as a useful reference point to examine the benefits to be derived from conducting a human resources audit. In 1994, a class action lawsuit was filed by minority employees of *Texaco*, alleging that minorities were systematically passed over for promotions and were subjected to a racially hostile environment. In November 1996, *The New York Times* disclosed the existence of tape recordings wherein executive employees responsible for responding to discovery referred to minorities as, inter alia, "black jelly beans" that were "glued to the bottom of the bag." More importantly, the tapes disclosed a conspiracy by *Texaco* executives to alter, withhold, or destroy corporate documents requested by the plaintiffs in discovery.[1] Approximately two weeks later, *Texaco* agreed to settle the lawsuit for a record-breaking amount of money, in addition to numerous affirmative commitments to ensure equal employment opportunity and workplace diversity.

As reported by *The New York Times*, a review of court records revealed a two-faced *Texaco*, that is, "a company that says all the right things but that has done far too little to insure they have meaning."[2] *Texaco* did not audit its divisions to ensure that they were complying with equal employment opportunity obligations, but rather relied on its divisions to police themselves. While *Texaco* had a written policy prohibiting discrimination, there was no oversight of management to ensure that they were complying with equal employment opportunity obligations. In a deposition, the Vice President of Human Resources testified that he was unaware of any "periodic or systemic" effort by *Texaco* to ensure that all business units of the company were in compliance with federal employment laws. *Texaco* also never tried to determine whether its employment practices discriminated against minorities.[3] Query whether this litigation could have been avoided had *Texaco* devoted serious efforts toward auditing and monitoring its human resources policies and practices.

Protecting the Confidentiality of the Human Resources Audit

Despite the obvious benefits to be derived from a thorough human resources audit, many employers fear that written records generated during the audit process may be used against them in the event of litigation or other proceedings. For example, in the *Texaco* case, the plaintiffs sought corporate documents generated and maintained by *Texaco* in order to obtain damaging evidence to prove their discrimination case.[4] Accordingly, before beginning any audit, an employer must take steps to ensure that materials related to the audit will remain confidential, including determining what legal doctrines will provide the most protection from disclosure.

The Attorney-Client Privilege

The attorney-client privilege, under both federal and state law, prevents the disclosure of communications between an attorney and his or her client which are legal in nature and confidential. The privilege is absolute and can only be waived by the client. The privilege applies only to communications between the client and the attorney and does not apply to communications made to third parties. Merely providing the attorney with copies of all documents generated by the employer will not suffice to invoke the privilege.[5]

The attorney-client privilege applies to a corporation, where the communications are made by corporate employees to the corporation's attorney to secure legal advice, and the corporate representatives are aware of this.[6] The privilege exists regardless of whether the communication is made to "in-house" counsel or to an outside attorney. As is discussed below, the use of an attorney to chair or lead the human resources audit may go far in preventing written documents generated during the audit from being disclosed in the event of litigation.

The Attorney Work-Product Doctrine

Under federal and state law, information, statements, documents, and other written matter prepared by an attorney in anticipation of litigation or for trial may be protected from disclosure. Attorney work-product materials (that is, materials containing the attorney's mental impressions, thoughts, theories, and opinions) may only be disclosed where the party seeking the materials can show a substantial need for them in preparing the case, and the materials cannot be obtained from another source without undue hardship. Materials prepared by others for an attorney at the attorney's direction may also be protected from disclosure.[7] This doctrine may also provide some limited protection from the disclosure during litigation of documents generated during a human resources audit.

The Self-Criticism Privilege

Referred to as the self-criticism privilege, or the self-evaluation privilege, this common-law doctrine protects from disclosure documents which contain candid and potentially damaging self criticism of a company's own performance.[8] The privilege is grounded in the theory that disclosure of documents containing serf-criticism will deter socially useful investigations or compliance with the law, and that without the privilege, a company will not conduct a critical examination of itself.

In determining whether the privilege exists, the court examines (1) whether the information sought contains self-criticism; (2) whether the public has a strong interest in preserving the free flow of the information that is sought; (3) whether the self-criticism would be curtailed if the discovery was allowed; and (4) whether the information sought was intended to be confidential and kept confidential. The privilege only protects against the disclosure of the self-criticism. The underlying facts remain discoverable. Where the privilege is recognized, it is qualified and may be overcome by a showing of extraordinary circumstances or special need.[9]

While the privilege of self-criticism has been recognized by at least one circuit court of appeals and several district courts, other circuit courts and district courts have refused to recognize the privilege or have refused to apply it to particular employment documents.[10] Courts which have embraced the self-criticism privilege in the employment law context argue that the privilege promotes the public interest in fair employment practices by encouraging employers to be candid and forthright in assessing their employment practices and setting goals and timetables for eliminating discriminatory practices and policies.[11] Courts rejecting the self-criticism privilege have done so for a variety of reasons: that the documents were not created solely for internal use with the intention that they remain confidential;[12] that rejecting the self-criticism

privilege will not have a "chilling" effect on employer self-criticism because the documents requested were mandated by law, and because employers may already make less than full and candid assessments of themselves;[13] and because private civil litigation is the engine driving the enforcement of civil rights laws, and to recognize the privilege will restrict this enforcement.[14]

While many courts have rejected this privilege when the documents or reports have been mandated by federal law, the privilege may afford protection to purely voluntary self-critical materials which were created in a confidential manner and kept confidential. It should be acknowledged, however, that the self-criticism privilege is a second tier privilege and inferior to the attorney-client privilege.[15]

Establishing the Privileged Framework for the Audit

In order to maximize the potential protections afforded by the attorney-client privilege, the attorney work-product doctrine, and the privilege of self-criticism, the employer should ensure that a written directive is issued to its attorneys requesting an audit of its human resources functions for purposes of establishing legal compliance and advice. With large employers, this directive may issue from the chief executive officer in charge of human resources/labor relations, while in smaller organizations, this directive may issue from the CEO or board of directors. This directive should clearly state that the employer's attorneys are in charge of the audit process.

The employer, with its legal counsel, should also establish the particular employer representatives and agents who will participate in the audit process. These individuals will vary depending on the size of the organization, the individuals who have knowledge of the human resources function, whether the employer has more than one location, and so forth. In order to manage the audit and ensure confidentiality, the employer should not include too many individuals in the audit process.

An employer representative participating in the audit should execute a written statement expressing that the purpose of the audit is to determine legal compliance and to obtain legal advice, outlining his or her role in the audit, and stating that the representative will be reporting to the employer's attorneys for the purpose of obtaining legal advice. This statement should also contain a clear commitment to keep the audit and its efforts confidential from all other employees and third parties. All written communications between the employer's representatives and its attorneys should be clearly marked in bold with the following: "Privileged and Confidential; Attorney-Client Communication; Attorney Work-Product."

The Final audit report should be drafted by the employer's attorney and also clearly marked "Privileged and Confidential; Attorney-Client Communication; Attorney Work-Product." The report should only be distributed and maintained by those employer representatives who are ultimately responsible for ensuring legal compliance and taking corrective action with advice of counsel. The report must be kept in a secure, confidential place, so that no other person can have access to it. All underlying materials generated during the report and extra copies of the report should be destroyed.

The Scope of the Human Resources Audit

The scope of the audit will depend on the objectives or needs of the particular employer organization. For example, an employer may only want to examine its hiring practices to ensure compliance with the law. On the other hand, an employer may want to audit all of its human resources functions, policies, and practices. Regardless of the scope of the audit, realistic timetables for completing the process must be established and adhered to.

The employer must review whether it has a written policy covering an area of concern and, if so, whether the policy is or should be included in an employee handbook. The employer must also discover and examine what unwritten employment practices exist, whether they should be reduced to writing, and, if so, whether they should be included in an employee handbook. The employer also must identify those areas of the employment relationship in which the employer has no written policy or unwritten practice, determine whether they are in legal compliance with the law, and decide whether a formal policy is warranted.

Additionally, the employer must determine which federal, state, and local laws, regulations, and ordinances apply to its organization, by examining the size of the employers organization and the states and localities that the employer operates in. For example, while the employer may be too small to be covered by *Title VII* of the *Civil Rights Act of 1964* or the *Americans with Disabilities Act (ADA)*, the employer may be covered by similar state laws or local ordinances prohibiting race, gender, and disability discrimination. Moreover, an employer must identify the particular employment laws or regulations, if any, that cover the employer because of the nature of the employer's industry or business. For example, if the employer is a federal contractor under the federal Drug-Free Workplace Act, the employer will have to maintain certain policies to maintain a drug-free workplace. Similarly, if the employer is a federal contractor under Executive Order 11246, it is required to adopt and maintain an affirmative action plan, while employers engaged in trucking operations must comply with the federal Department of Transportation's drug testing regulations.

Obviously, with the myriad of laws and regulations on the books, the employer should consult with its attorney to ensure that no laws are overlooked.

Selected Common Areas of Concern for Employers

The remainder of this column is devoted to discussing those areas which are often in need of auditing. This treatment is not exhaustive, but rather is a discussion of those areas most commonly of concern to employers.

Employee Handbooks

An employer that maintains an employee handbook must ensure that it contains clearly worded and conspicuously located disclaimers establishing that:

The handbook is not a contract of employment and is not intended to create any binding contractual commitments between the employer or any of its employees, and the employment relationship is at-will;

The employer and its employees retain the mutual right to terminate the employment relationship at-will, with or without wanting, notice, or cause;

The employer retains the right to unilaterally modify, interpret, or discontinue any of the policies or procedures set forth in the handbook; and

Any such action will apply to existing and future employees, with continued employment representing the consideration and the employee's acceptance of the action.

The employer must also ensure that each employee signs a form acknowledging receipt of the handbook and that the employee has read and understands the handbook and the disclaimers contained therein.

Employers should also review the information contained in the handbook to ensure that employees are informed about those matters that the employer wants them to be informed about, for example, wages, benefits, working conditions, seniority rights, absenteeism and tardiness policies, work rules and discipline policies, equal employment and sexual harassment policies and procedures, leave rights, and smoking policies. While the various areas of the employment relationship that appropriately may be included in a handbook are beyond the scope of this column, the important concern is to make sure that the handbook adequately puts the employees on notice of what is expected of them. It is equally important to make sum that managers and supervisors clearly understand the terms of the employee handbook and enforce it uniformly.

Equal Employment Opportunity and Harassment Policies

An employer must ensure that it has an updated Equal Employment Opportunity statement which covers all protected classifications of employees, including additional classes that may be protected by state law or local ordinances. This policy should be conspicuously posted in areas where employees will see it and should be included in the employee handbook.

A prudent employer will also review and/or adopt an anti-harassment policy which prohibits sexual and other unlawful types of harassment (such as racial harassment), and make sure it is included in the employee handbook. The anti-harassment policy should set forth and contain: (1) definitions of sexual harassment and other types of unlawful harassment, using examples; (2) the illegality of the harassment; (3) the internal complaint procedures available to employees to complain of harassment; (4) a statement explaining that prompt investigation of the complaint will take place and that appropriate remedial action will be taken to stop unlawful harassment; and (5) assurances that employees will not be retaliated against or discriminated against in any fashion for making complaints of harassment. The policy should clearly identify the procedures for employees to follow to complain about harassment without requiring the employee

complain through a harassing supervisor. Careful attention should be paid to state law and local ordinances which may place additional affirmative obligations on the employer.

An employer should also consider developing a "reasonable accommodation" policy complying with the ADA and other state laws or local ordinances dealing with disabled employees. This policy should set forth the concept of reasonable accommodation, the procedures to be followed when an employee needs accommodation, and a commitment to provide reasonable accommodation that does not cause an undue hardship to the business. This policy is also appropriate for inclusion in an employee handbook.

Hiring and Selection Procedures

A good human resources audit will require a thorough review of the employer's hiring and selection procedures to ensure they are lawful and nondiscriminatory. The most common areas of concern are discussed below.

Recruitment and Advertising. One purpose of the audit is to investigate whether the employer's recruitment and advertising practices raise potential equal employment opportunity liability issues. An employer should determine whether there is a central entity in charge of placing advertisements for new hires or whether its managers and supervisors act independently in filling their hiring needs. An employer must also determine whether it is seeking candidates through appropriate media sources which reach the reasonable geographical recruitment area for the job openings in question. All advertisements should include an appropriate equal opportunity statement, contain gender-neutral language, and avoid language which might imply a preference for a certain race, sex, or age group.

A prudent employer will also avoid hiring by word-of-mouth, because this practice may lead to the hiring of individuals who are predominantly of the same race or national origin. This practice could cause legal problems even if the word-of-mouth hiring is only done in one part of the employer's operations. If the employer has been hiring by word-of-mouth, it should determine whether this practice has had an adverse effect on the hiring of minorities or other protected groups and, if so, take corrective action, including advertising in newspapers of general circulation and newspapers which circulate among members of the protected class.

Job Postings. While employers have no per se legal obligation to post job openings, employers that have adopted such a policy should ensure that all employees have an equal opportunity to apply for new positions/promotions as they open up in the company. One point of contention in the *Texaco* case was its failure to post higher managerial and executive positions within the company so that minority employees could apply for the positions.

Employment Applications. All employment applications should be reviewed to make sure that they contain at-will disclaimers and appropriate equal employment opportunity statements. The applications also should be reviewed to make sure that they do not make impermissible inquiries (including impermissible inquiries under local law). For example, employment applications should not inquire into birth dates, gender, race, marital status, financial status, arrest records, citizenship, or membership in groups or organizations which may tend to

disclose a person's race, religion, or other information which is not job-related. Additionally, make sure that the application does not ask about medical conditions, workers' compensation injuries, disabilities, or treatments received from a physician. The application may, however, inquire about whether the applicant can perform essential job functions with or without reasonable accommodation. For example, the application could state, "This job requires you to move 40 lb. parcels every few minutes. Could you do this with or without accommodation or assistance?"

Pre-Employment Medical Inquiries. The ADA prohibits an employer from requiring an applicant to submit to a physical examination at the pre-offer stage of the hiring process. An employer may require a medical examination after an employment offer has been made, and may condition the offer of employment on the results of the examination, as long as all applicants are required to take the examination regardless of disability, the information collected is maintained confidentially in a separate file, and the results of the examination are used in compliance with the *ADA*. An employer should make sure that any post-offer medical examination practice is reduced to writing, utilizes employee consent forms, and that all supervisors and managers involved in the hiring process are educated about it. (Pre-employment drug and alcohol testing are discussed below.)

Other Pre-Employment Inquiries. An employer should also examine whether it uses any pre-employment tests (for example, honesty tests, integrity tests, or aptitude tests) which may have an adverse impact on the hiring of minorities or other protected groups of applicants. Generally, no adverse impact exists if the selection rate of the least successful group of applicants is at least four-fifths (that is, 80 percent) of the selection rate of the most successful group. In the event the test has an adverse impact on some protected group, the employer will have to make sure that the test is "validated." Validation requires that the employer show, by professionally accepted methods, that the test is predictive of or significantly correlated with work behavior or performance which is related to the job. Validation is a costly process, requiring the employer to hire industrial psychologists, statisticians, and other testing professionals. Or, the employer may determine that it is best to eliminate the invalidated test from its hiring practices.

Interviewing Procedures. Similar to the restrictions on employment applications, those persons who undertake face-to-face employee interviews must be trained about the types of questions that may not be asked during the interview. This training should include providing the interviewers with a list of topics that should not be asked during the interview and avoiding seemingly innocuous questions such as whether the person is married, has a family, what their interests are, or what they do in their spare time.

Conducting and Responding to Background Checks. A prudent employer conducting background checks should develop a form, separate from the employment application, for verifying prior work history. This form, which is mailed to former employers, should contain an authorization and release clause executed by the employee which (1) allows the inquiring employer to contact former employers and (2) authorizes former employers to disclose the requested information and releases the former employers from any claims based on the disclosure. This form may read as follows:

I hereby authorize *Spognardi and Sons, Inc*. to contact my former employer listed above. I hereby authorize all my former employers to disclose my prior work history with them, including the reasons for my separation of employment. Additionally, I hereby release all of my former employers from any and all claims, liabilities, or causes of action for verifying the information which I have provided in my employment application, as well as any other information they may provide about me.

Reference check inquiries should be limited to job-related concerns such as dates of employment, rates of pay, positions held, attendance, performance evaluations, and reasons for separating employment. Oral reference checks should also be limited to job-related issues. Impermissible inquiries, such as those discussed above in relation to employment applications, should not be made.

Despite the existence of various state common-law and statutory qualified privileges shielding an employer from liability for truthfully responding to reference checks, many employers continue to limit their responses to the dates of employment, positions held, and the rates of pay, regardless of whether they have been provided with a release. Should the employer feel compelled to supply more information, it should limit the information disclosed to matters that can be objectively verified.

Offers of Employment and Restrictive Covenants. If the employer extends job offers in writing, make sure the offer clearly states that the employment is at-will. Additionally, employers requiring new employees to execute restrictive covenant/noncompete agreements should have those agreements reviewed to make sure they are narrowly tailored, supported by consideration, and otherwise enforceable.

Workplace Policies and Practices during the Employment Relationship

A thorough human resources audit will also examine all facets of the ongoing employment relationship, from the first day after hire through termination. The more common areas of concern are discussed below.

Pay Policies and Practices

An issue of great concern to employers of all sizes is whether they are properly complying with the federal *Fair Labor Standards Act (FLSA)* and state laws when it comes to compensating employees for hours worked. Of particular concern is (1) whether the employees are exempt or nonexempt for purposes of overtime and (2) whether nonexempt employees are properly receiving at least the minimum wage for hours worked, and time and one-half their regular rate for hours worked over 40 in one week. Because the *FLSA* provides that employees may be able to recover from two to three years' worth of unpaid or underpaid wages, liquidated damages, and attorneys' fees, and because some state laws provide for the imposition of fines, an employer should devote substantial attention during the audit to determining whether it has properly classified persons working for it and whether it is properly compensating those employees. This should be done by sampling the various job classifications to determine that they are being properly compensated.

To determine whether an employee is exempt from the overtime requirements of the *FLSA*, an employer must review the actual job duties of the employees in question. Salaried employees whose job duties qualify them as "executive," administrative," or "professional" are exempt from overtime requirements. However, because this status is determined by the actual job duties that the employee is performing, the employee's job description, title, or salaried status is not controlling. Moreover, many employers have lost the exempt status for otherwise bona fide executive, administrative, or professional employees by making deductions from their salary for absences of less than a day or deductions for disciplinary suspensions of less than a full week.

An employer must also ensure that nonexempt employees are being paid at least the minimum wage for each hour worked, up to 40 per week, and that they are paid one and one-half times the employees' regular rate of pay for all hours worked over 40 per week. Employers are also cautioned to check state laws which may have more generous overtime provisions. Often well-intentioned employers run afoul of the *FLSA* because they have improperly calculated the employee's regular rate of pay by forgetting to include, for example, production bonuses.

The employer should also determine whether it is complying with state laws governing when wages are to be paid and when deductions can lawfully be made from paychecks or other final compensation.

Job Descriptions

During the human resources audit, the employer must review/develop job descriptions which accurately describe the essential functions of each job. Having accurate job descriptions is necessary not only for compliance with wage and hour laws, but also to defend against charges of discrimination brought under the *ADA*.. In determining which aspects of the job constitute essential functions, the *Equal Employment Opportunity Commission (EEOC)* will consider (1) the employers judgment as to what it considers to be the essential functions; (2) the amount of time spent on the job performing the function; (3) the consequences of not requiring the employee to perform the function; and (4) the written job description established before the position is advertised or applicants are interviewed for the position.

More than likely, the audit will reveal either that job descriptions do not exist, that they are obsolete, or that they do not adequately or specifically identify the essential functions of the job. Observe and question employees holding the position to determine what the essential functions of the position are. In large organizations with many different jobs, the employer may have to develop a program that periodically schedules various job groupings for review.

Personnel Files

During the audit process, the employer should develop a checklist of all required information that must be kept in the employee personnel file. The employer should then sample its personnel files to ensure that all necessary information is properly maintained in the file. If the sample indicates that there are serious deficiencies with the files, the employer may have to resort to examining and supplementing each file as needed. Consideration must be given to

whether the employer is in a regulated industry which requires particular information to be in the file, for example, the health care or trucking industry.

The employer should also make sure that a properly completed I-9 has been prepared and executed for each employee. While this document can be kept in the employee's personnel file, copies of all I-9s for all employees may be retained in a separate I-9 file for ease of access in the event of an Immigration and Naturalization Service audit. The employer should also ensure that no inappropriate information is placed in the employee's personnel file. All medical information, including information concerning medical exams, workers' compensation injuries, drug testing, and medical leave requests, should be maintained in a separate medical file which is established for each employee and should not be placed in the employee's personnel file.

Performance Evaluations

The audit should determine whether employee performance evaluations are being performed by supervisors on a regular basis in a timely fashion. If not, determine why and take corrective action. Nothing is worse than trying to terminate an employee for poor performance when no performance evaluation has been conducted.

Review employee evaluation forms to determine that they have uniform standards. Determine whether supervisors may be subjectively inserting their biases into the evaluation process. The areas of performance examined should be reasonably related to the employee's job. The employer also should make sure that object rather than subjective criteria are used in evaluating the employee.

Review the percentage of employees receiving outstanding evaluations with the percentages receiving satisfactory or poor evaluations. Make sure that supervisors are not inflating the number of employees who are meeting the performance standards of any given rank. Likewise, make sure your supervisors accurately evaluate the poor performance of underachievers. Remember that it is difficult to justify the discharge of a poor-performing employee when the employee has had year after year of satisfactory or superior evaluations. The majority of employees should be receiving only satisfactory or average evaluations.

Discipline and Termination of Employees

Many an employer has encountered the situation where one supervisor has disciplined an employee for a specific work rule infraction while a different supervisor has let the infraction go unpunished. Such disparate treatment leads to, at best, perceptions of unfairness impacting upon employee morale and, at worst, to charges of discrimination and their costly and time-consuming ramifications.

During the audit, an employer should examine its disciplinary policies and procedures and employee personnel files to determine:

(1) whether its work rules are job-related to the proper performance of the employee's job; (2) whether the work rules are being enforced uniformly by all supervisors; (3) whether the

employees have notice of the work rules and the consequences of not following them; (4) whether a prompt investigation is being conducted to determine whether there is a violation before discipline is imposed; (5) whether discipline is promptly and consistently imposed once a violation of a work rule is confirmed; (6) whether the discipline that is imposed on the employee is justified by the offense; and (7) whether supervisors are uniformly and consistently documenting work rule violations and the discipline imposed. If the audit discloses problems in any of these areas, steps should be taken to correct the deficiencies, including training supervisors in the proper way to prepare disciplinary documentation. When investigating discipline and discharge cases, make sure your supervisors are trained to inquire into whether the employee has recently engaged in some type of protected conduct (for example, filing a discrimination or sexual harassment charge) which the employee could assert is the real reason for the discipline or termination.

Other matters to consider during the audit include providing supervisors with discipline and termination checklists and reviewing/developing exit interview procedures, including procedures to provide for final paychecks and the settlement of all accrued benefits such as vacation pay, procedures to ensure the return of company keys and property, and procedures to provide terminated employees with *COBRA* coverage notice. Of course, work rules and disciplinary and termination procedures are appropriate topics for inclusion in an employee handbook.

Leave of Absence Policies

If the employer has 50 or more employees within 75 miles of one of its locations, it is covered by the *Family and Medical Leave Act (FMLA)*. This Act provides employees with 12 weeks of unpaid leave in a 12-month period to, inter alia, care for the employee's own or an immediate family members serious health condition. An employer must ensure that its other leave and absenteeism policies are consistent with the requirements of the FMLA. An employer is also well advised to review/develop a written *FMLA* policy to ensure compliance with the Act and to take advantage of certain provisions of the Act which are beneficial to employers.

For example, by having a written policy, the employer can establish eligibility for leave based on a "rolling" 12-month period, measuring backwards from the date the leave commences. This has the effect of preventing employees from "stacking up leave" by taking 12 weeks of leave during the last quarter of the year, and then requesting an additional 12 weeks of leave on January 1st of the next year. With a written policy, the employer may also require employees to substitute paid leave, such as accrued vacation time and sick days, for unpaid leave.

Employers are cautioned to review state law to determine whether there is a state leave act which provides more generous provisions. In such a case, the more generous provisions of the state law would control. The employer must modify its leave policy accordingly.

Additionally, an employer should determine whether its *FMLA* policy is being properly administered. For example, is the employer properly and in a timely fashion designating employee absences and leave requests as requests for *FMLA* leave so that the days off are

counted toward the 12-week leave entitlement Is the employer complying with its own policy and requiring employees to substitute accrued vacation time for unpaid *FMLA*, leave?

Employers should also review their policies regarding military, jury, and voting leave to ensure that they are in compliance with applicable federal or state law. It is appropriate to include all leave policies, particularly an *FMLA* policy, in the employee handbook.

Union Avoidance

Another audit area of concern is remaining union-free. An employer should examine whether it has a lawfully worded policy defining its status as a nonunion employer and its desire to stay that way. No solicitation/no distribution rules and bulletin board policies should be reviewed for legality so that they lawfully deter union organizing without running afoul of the *National Labor Relations Act*. Visitor access rules should be reviewed to ensure that they lawfully allow the employer to control access to its property and exclude union organizers. Employees should be clearly informed about these policies through the employee handbook and/or postings.

Drug and Alcohol Testing Policies

Because many states have statutes regulating drug and alcohol testing in the workplace, employers should review their testing policies to determine that they comply with state law. These state laws often set forth procedures for when testing can be done, sampling, chain of custody, and confirmatory testing and provide certain privacy protections. Some employers may also be governed by federal regulations governing drug testing. For example, trucking employers are governed by the federal *Department of Transportation's drug and alcohol testing regulations*. Employers should protect themselves by having properly executed consent forms from employees authorizing them to conduct the testing.

Employers are cautioned to ensure that their drug and alcohol testing policies are being administered in a uniform and nondiscriminatory manner and that they are not targeting protected groups. Also be aware that under the *ADA*, alcohol testing is considered a physical examination and cannot be performed on an applicant until after a conditional offer of employment is made. On the other hand, drug testing is exempted from the definition of physical examinations under the *ADA*, and therefore employers can continue to conduct drug tests prior to making an offer of employment.

Record Retention and Maintenance

An employer should review its record retention policy and develop one if it does not have one. This is important because various federal laws have different record retention requirements, and a failure to maintain the records could be used against an employer in the event of a lawsuit. Additionally, a failure to keep and maintain other records, such as records required by *OSHA*, may result in civil fines.

In reviewing or developing the retention policy, an employer must determine how long the records should be kept. For example, *Title VII of the Civil Rights Act of 1964* requires

employers to keep application forms, resumes, job advertisements, and other records made or kept by the employer concerning hiring, promotion, layoff, or termination, for a period of one year from the date the record was made or the personnel action was taken. However, the *Age Discrimination in Employment Act (ADEA*) and the *FLSA* require employers to keep certain payroll records for three years. *Occupational Safety and Health* records must be kept for five years. The employer should seek advice from its attorney concerning its record retention obligations.

Required Postings

Various employment statutes place an affirmative obligation on the employer to post required notices to employees informing them of theft rights under law. An employer must determine whether it has posted all required federal and state notices to employees. This includes posters from the *EEOC* concerning equal employment opportunity, from the *Department of Labor* concerning minimum wage requirements, family and medical leave rights, and prohibitions against polygraph testing, and from *OSHA* concerning occupational safety and health. State laws often require additional postings informing employees about their unemployment compensation and workers' compensation rights. These posters can be obtained directly from the responsible agency or from a good commercial office supply retailer.

Litigation

The audit should examine the administrative and judicial claims that have been made against the company with the goal of determining where the employer's weaknesses and shortcomings are. This review will help the employer determine whether the legal claims are originating in any particular division or department, or whether they are arising from the actions or misconduct of any particular supervisor. It will also allow the employer to pinpoint where its substantive weaknesses are and why things may be falling through the cracks. Once the problems are identified, the employer will be able to take appropriate corrective action, including developing or refining policies and conducting supervisory training.

Conclusion

The importance of conducting periodic and systematic human resources audits cannot be overemphasized. Through the audit process, an employer is able to identify those aspects of its human resources management that are in disarray, before the problems become the subject of a claim or lawsuit. It also allows the employer to take corrective action at its own pace, on its own terms, without meddling by or interference from plaintiffs' attorneys or the courts. Because of these benefits, the wise employer will conduct systematic and periodic human resources audits, and treat them just as seriously as Financial audits.

Notes

1. *K. Eichenwald, "Texaco Executives, On Tape, Discussed Impeding a Bias Suit," The New York Times, Nov. 4, 1996, Sec. A, at 1.*

2. *K. Eichenwald, "The Two Faces of Texaco," The New York Times, Nov. 10, 1996, Sec. 3, at 1.*

3. Id.

4. See note 1.

5. *J.W. Moore, Moore's Federal Practice, Par. 26.11(2)(2 ed. 1996).*

6. Id.

7. Id. at Par. 26.5.

8. *D.P. Vandegrift, Jr., "The Privilege of Self-Critical Analysis: A Survery of the Law," 60 Alb. L. Rev. 171, 191-92 (1996).*

9. Id. at 195.

10. See *Tharp v. Sivyer Steel Corp., 149 F.R.D. 177, 181 (S.D. Iowa 1995)* (collecting cases recognizing or rejecting application of the privilege).

11. Id. at 181.

12. *Martin v. Potomac Elec. Power Co.,* 58 Fair Empl. Prac. Cas. (BNA) 355, 359-60 (D.D.C. 1990).

13. *Tharp* (cited in note 10).

14. Id. at 185-84.

15. *Vandegrift* (cited in note 8 at 181, 191, citing *In Re Burlington Northern, Inc.,* 679 F.2d 762, 767 (8th Cir. 1982).

16. *K.A. Jenero, "Employers Beware: You May Be Bound by the Terms of Your Old Employee Handbooks," Empl. Rel. L.J.* 299 (Autumn 1994).