# Avoiding Employment-Related Litigation in 2009 and Beyond

## Fourteen Preventative Measures Every Employer Should Complete

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During the current economic downturn, all companies are trying to save money. At the same time, however, employers are facing a significant increase in employment-related litigation. In large part, this increase has been the result of lawsuits and claims filed by disgruntled employees who are terminated for legitimate reasons as companies reduce their overhead expenses. Therefore, now more than ever, to protect themselves from costly litigation, employers must be extra vigilant not to cut corners on personnel-related matters and to ensure that they are taking the steps necessary to comply with existing laws.

Fortunately, there are a number of easy and inexpensive preventative measures that employers can take now to protect themselves from potential liability they may face this year and beyond. While these preventative measures may not prevent the litigation, by implementing these measures a company will better position itself in the event of litigation. This article outlines fourteen easy steps that companies can take to reduce employment-related liability and comply with existing labor and employment laws.

### 1. Review and Update the Employee Handbook.

Most companies have recognized that adopting a well-drafted employee handbook can protect them from a wide range of employee-related problems. However, once drafted, these same companies frequently fail to update their handbooks. As a result, the handbook, which once complied with the then-existing laws, becomes outdated, is inconsistent with the actual policies of the company or, worse, is contrary to existing employment laws. Accordingly, like all business documents, employee handbooks need to be reviewed at least once a year and revised, as necessary, to keep up with the latest policies and laws.

While there are hundreds of policies that companies can include in their employee handbook, any handbook should contain certain provisions that are carefully worded in "plain English." Among others, it is strongly recommended that each handbook contain the following policies: (1) "at-will" employment policy, (2) equal employment opportunity policy, (3) anti-harassment policy, (4) reasonable accommodation policy, (5) workplace violence prevention policy, (6) discipline and termination policy, (7) immigration policy, (8) trade secrets/confidentiality/non-disclosure policy, (9) technology use policy, (10) drug and alcohol policy and (11) hours of work (including FLSA safe harbor language) policy. Companies should routinely review their handbooks and determine if changes need to be made to the current policies so that they can be used as a shield against lawsuits filed by unhappy employees. Companies should also avoid the temptation of saving costs by using “cookie cutter” handbooks or policies passed down from other companies or third-party vendors, as this can lead to the same problems as having an outdated handbook.

In this regard, pursuant to the recent regulations promulgated by the U.S. Department of Labor, any employer that maintains an employee handbook and who is governed by the Family and Medical Leave Act (“FMLA”) must provide a written notice of FMLA rights in the handbook. And, as detailed more fully below, care must be taken to ensure that any FMLA policy comports with the most recent regulations.

Finally, to the extent that an employee handbook is updated, companies must remember to redistribute the handbook and obtain acknowledgment forms from all employees that they have read, reviewed and agreed to the terms and conditions of the new handbook.

**2. Review and Update New Employee Hire Package.**

Most companies have new employees review and execute a large number of acknowledgments of policies, agreements, statements and memoranda during their initial orientation. In many cases, however, the "new hire" documents were adopted years before and often are out-of-date, or worse, conflict with the employee handbook or other policies. As a result, employers should ensure that any "new hire" packet is up-to-date.

In this regard, it is important to note that the IRS Form I-9, which is required to be completed for each newly-hired employee to verify their eligibility to work in the United States, has recently been modified. The revisions omit, as well as add, certain documents that employers can use to verify the new employee's eligibility to work in the United States. A company's failure to utilize the new Form I-9 could result in significant fines and penalties. Therefore, companies should verify that they are using the new Form I-9 for new hires, or when re-verifications are required.

As well, employment applications need to be periodically reviewed and updated. For example, questions that disclose an applicant's age (such as date of birth or even dates attended high school) should be omitted. And, in Illinois and some other states, if the application requires the applicant to disclose criminal convictions, it must include language that applicants are not required to disclose sealed or expunged records. Finally, be particularly careful if the company has employees in several states. With different states having their own rules on pre-employment inquiries, employers must make certain that their applications and other pre-hire documents conform to the particular state laws where they hire employees.

**3. Review and Update Anti-Harassment Policy.**

Unfortunately, harassment and discrimination complaints appear to be a cost of doing business these days. In fact, 2008 saw one of the largest increases in discrimination lawsuits according to the U.S. Equal Employment Opportunity Commission. With the increase in complaints being filed, courts have fortunately detailed exactly what steps employers can take in order to protect themselves from harassment and discrimination claims.

The threshold step in minimizing a company from harassment liability is to develop a comprehensive written policy prohibiting all forms of harassment, discrimination and retaliation. At a minimum, the policy should set forth: (1) a clear explanation of the prohibited conduct, (2) a statement that harassment is illegal, (3) a clearly described complaint process that provides accessible avenues of communication (and the ability to bypass a harassing supervisor), (4) a complaint process that provides a prompt, thorough and impartial investigation, and (5) assurances that employees will not be retaliated against for making truthful complaints of harassment, or cooperating in an investigation of harassment. In addition, employees should be periodically reminded of the policy and the reporting avenues. Without an up-to-date harassment policy, an employer is giving away valuable legal defenses that it easily could assert in response to harassment and discrimination lawsuits.

Finally, like employee handbooks, employers must remember that harassment policies should be written in "plain English" so that they are easily understood. Courts have recently ruled against employers when the reporting procedures outlined in policy are confusing, outdated or not tailored to the workforce to which they apply. In short, employers must generally tailor their harassment policies to the sophistication and age of their employees. Therefore, "canned" anti-harassment policies downloaded from the internet or copied from another company can be problematic in litigation.

**4. Revise and Update FLMA Policy and Forms.**

The new FMLA regulations took effect on January 16, 2009. Among other modifications, the new regulations change some of the notice requirements, medical certification standards and methods of accounting for FMLA leave time. They also provide guidance on the two new types of FMLA leave, specifically, "qualifying exigency" and "military caregiver" leave. While a full discussion of the changes to the FMLA is beyond the scope of this article, there are steps that employers must take now in order to comply with the updated FMLA.

First, all employers must promptly update the FMLA policy in their employee handbook. If they are governed by the FMLA and do not have the policy in their handbook, an updated FMLA policy must be drafted and inserted into the handbook. If the company does not maintain an employee handbook, but is otherwise governed by the FMLA, then a stand-alone FMLA policy must be updated and distributed to the workforce.

Second, update the company's FMLA notice forms, such as the Notice of Eligibility; Rights and Responsibilities Notice; and Designation Notice. The new regulations provide at least four new mandatory notices (WH Publication 1420, WH-381 (Parts A & B), WH-381, WH-382) that employers must issue during the FMLA process. All these forms are available to download from the U.S. Department of Labor website (www.dol.gov/esa/WHD/fmla/index.htm). The penalty for failing to provide any of these required notices is potentially draconian, especially if the employee is able to prove that he or she incurred actual harm.

Third, post the new FMLA poster in a conspicuous location visible to both employees and applicants. And, if a majority of your workforce is comprised of workers who are not literate in English, the FMLA poster must be provided in the language in which the employees are literate.

Fourth, review other employee handbook policies, such as paid leave, bonus policies and perfect attendance awards, to ensure they comport and are consistent with the new FMLA regulations.

Fifth, update the company's medical certification forms (WH-380-E and WH-380-F, also available on-line) to comport with the new regulations and modify the certification and re-certification procedures to reflect the company's ability to directly contact the employee's medical provider to authenticate the certification form or to obtain clarification.

Finally, train supervisors, managers and individuals responsible for administering FMLA leaves about the new FMLA military family leaves, as well as the new regulations. The changes to the FMLA are significant, so these individuals need to be adequately prepared to respond to FMLA leave requests without running afoul of the new law.

**5. Comply With the New ADA Amendments Act.**

On January 1, 2009, the ADA Amendments Act ("ADAAA") took effect. Among other things, the ADAAA expanded the definition of "disability" and widely broadened the class of employees who are protected by the Americans with Disabilities Act. In effect, the ADAAA makes it much easier to bring disability discrimination claims and harder for employers to defeat those claims. As a result, employers must take some proactive steps to protect themselves from what will likely be a significant increase in disability-related lawsuits.

First, employers need to review their disability/reasonable accommodation policies and practices and revise them, especially if the policies were drafted before the ADAAA became law. For example, since the definition of "disability" has been widely broadened, a policy that defined "disability" prior to the ADAAA must be updated.

Second, human resource personnel need to be aware of the new changes so that they can properly deal with reasonable accommodation requests. The crucial inquiry for employers now will not be so much whether the employee is disabled, but rather whether the employer can reasonably accommodate the employee.

Third, in light of the ADAAA, it is important that employers now document reasonable accommodation requests and what the company is doing to accommodate the request (e.g., the interactive process).

Fourth, employers that have recently denied reasonable accommodation requests to current employees based on a lack of "disability" should re-evaluate those decisions since, under the ADAAA, those employees may now be legally disabled and entitled to a reasonable accommodation from the company.

Fifth, managers should be trained on the ADAAA. They must be trained on the requirements concerning the interactive dialogue with an employee who requests an accommodation and the employer's obligation to reasonably accommodate an employee's disability absent on undue hardship.

Finally, since the crux of a claim under the ADA is whether the disabled employee can satisfy the essential functions of the job with a reasonable accommodation, employees should take time to more clearly and explicitly spell out the essential functions of each job. This can be done by updating the job descriptions of each class of employees. This way, it will be clear to both the employee and employer (and, if applicable, a court) what are the essential functions of a particular job and whether the company satisfied its obligation to reasonably accommodate the disabled employee.

### 6. Be Cognizant of the Lilly Ledbetter Fair Pay Act of 2009.

On January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act requiring employers to redouble their efforts to ensure that pay practices are not discriminatory. The Act effectively extends the statute of limitations applicable to claims of compensation discrimination under Title VII and other federal anti-discrimination laws beyond the normal 180 or 300-day statutory charge filing period. By eliminating the normal charge filing period for pay discrimination claims, the Act allows the filing of charges alleging pay discrimination with the issuance of each paycheck tainted by the pay discrimination. Therefore, an employee hired 10 years ago may now challenge his or her starting pay on the ground that each paycheck since then has been tainted by that 10-year-old discriminatory decision.

As a result of the Act, employers must immediately undertake several tasks to avoid the potential onslaught of pay discrimination litigation. First, since employees can now challenge pay decisions made many years earlier, employers should consider modifying their record retention policies to keep pay decision documents for longer periods of time, perhaps indefinitely. Employers will need to weigh the costs and logistics of extending record retention periods for such documents against the potential for pay discrimination litigation.

Second, employers should review their pay policies and, in particular, their policies related to starting pay, merit pay increases and promotional pay increases. Employers may want to consider implementing formal pay grades for certain positions since managerial discretion in setting an employee's pay could turn into the company's liability many years later. It is recommended that managers' discretion to set salaries or starting pay either be eliminated or controlled by higher management to ensure that safeguards are implemented to avoid pay discrimination claims.

Finally, an audit of a company's pay decisions should be undertaken to ascertain whether a pattern of pay discrimination exists or to bridge the gap in any significant, unexplained disparities in compensation for individuals in a protected class. Thereafter, it is generally advisable to regularly conduct self-audits regarding pay decisions to ensure that any potential pay discrimination claims by current or former employees is minimized.

### 7. Comply with the Expansion of COBRA Under the American Recovery and Reinvestment Act of 2009.

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 ("Recovery Act"). Among the Recovery Act's numerous other provisions designed to jumpstart the U.S. economy, the Recovery Act affects all employers that sponsor a group health plan and are governed by the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"). The Recovery Act creates additional COBRA notice requirements and affects payroll tax administration in order to administer a temporary federal subsidy of COBRA premiums.

Specifically, employees who have an adjusted gross income of less than $125,000 ($250,000 for joint filers) who are terminated "involuntarily" between September 1, 2008 and December 31, 2009, and their covered dependents, are eligible for a subsidy of 65% of the premiums they would normally be required to pay for up to nine months. In other words, employees are required to pay only 35% of the premium charged and their employers are charged the remaining 65%. Employers do not initially receive any federal subsidy, but they are able to record the 65% of premiums in the form of a credit against their income tax withholding and FICA taxes.

Therefore, effective immediately, employers need to amend their current COBRA election notices to include general information about the availability of the premium subsidy and, if applicable, the option to enroll in different coverage. In particular, the notice must include: (1) the forms necessary for establishing eligibility for the premium subsidy, (2) contact information of the plan administrator and any other person with information regarding the premium subsidy, (3) a description of the employee's obligation to notify the plan when he or she becomes eligible for coverage that would cause eligibility to cease (as well as the penalty for failure to do so), (4) a description of the extended election opportunity for those who previously declined COBRA continued coverage, (5) a description of the qualified beneficiary's right to the COBRA subsidy and any conditions on such right, and (6) a description of the option to enroll in different coverage under the health plan. The U.S. Department of Labor has issued the model COBRA notices, which are available on their website.

Significantly, the new COBRA notice must be provided to eligible employees after the enactment of the Recovery Act (currently through December 31, 2009), plus those employees who became eligible for the COBRA continuation coverage prior to the Recovery Act (those terminated as far back as September 1, 2008).

### 8. Prepare for Passage of the Employee Free Choice Act.

Passing the Employee Free Choice Act ("EFCA") is organized labor's primary priority in 2009 and, given that President Obama is an original sponsor of the EFCA, it is all but certain that some version of it will pass this year. Therefore, non-union employers must quickly prepare themselves for the expected passage of EFCA.

Among other significant changes to established labor law, the EFCA eliminates an employer's right to demand a secret ballot election supervised by the National Labor Relations Board ("NLRB"). Unlike in the past, the EFCA allows a union to become the employees' "exclusive" bargaining representative based simply on the presentation of signed authorization cards from a majority of the employees in the proposed bargaining unit. This is dangerous for employers because this can be done without the employer even knowing about the union activity and, therefore, the employer has no opportunity to communicate the employer's position on unionization until it is too late. The EFCA also imposes mandatory binding arbitration of the first collective bargaining agreement. This is a radical deviation from past labor law practice, since unions can now guarantee a collective bargaining agreement to employees whereas before, neither the NLRB nor the courts could force an employer to agree to the terms of a collective bargaining agreement.

In light of the foregoing, steps must be taken by non-union employers now to put themselves in a position to remain union-free. First, employers must continually act as if they are involved in a union election campaign since they may not know whether union organizing activity is being conducted. This can be done by regularly and proactively promoting their union-free position and emphasizing the importance of employees being able to deal directly with management. Additionally, employers must continually develop and promote positive employee relations through active performance management and regular communications.

Second, employers must devise systems to identify early warning signs of union activity. This can be done by, among other things, training supervisors and managers to look for union activity and to make sure that they are promoting effective communication between management and the workforce. Employers may also want to designate an EFCA Response Team to monitor EFCA developments and to understand how union organizing may be directed at the company.

Third, initiate employees to the employers' "union-free" culture starting during the employee's orientation. By way of example, inform employees about the negatives or risks of unions and that signing a union card (after the EFCA passes) is their vote for a union.

Fourth, employers must be ready to respond quickly and legally to union organizing activity. This can be done by having legal counsel on hand to assist wherever union organizing is suspected or has been detected.

Fifth, develop internal grievance procedures. Many organizing drives are the result of employees' inability to effectively communicate and/or resolve their work-related problems. Implementing internal grievance and complaint procedures can go a long way to reducing an employee's desire for union representation.

Finally, develop non-solicitation, non-distribution, email and employer property restriction policies. These help limit the opportunities employees have to organize on employer properties. However, care must be taken not only to draft these policies correctly, but also to consistently and uniformly enforce these policies.

### 9. Review and Update Federal and State Labor Law Notices.

Illinois' labor laws, as well as the labor laws of most states, require employers to post state and federal labor law and OSHA-mandated notices where visible to employees and applicants to inform them of their employment and labor law rights. Significantly, an employer's failure to post mandated notices can subject it to fines and penalties, as well as lawsuits. Accordingly, employers should routinely ensure that the required notices posted are current.

In this regard, mandatory federal and state labor law notices are frequently updated. For example, the Illinois Department of Labor Notice to Employer and Employees was recently revised to reflect the increase in the minimum wage in Illinois. Similarly, in light of the recent amendments to the Family and Medical Leave Act, the FMLA notice has been modified to reflect new types of leave allowed to eligible employees. It is further mandatory that FMLA-qualified employers post an FMLA poster at each facility, even if they do not have the required 50 employees at the facility. Finally, President Barack Obama recently signed an Executive Order essentially providing that federal contractors are no longer obligated to post the "Beck" poster, and that a new pro-labor union poster will replace the Beck poster in the near future. In order to ensure compliance with the posting requirements, companies should routinely review the posting requirements and consult with counsel to ensure that the appropriate notices are posted.

### 10. Protect Confidential Information.

In today's competitive business environment, it is crucial that employers take every possible measure to protect and maintain their competitive advantage in their industry. Companies can maintain their competitive advantage by developing tools and procedures to protect their assets and to minimize the possibility that their trade secrets will end up in the hands of their competitors.

First, the most common tool a company may utilize to maintain a competitive advantage are restrictive covenants, such as covenants not to compete, that bar former employees from unlawfully competing against the company during and after their termination. As restrictive covenants are viewed as a restraint on trade, they are closely scrutinized by the courts and are only enforced if they are narrowly tailored to protect the employer's legitimate business interests and are reasonable in scope. And, what may have been reasonable several years ago, may not be reasonable today. Therefore, employers should review their restrictive covenants every few years to ensure they are still enforceable and will hold up if challenged.

Second, every company should limit access to its confidential documents and information. The more employees who have access to confidential information, the more likely those employees will be able to walk out the door with the valuable information. Similarly, if every employee has access to confidential information, the employer will have a much harder time convincing a court that the information is a trade secret and subject to legal protection. Therefore, an employer should evaluate and revise its internal safety mechanisms to limit access to confidential information to only those who need to know that information.

Third, since virtually all business today is conducted electronically, it is necessary to implement strict computer security. Access to computers, as well as information about the company and its clients, should be password protected and compartmentalized. If possible, software and database access should be monitored and restricted. All data should be backed up and the back up tapes should be maintained, marked as confidential and secured in a restricted area for a designated period of time.

Fourth, it may be prudent to have employees execute confidentiality agreements. Written properly, confidentiality agreements demonstrate an employer's efforts to maintain the secrecy of certain information, while at the same time establish that the employee knew that the information is confidential. The confidentiality agreement should identify the protected information and specifically prohibit employees from using or disclosing that information during and subsequent to their employment. Having a confidentiality agreement will not mean a court will find the information to be confidential, but not having one will mean that the company does not consider the information to be confidential.

### 11. Review and Update Document Retention Policies.

All companies, large and small, must have written guidelines for the retention and destruction of company records. Not only does this reduce the volume of records, it also keeps the company in compliance with applicable law. Documents should be destroyed only in the regular course of business, and not on a selected basis. A company's failure to maintain documents for the legally mandated period can subject it to liability and hefty fines.

While there are hundreds of different categories of documents that a company may generate, it is important to have a document retention policy that identifies the legally mandated retention periods for specific categories of documents. For example, IRS Form I-9s must be kept for three years after the employee's date of hire or one year after termination (whichever is later). Additionally, according to the Department of Labor, payroll time cards should be kept for a minimum of three years.

Notwithstanding the existence of a record retention policy, document destruction must cease whenever a subpoena is issued or when litigation, a government investigation or an audit is pending, imminent or reasonably anticipated. In those cases, a litigation "hold" should be implemented and the appropriate employees and IT personnel must be instructed not to destroy relevant files or data despite the record retention policy. Destroying documents that are relevant to pending or anticipated litigation (including threatened but not yet filed employee lawsuits) can result in significant monetary penalties and adverse inferences against the company in litigation. Therefore, any record retention policy should provide for the cessation of the destruction of relevant records in this circumstance. The last thing an employer wants is to lose a lawsuit or be subjected to sanctions because relevant documents were inadvertently destroyed.

### 12. Perform a Wage and Hour Audit.

An issue of great concern to all employers in today's regulatory environment is compliance with the Fair Labor Standards Act ("FLSA") and similar state laws and ensuring that employees are properly compensated for the hours they work. Class action lawsuits are being increasingly filed against companies for their failure to properly classify and compensate employees. A company's failure to properly compensate its workers can have a profound financial impact on the company, subjecting it to large liquidated damages, back pay awards and attorney's fees.

The primary issues in FLSA cases are whether a company's employees are exempt or non-exempt for purposes of overtime compensation, and whether non-exempt employees are receiving proper compensation for hours worked. An internal wage and hour audit is an easy way to ascertain whether the company is properly classifying and compensating its employees consistent with the FLSA. To determine whether an employee is exempt from overtime, an employer must closely review the employee's actual duties. Salaried employees whose job duties qualify them as "executive," "administrative," "professional," "highly compensated," or "outside sales" are generally exempt from overtime requirements. However, because the status is determined by the actual duties the employee performs, the employee's job description, title or salary status is not controlling.

Many companies continue to ignore wage-hour matters because, frankly, they can be complicated and companies do not want to deal with paying additional overtime, especially when times are financially tight. However, the reality is that most companies can comply with these laws without paying employees any additional money simply by adjusting the employee's duties or pay plan. Being proactive on this issue is imperative since FLSA lawsuits are on the rise and very costly.

### 13. Review Performance Evaluation and "Write Up" Procedures.

Employee layoffs and terminations are traditionally more prevalent during a bad economy. Usually the first employees selected for termination are those with poor work performance. However, in order to adequately justify a termination based on work performance, the performance reviews must reflect the employee's poor performance. Employers should therefore ensure that the evaluation process does not artificially inflate performance scores. One of the most difficult situations to defend in litigation is when an employee is terminated for poor performance but their recent performance reviews are better than average (or better than similar employees who were not terminated). Thus, managers who conduct performance evaluations must review their employees in a consistent and uniform basis and avoid artificially inflating performance evaluations.

Additionally, supervisors should document instances of poor performance and behavior. Absent consistent documentation justifying an employee's discipline or termination, any dispute results in a "he said/she said" debate, which, in most jurisdictions, can be a losing proposition for the employer. Any "write up" of an

employee should be dated, specify the reason for the write up and shared with the employee to place them on notice of their poor performance.

Finally, every company must be careful in any disciplinary setting to treat employees in a similar fashion, applying the same standards to similar situations. If one employee is terminated for making sexually explicit comments to a co-worker, another employee who later conducts himself or herself in a similar fashion should likewise be terminated. All too often, this rule is inadvertently violated and creates an impression that the complaining employee is being treated differently than others. In light of the foregoing, employers should routinely review performance evaluations and disciplinary procedures.

### 14. Reduce Liability During a Reduction in Force.

Like 2008, 2009 may prove to be a very tough year for companies across many industries. Consequently, conducting a reduction-in-force ("RIF") may become a necessity for many employers. Downsizing gives rise to a multitude of legal claims, including discrimination, retaliation, breach of contract, WARN Act, ERISA, NLRA and COBRA claims. Since a single lawsuit can wipe away much of the financial relief that is expected from a RIF, care must be taken to correctly implement a RIF.

The basic components of a RIF are not particularly complex and, in most cases, are common sense. While there is no guaranteed way to avoid lawsuits during a RIF, the company can minimize the risks and exposure if litigation ensues. In this regard, there are six basic components to RIFs: (1) establishing the plan's rational; (2) identifying the criteria for layoff decisions; (3) communicating the plan and its procedures; (4) making the selection decisions; (5) reviewing the list of affected employees; and (6) notifying the employees of the decision. All in all, it is important to consider the "after" picture of the RIF. For example, will there be the same ratio of men and women, minorities and non-minorities, and employees over and under the age of 40? The statistical analysis during a reduction of force is critical because it is what a judge, jury or governmental agency will scrutinize if the RIF is ever challenged.

Finally, if severance agreements containing releases are being obtained from employees being terminated as part of a RIF, the company should ensure that the releases not only comply with applicable law (such as the requirements of the Older Workers Benefits Protection Act), but that they also provide the company with as much legal protections as possible.

## Conclusion

These fourteen recommendations may seem daunting, but they will go a long way towards protecting a company from employment liability, which is especially important during an economic downturn when employment-related litigation tends to increase. Keep in mind that these recommendations do not have to be completed all at once. Tackling only one or two of these issues a month can eliminate many common sources of employment problems facing a company by early next year.

## About the Author

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