5 Things Every Business Owner Must Know If They Have Employees

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Agenda

I. Employee Handbook and Agreements – “Yes, You Should Usually Have Both.”

II. Understanding Your Obligations Under the ADA – “You Probably Have To Accommodate the Employee.”

III. Complying with the FLSA – “Just Because You Pay An Employee a Salary Does Not Mean They Are Not Entitled to Overtime.”
IV. Employee or Independent Contractor? – “Most of The Time Your Worker Will be Deemed An Employee.”

V. Implement Security Measures To Protect Your Business – “An Ounce of Prevention is Worth a Pound of Cure.”
Employee Handbooks and Agreements

“Yes, You Should Usually Have Both.”
Employee Handbooks – Benefits

- Can be used as a “shield.”
- Advises both employer and employee of duties and responsibilities.
- Helps promote the fair administration of policies.
- Helps promote consistent administration of policies.
- Helps avoid disagreements (if well written).
- Helps boost employee morale.
Employee Handbooks – Drawbacks

- Can be used as a “sword” against company.
- Poorly written handbooks lead to conflict.
- Poorly written handbooks bind the employer.
- Inconsistent implementation leads to morale problems and lawsuits.
- Outdated handbooks lead to liability.
What Policies Must Be in a Handbook?

1. At will statement.
2. Harassment and retaliation policy.
3. Reasonable accommodation policy.
4. Hours of work, timekeeping, overtime and FLSA policies.
5. Workplace conduct policy.
6. Discipline and termination policy.
What Policies Must Be in a Handbook?

7. Immigration policy.
8. Confidential information policy.
9. Computer/technology resources policy.
10. Leave of absence policy.
11. Drug and alcohol use policy.
Employment Agreements – Should You Have Them?
Generally recommended for: (1) higher level employees, (2) those that you want to restrict in some fashion following termination, and/or (3) those employees that are dealing with sensitive and/or confidential information.
Why Have Employment Agreements?

1. To discourage certain conduct – during and post employment.
2. Clearly define wages, hours and benefits to the extent they are different from other employees.
3. Have a clear document outlining source of employee’s rights.
4. Helps avoid disagreements/disputes.
Understanding Your Obligations Under the ADA

“You Probably Have to Accommodate the Employee.”
What Is the ADA?

ADA prevents discrimination in the workplace by requiring that reasonable accommodations be made to those with known or perceived disabilities.

Prohibits discrimination in the application process, hiring, training, promotion, pay, benefits, discharge and other conditions of employment.
What Is the ADA?

ADA applies to companies with 15 or more employees for 20 or more weeks.

_Beware_: The Illinois Human Rights Act applies to companies with just 1 employee.
Who Is Disabled?

- Just about everybody (under the ADAAA).
- Interpreted broadly under the ADAAA to promote coverage.
- Supreme Court decisions on who is disabled pretty much negated by legislature.
Who Is Disabled?

The ADA has a three-part definition of disability. Under ADA, an individual with a disability is a person who: (1) has a physical or mental impairment that substantially limits one or more major life activities; OR (2) has a record of such an impairment; OR (3) is regarded as having such an impairment.
Who Is Disabled?

A physical impairment is defined by ADA as "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine."
Neither ADA nor the regulations list all the diseases or conditions that are covered, because it would be impossible to provide a comprehensive list, given the variety of possible impairments.
List of conditions that are not disabilities:

1. Homosexuality and bisexuality.
2. Compulsive gambling.
4. Pyromania.
5. Transvestism.
6. Transexualism.
7. Exhibitionism.
8. Pedophilia.
11. Obesity (other than morbid obesity).
Employer Obligations Under the ADA

- Less about whether an employee is disabled and more about what employer has to do to accommodate the employee.
- Reasonable accommodation allows disabled employee to perform in the same manner as a non-disabled employee.
Employer Obligations Under the ADA

- Don’t have to accept anything employee demands.
- Don’t have to change essential functions of job either.
- Cannot be an undue burden on the employee (high threshold).
Examples of Reasonable Accommodations

1. Installing special equipment.
3. Moving employee to a vacant position or temporary light duty.
4. Modifying the employee’s work schedule.
5. Allowing temporary work from home.
6. Allowing an unpaid leave of absence.

- Very fact specific.
- Remember that you don’t have to change essential job duties.
Complying With the FLSA

“Just because you pay an employee a salary does not mean they are not entitled to overtime.”
What Is the FLSA?

- Enacted in 1938, the FLSA established minimum wage and overtime standards for a large segment of the US workforce.
- Created the DOL’s Wage and Hour Division.
- Largely unchanged since 1938.
Who Is Covered Under the FLSA?

Just about every company.

- All employers that engage in interstate commerce or in the production of goods for interstate commerce.
- Only employers who are exempt are those small businesses not engaged in interstate commerce and who have an annual gross revenue under $500,000.
(Why Plaintiffs’ Attorneys Love Wage and Hour Lawsuit)

- Payout is extremely large.
- Attorney’s fees are available.
- Regular burdens of proof are shifted to employer.
- Individual liability.
(Explosion of FLSA Cases)

- FLSA is now the most popular employment collective action.
- FLSA litigation doubled from 2004 to 2007 and becoming more pervasive.
- Record # of FLSA suits filed in 2011 (7,064)
- DOL estimates that 80% of employers are out of FLSA compliance.
- One of the states with the largest growth in wage and hour litigation is Illinois.
What Does the FLSA Require?

- Employee exempt or non-exempt?
  - “Exempt” means they are not entitled to overtime.
  - “Non-exempt” means they are entitled to overtime (which is 1.5 the employee’s regular rate of pay for hours worked in excess of 40 hours per work week).

- FLSA requires accurate recording of time for non-exempt employees.

- FLSA mandates minimum wage for hourly employees.
Who Is Exempt for Overtime?

Threshold Inquiry

- Must be paid a salary of at least $455/week (approximately $23,700 per year).
- Must fall into recognized exemption.
- Duties dictate whether an employee is exempt.
Most Common FLSA Overtime Exemptions

- Executive
- Administrative
- Learned Professional
- Computer Professional
- Outside Sales
FLSA Take Away

- Just because an employee is salaried does not mean they are exempt and that you don’t have to pay them overtime.

- Need to review the duties to ensure that they fall into a recognized category.
Take Away Strategies & Tips

- Know and pay minimum wage.
- Pay overtime.
- Do not rely on titles.
- Duties, not titles, matter.
- Ensure time and pay records are properly kept.
- Know proper deductions for exempt employees.
- Ensure you follow state laws.
Take Away Strategies & Tips

- Require employees to certify that they have been accurately paid.
- Require employees to obtain approval before working overtime.
- Control “after hours” work by non-exempt employees.
- If ever in doubt, treat employee as non-exempt (and call your attorney).
Employee or Independent Contractor?

“Most of the time your worker will be deemed an employee.”
Why Is This Topic Important?

- Every employment law statute contains its own unique definition of the term “employee.”
- State and federal agencies use different tests.
- An individual who may qualify as an independent contractor under one test may, in fact, be deemed an employee under a different test.
Why Is This Topic Important?

- No “one size fits all” answer.
- Fact specific inquiry.
- Leave today with a better understanding of how to identify the issues and help determine worker’s proper classification.
Benefits of Independent Contractors

- Decreased FICA contributions.
- No workers’ compensation premiums.
- No unemployment insurance premiums.
- No FLSA overtime pay.
- No requirement to provide employee benefits.
- Reduction of training and other administrative costs.
Benefits of Independent Contractors

- Reduction of training and other administrative costs.
- Expertise in specific area.
- Flexibility in increasing and decreasing workforce.
- No liability under federal employment laws (Title VII, ADA, ADEA, FMLA, WARN Act, IRCA, NLRA).
Drawbacks of Independent Contractors

- Loss of control over the contractor.
  - Contractors generally set their own hours.
  - Lack of uniformity in process.
  - Not trained in a specific way.
  - Potential restrictive covenant enforcement problems.

- Increased liability for injured contractors.
Drawbacks of Independent Contractors

- Significant liability for misclassification.
- IRS can re-characterize the relationship and seek back federal taxes plus penalties.
- IDES can seek unemployment insurance compensation.
- Entitlement to insurance and other benefit plans (ERISA).
Drawbacks of Independent Contractors

- Potential loss of intellectual property.
- Absent a written agreement, intellectual property created by the independent contractor belongs to the contractor, and not the employer.
- Joint employer liability.
What Is an Employee and Independent Contractor?

🌟 Labels DO NOT matter.

You can call a worker anything you want, but if a company treats the worker like an employee, the worker will be deemed an employee.
What Is an Employee and Independent Contractor?

There are four primary tests used to determine whether a worker is an employee or independent contractor:

1. The Right to Control Test
2. Economic Reality Test
3. The Hybrid Test
4. 20-Factor IRS Test
Tremblay Test

- Does the worker provide services to the public at large?
- Does worker have his or her own office?
- Does the worker advertise his or her services in newspapers, yellow pages, journals or other media?
- Does the worker maintain a separate business bank account?
Is the worker able to retain helpers and assistants without the employer’s approval?

Does the worker furnish his or her own tools and equipment?

Does the worker have certificate of incorporation, partnership or other business filings?

Does the worker file his or her own federal income tax schedules every year?
- Does the worker pay his or her own workers’ compensation and/or provide a waiver of workers’ compensation coverage?
- Has the worker made a significant investment in the business, for example, purchasing or leasing of a building or office space?
- Does the worker hold any particular license or other specific skills that the company does not maintain?
- Is the worker performing special, unique skills for the company?
- Does the company file and submit 1099 forms for the worker’s pay?
- Does the worker get paid on a project basis rather than on a hourly, weekly or monthly basis?
- Does the worker invoice the company for the services provided?
- Is the worker allowed to dictate the when, where and how of the particular project?
- Does the worker generally set his or her own hours?
- Is the worker allowed to work off the company’s premises?
- Is the worker allowed to work for more than one company at a time?
Is the worker insulated from being terminated as long as he or she produces the result under the contract’s specifications?

Does the worker have his or her own business cards and marketing materials?

Is the worker free from training by the company?
- Does the worker perform a function for the company that other employees at the company are unable to perform?
- Does the worker have his or her own federal identification or IDES number?
- Is the employee not entitled to benefits from the company?
Implement Security Measures to Protect Your Business

“An ounce of prevention is worth a pound of cure”
Every company has something that makes them unique and competitive.

What is it for your company?
What Is a Trade Secret?

- Information that:
  - Has economic value;
  - Based on its secrecy (e.g., not publicly available); and
  - Is protected by reasonable efforts.
Not everything is a trade secret.

Illinois courts look at the following to determine existence of a trade secret:

1. Extent to which info is known outside the business.
2. Extent to which info is known within business.
3. Extent of measures to guard secrecy of info.
4. Value of info to business and competitors.
5. Amount of effort or resources used to develop information.
6. Ease or difficulty with which info could be properly acquired or duplicated by others.
Easy Security Measures

- Restrictive Covenants.
  - Non-Compete agreements.
  - Non-Solicitation agreements.
- Policies providing for monitoring of computers and other company assets.
- Intellectual property assignments/other protections.
- Keep trade secrets under lock & key/limited disclosure.
- Non-Disclosure agreements.
Easy Security Measures

- Surveillance of employee email.
- Monitoring employee’s use of computers.
- Security cameras.
- Surveillance of telephone calls and usage.
- Installation of software on remote computers to wipe data out, if necessary.
General Security Practical Pointers

- Draft provision in employee handbook addressing trade secrets and confidential information.
- Have employee execute an acknowledgement form.
- Limit access to trade secrets & confidential information.
General Security Practical Pointers

- Tighten computer security.
- Implement document handling procedures.
- Train company employees on security measures.
- Conduct annual trade secret/confidential information audit.
Practical Pointers When Employees Resign/Quit

- Ensure return of records and property.
- Discontinue remote electronic access.
- Discontinue local electronic access.
- Escort from premises at termination.
- Quarantine employee’s computer if misconduct is suspected.
Practical Pointers When Employees Resign/Quit

- Inform and transition employee’s clients quickly.
- Interview co-workers.
- Pay final compensation.
- Social media research.
- Exit interview – remind employee of obligations.
QUESTIONS?

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