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Play Now or Pay Later

EMPLOYMENT COLUMN

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We all procrastinate. It is human nature. We hope problems will resolve themselves if we ignore them and pretend they aren't there. We avoid making that annual dental appointment, preparing an estate plan or cleaning out our desk drawers, but when we finally do accomplish those tasks we feel so relieved.

But employers who want to avoid getting sued need to fight the urge to procrastinate. The costs of wage and hour class actions can be enormous. Starbucks recently was ordered to pay $105 million for its California tipping practices, and Wal-Mart lost a $172 million verdict in a class action brought by California employees who missed meal breaks.

For companies doing business in California, human resources compliance audits are a necessary evil for at least three reasons:

Employers can save time and money by doing compliance assessment and proactive planning before getting sued. It is much easier (and cheaper) to fix a problem on your own terms, and your own timetable, than to fix it after a plaintiffs' attorney has brought it to your attention in a demand letter or lawsuit.

The laws governing employment relationships change frequently. Often policies have been created or added ad hoc to respond to specific issues or crises, and without figuring out how those policies fit into the bigger strategic plans for the company. As a result, some policies or practices may be outdated, or may conflict with each other, with the company's strategic goals, or with newer laws or regulations. It is important to flesh out these issues, to resolve inconsistencies and to update outdated policies and practices.

California is special. Many companies that operate in several states, or have headquarters in another state, have not paid enough attention to the nuances of California law. They may not realize that someone who is an exempt computer professional in Nevada may not qualify for the exemption in California, or may not fully understand the very strict rules that essentially force employers to make non-exempt employees take meal breaks at specific times.

An HR compliance audit should be conducted, or at least reviewed, by someone outside of your company. The reason is simple - an outsider sees things that you do not. An outsider can provide more objective observations and recommendations than an insider who is accustomed to the way things have always been done. You need someone to bring a new set of eyes to your way of doing business.

An outsider can also allow your managers and staff to open up about issues they may not feel comfortable discussing internally. For example, what if that supervisor insists on conducting business in a manner that creates a compliance problem? It may be much easier for an employee to raise a concern in the context of an audit than it would be to challenge the supervisor directly.

Care should also be taken to consider attorney-client privilege issues before an HR audit is commenced, and to figure out how audit results should be communicated.

One key issue is what results (if any) should be in writing. The last thing you want to do is to create a document outlining all of the compliance issues in your company that will be discoverable in litigation. Too many times an HR department or outside consultant will send an audit to company management outlining various compliance issues (failure to provide meal breaks, failure to consistently pay "premium pay" for missed breaks or breaks taken at the wrong time, insufficient I9s, medical information in a personnel file, the lack of work permits for minors, etc.).

We all know that not every problem identified is promptly fixed. If so, there would be no business for lawyers. And, what would be a better blueprint for a plaintiffs' attorney than an HR audit highlighting

problem areas, copied to key management personnel, when the problems identified have not been fixed?

Such problems can be avoided by having an outside attorney involved in the audit process, and by careful planning as to where and how the audit results will be communicated. For example, perhaps the results should only be communicated verbally, in an attorney-client privileged conversation with one or two company executives. Or perhaps the audit report can be clearly marked as "attorney-client privileged" and steps can be taken to protect the privilege. The key is to think about these *before* the audit, not after.

You probably think your company is complying with applicable laws regarding meal periods for non-exempt employees, but audits typically show otherwise. With meal periods, the devil is in the details. Even minor violations by a few employees each pay period can add up to thousands (if not millions) of dollars in liability. Just ask Wal-Mart!

Despite the employer-friendly ruling in *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, 2008 DJDAR 11267, the issues surrounding meal and rest breaks are still in play in California, so be cautious in relying on that decision before the appeals have been exhausted. You should still be doing meal period audits, which typically include a review of time records for employees over a period of time, to confirm they consistently take meal breaks, and that the breaks are taken at the correct time. The easiest way to do this is to audit the time records to see if there are any periods of over five hours, either before or after a break. To be complete, your audit should also include a review of pay records to make sure that employees who missed meal breaks, or took them at the wrong time, have been paid appropriately. Remember that in California, for each workday you fail to provide an employee a meal break as required, you owe the employee an additional hour of pay at the employee's regular rate of pay.

One of the most costly problems for employers is the mis-classification of employees as exempt. While exempt positions should be reviewed periodically to ensure that they are appropriately categorized as exempt, HR audits do not necessarily need to include a review of all exempt positions. Typically, HR can eliminate certain key managerial or professional positions that are clearly exempt, and focus on certain positions that are new, where the duties have changed or are in areas considered to be borderline.

An audit of exempt positions should include confirmation that all employees classified as exempt are being paid the minimum salary required for exempt status. As of Jan. 1, 2008, that amount changed with the increase in California's minimum wage to $8 per hour, raising the base salary for an exempt employee to $33,280.

HR audits should also include a review of payroll practices. Confirm that all manual edits on timecards are authorized by the employee. All too often you have a manager who is told not to incur any overtime expenses, and who takes it upon himself to edit an employee's timecard to eliminate the overtime. This, of course, is illegal. The manager can discipline the employee for working unauthorized overtime, but cannot refuse to pay for the time worked.

Deductions from final paychecks are generally not allowed, even if the employee has signed a written consent. Deductions cannot be made for loans, uniforms or errors. Confirm that commissioned employees have a signed, understandable commission agreement on file. A general rule to follow is if you can't explain the commission agreement to your grandmother, then the average employee isn't going to understand it either, and you are likely to have a problem when and if that agreement is ever challenged.

HR audits should include a review of termination procedures to confirm that legal requirements and best practices are being followed. First and foremost, take a look at your final paychecks. An employee in California who is discharged must be paid all of his or her wages, including accrued vacation, floating holidays and personal days, immediately at the time of termination. An employee without a written employment contract for a definite period of time, who quits without giving 72 hours prior notice, must be paid all wages within 72 hours of quitting. An employee who gives at least 72 hours prior notice of his or her intention to quit, and quits on the day given in the notice, must be paid all wages at the time of quitting. In addition, you must provide all separating employees with an EDD notice to employees stating the reason for the separation (i.e., voluntary quit, discharge, layoff, etc.).

Other best practices include obtaining a letter of resignation from employees who quit, and conducting an exit interview for all separating employees. Exit interviews are an excellent way to gather evidence to defend lawsuits. If an employee does not raise issues of unfair treatment even when given the opportunity in an exit interview, such claims are much less credible if raised thereafter. Moreover, an audit should confirm that any issues of unfair treatment raised in an exit interview are still followed up on, even if the employee is leaving, because such issues could impact current employees.

Don't let a disgruntled employee or plaintiff's attorney set your schedule for addressing compliance issues. Budget for an audit now, and plan to address the areas of most concern to you first. Don't let your company be the subject of the next costly lawsuit and embarrassing headline.

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