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LABOR AND EMPLOYMENT ATTORNEYS

Pay, Policy, and Practices: Avoiding some of *today's* common mistakes

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TYPES OF MISTAKES

Mistakes of *Action*

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- Many mistakes can be called mistakes of *action*
- These are mistakes where someone does something on purpose – or does something they *ought* to know is *wrong*
- Some examples:

Mistakes of *Action*

- Harassment:
 - Harassment on purpose: overt sexual harassment, boorish behavior, racism, sexism
 - Harassment without thinking: stereotypes, insensitivity
 - Things people do to one another that can be offensive and affect an individual's working environment

Mistakes of *Action*

- Discrimination:
 - Much like harassment – discrimination can be *on purpose*, motivated by personal opinion, group dynamics, peer pressure
 - Also can be without thinking: stereotypes, assumptions
 - Historical: men were bread-winners, women would miss work due to child rearing
 - Modern: employees with parents or children will need family care leave, dreamers may be deported, etc.

No Easy Answer

- These types of mistakes have no easy answer
- They are easy to fall into for individuals, hard to police among the workforce
- They are especially dangerous in a state like California, where employers have strict liability for supervisor harassment - and adequate policies offer more limited protection than under federal (and most other states' law)

No Easy Answer

- This presentation does not address mistakes of action, which are best handled by proactive management:
 - Training supervisors
 - Training workers
 - Maintaining policies
 - Implementing protective measures (HR audits, open-door policies, arbitration agreements, class waivers)

No Easy Answer

- We will discuss another class of problems – issues that can creep up on the best-intentioned and most progressive employers
- These tend to be issues of pay, policy or procedure: places where busy employers may never realize there is a problem
- These can be called mistakes of “inaction” because they aren’t based on otherwise wrongful conduct

Mistakes of “Inaction”

Major Pitfalls

Major Issues

- Major issues have drawn attention over the past decades
- They are the “big” issues that have plagued employers, especially since the 1999-2000
- Many employers did not revise their practices quickly enough and found themselves with lawsuits based on these major issues

Major Issues are Relevant

- Employers still need to address the major issues that crop up again and again. These are the ‘pitfalls’ usually addressed in litigation:
 - Exempt vs. non-exempt
 - Meal & rest periods
 - Independent contractor vs. employee
 - Tracking and paying overtime
 - Itemized wage statements

Minor Pitfalls

Minor Issues Trap Employers

- There are many small issues that employers miss even when they correct major issues such as meal/rest breaks
- Some of the “small” issues can trap employers into major liability – and it’s gotten worse this decade:
 - PAGA liability for any labor code violations
 - Liquidated damages liability (with longer 3-year statute)
 - Waiting-time penalties
 - Potential inaccurate wage statements (and penalties)
 - ... etc.

Small mistakes add up ...

- Small mistakes – issues that escape attention – are also now found in many class-actions and PAGA claims
 - Example: “seating” lawsuits alleging PAGA violations for not providing appropriate seating to cashiers, etc.
- These can add a little or a great deal to the value of employment litigation!

EXAMPLES OF ISSUES



Training on Meal & Rest Periods

Meal & Rest Periods

- Employers have been updating policies since 2000 and especially since the *Brinker* decision
- But many have *not* provided any training to supervisors or lead people at any time
- Most supervisors have never been formally trained on the precise requirements

Meal & Rest Periods

- Worse: courts will examine supervisor conduct to see whether it interferes:
 - Employers must avoid “coercion” against taking breaks
 - Creating “incentives to forego” breaks
 - Or “encouraging the skipping of legally protected” breaks

Meal & Rest Periods

- Any of this conduct can destroy the effectiveness of a well-written and widely distributed break policy!
- Subtle pressure, word choice, offering to reward a crew for finishing early – all could be interpreted as interfering with breaks or incentivizing employees!
- Supervisors *must* be familiar with these principles as well as the basic rules about when and how breaks work.



Training on Individual Areas

Training on Individual Areas

- Individual workers and supervisors need training on all areas where they exercise important duties.
- Without training, they can commit small errors that become big problems even where an employer has a good defense overall.
- Like meal and rest periods, failure to train supervisors on other issues can lead them to fail in areas that give leverage in other claims.

Training on Individual Areas

- Application questions: untrained staff frequently ask questions that can “lead” to protected information.
- War story: management who did not know that alcoholism is a disability

Training on Individual Areas

- Reimbursement: managers often send workers to pick things up, drop things off, go to the bank, or use their mobile phones.
 - This creates expense reimbursement issues that are now cited frequently by counsel
 - May also create overtime and *de minimus* issues that are unknown and untracked by management

Training on Individual Areas

- Employers should identify the major areas a manager oversees
- Train managers on these and common areas where small mistakes can be made



Small Wage Order Issues

Small Wage Order Issues

- Each Wage Order has requirements not often discussed in labor law presentations
- Some are obvious while others are not
- They were almost unenforceable in the past, but now the PAGA statute has converted small violations into huge potential liability

Small Wage Order Issues

- Seating cases:
 - Bank of America: \$15,000,000 settlement
 - Walgreens: \$65,000,000 settlement
 - Many others large and small

Small Wage Order Issues

- Pay attention to Wage Order requirements that may not be at the top of employers' minds
- They may be a problem at some locations but not others!

Small Wage Order Issues

- Examples:
 - suitable lockers, closets, or equivalent for the safekeeping of employees' outer garments
 - change rooms or equivalent space so employees may change their clothing in reasonable privacy and comfort (not toilet rooms)
 - suitable “resting facilities”

Small Wage Order Issues

- Examples:
 - Comfortable temperatures in working areas
 - At least 68° in toilet rooms, resting rooms, and change rooms
 - Clocks in all major work areas or within reasonable distance

Small Wage Order Issues

- Important to *scour* the wage order applicable to each workplace and make sure each is in compliance
- Failure to hit every requirement could lead to penalties each pay period for each affected employee

Monitoring *De Minimus* Time

- The California Supreme Court recently held that small amounts of worked time are not *de minimus* under state law
- Small amounts of time that would be hard to track can be excluded under federal law
- But the state courts and the local Labor Commissioner staff have said they will not set aside small amounts of time worked by employees

Monitoring De Minimus Time

- Employees often perform small tasks at the end of the day or outside of working hours
- The types of things people do tend to fall into identifiable classes.
- When they look the same, these types of activities look “regular” and are at risk of being compensable

Monitoring *De Minimus* Time

- Examples:
 - Stopping to drop something off after work
 - Posting mail after work
 - Taking calls while off duty to answer questions
 - Responding to voice mails and emails when contacted during off hours
 - Others

Monitoring *De Minimus* Time

- Examples:
 - Stopping to drop something off after work
 - Posting mail after work
 - Taking calls while off duty to answer questions
 - Responding to voice mails and emails when contacted during off hours
 - “walking time”
 - Others

Monitoring *De Minimus* Time

- Employers can create a culture where such time is expected as “reasonable” because it is so small
- The “reasonableness” is the dynamic that led to the idea that small bits of time are too small to care about
- But the recent *de minimus* law makes even small bits of time – especially when not uncommon – payable
- Failure to monitor and record this type of work can be a springboard for other actions



Monitoring Employee Expenses

Monitoring Employee Expenses

- Labor Code section 2802: reimbursements must be made for all necessary expenses incurred in the course of duties
- Courts have held that this includes the use of things even where the employee does not need to pay more (such as unlimited phone use)

Monitoring Employee Expenses

- Soapbox: I disagree – employers only need to reimburse employees for clothes when they cannot be used for other purposes (not when requiring black pants, for example, or washing regular clothes)
- But in California, courts have held that employers cannot use employees' personal items without reimbursement as it would be a 'windfall'

Monitoring Employee Expenses

- Examples of things employers must (or may need to) reimburse:
 - Cost of using a car for any purpose, such as taking deposits to the bank
 - Computer and internet use by employees' own devices and at employees' homes
 - Interest charges on purchases made for employer on a credit card

Monitoring Employee Expenses

- Examples of things employers must (or may need to) reimburse:
 - “Consumables” such as employee paper, pens, printer ink, etc.
 - Software used by employees (word processing, email, etc.)
 - Subscriptions

Monitoring Employee Expenses

- When: Some courts use a “know or could have known” standard requiring employers to reimburse when it should have known that an expense was incurred
- Lesson: make an effort to determine anything employees must use of their own during at-work or remote duties, and create a plan for reimbursement based on some reasonable model of expenses



Time and Regular Rate Calculation

Time and Regular Rate Calculation

- Most employers know that overtime must be calculated on a 'regular rate' rather than the base hourly rate
- 'Regular rate' can be different than the hourly rate when other items are included such as bonuses

Time and Regular Rate Calculation

- Unfortunately, many employers fail to include items that should increase the ‘regular rate’ but have not been included.
- Just one mistake can create “waiting time” penalties equal to 30 times an employee’s average daily pay

Time and Regular Rate Calculation

- Common mistakes:
 - Small production bonuses: gifts or bonuses for hitting targets, meeting production goals, etc.
 - Frequent in wine country: wine club “sign up” bonuses

Time and Regular Rate Calculation

- Other common mistakes:
 - Differentials: amounts paid for off-hours of unusual shifts. Often added per straight hour without rolling into pay for overtime premiums
 - “Commissions”: small commissions or bonuses paid to staff (also often in tasting rooms)
 - Service charges: service charges distributed to employees where assessed in lieu of tips

Time and Regular Rate Calculation

- Other common mistakes:
 - Some meals and lodging provided to employees (except in some cases)
 - Use of employer goods or “facilities” calculated at a reasonable “fair value”
 - Retroactive pay increases: must look back to overtime pay

Time and Regular Rate Calculation

- Other common mistakes:
 - Stipends and “longevity pay”
- Also consider issues such as:
 - Proper calculation of sick-leave pay
 - Proper allocation of bonuses and commissions to time when earned (which could be a separate presentation...)



Commuting in Different Areas

Commuting in Different Areas

- Most employers know that different places in California have adopted higher minimum wages than state law requires
- Municipalities may even have other requirements such as sick leave and health care contribution minimums

Commuting in Different Areas

- These laws may affect employees based in one town who work at times in others – such as delivery and route drivers
 - In San Francisco, minimum wage applies to anyone working at least 2 hours per week in SF
 - (Sick leave applies to someone working 56 hours in a year in SF)

Commuting in Different Areas

- These laws may also apply to employees who work from home part of the time (e.g., 8 hours per week in San Francisco for health contribution requirements)
- Local wage requirements can be enforced by the Labor Commissioner in any area (e.g., in Santa Rosa for SF requirements) and may support waiting-time penalties

Commuting in Different Areas

- Takeaway: pay attention to localities that require different pay or benefits
- Know where employees go and where they telecommute



Varying from Health Plan Requirements

Varying from Health Plan Requirements

- Employers often make statements in handbooks about health plan requirements and application – e.g., coverage applies only to “full time” employees
- They may also overpromise coverage or become out of date

Varying from Health Plan Requirements

- Health and pension-type plans *cannot* be modified by handbooks or other policies: they must be adopted and amended as allowed by federal law
- Failure to accurately describe benefits may result in penalties for noncompliance or even greater liability that is self-insured by the employer!



Unequal Pay

Unequal Pay

- This may be the greatest issue for employers today.
- Most employers know that recent California law requires equivalent pay among employees who perform “substantially similar work”
- Relevant: composite of skill, effort, and responsibility.
- Variation between ages and racial/ethnic classification prohibited

Unequal Pay

- Employers have had little time to assess these requirements since adoption
- But the law has few exceptions and applies to employees in different locations
- Failure to assess (1) which positions are substantially similar, and (2) how people are paid, may lead to massive liability

Unequal Pay

- Discussion in many industry sources and from the Labor Commissioner at:

www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm

Other Issues

Handbook Creep

- Failure to audit handbooks *and other policies* constantly (at least annually) to ensure compliance with changing laws
 - Protected categories
 - Specific wage and terms requirements
 - Prohibited items

Compensation and Duties Creep

- Monitoring the way people are paid to ensure managers do not adopt non-compliant practices:
 - Non-compliant bonus or pay structures
 - Manner of paying training and meeting time
 - Break practices (as opposed to formal policies)

Compensation and Duties Creep

- Monitoring duties to ensure they match exemptions
 - Create new “substantially similar” positions
 - Actual duties meet exemption tests
 - Actual pay or conditions meet requirements (e.g., commission levels for exempt inside salespeople)

SUGGESTIONS

Constant Vigilance

- Keep a thumb on the pulse of legal changes *and* new types of employment claims
- This is easy to follow through industry associations, chambers of commerce (e.g., HR California), HR organization (like PASCO!)
- It is easy to ‘fall off the wagon’ – even law firms do!

Recurrent Training

- Important that supervisors and employees know policies and expectations
- Ensure that training occurs on all important topics
- Make sure both supervisors and workers are exposed to and trained on your policies

Proactive Review

- Take time to compare information about your workforce with recent developments
- Consider a library of policies, forms and materials in order to:
 - 1. Maintain a history showing what policies have been
 - 2. Monitor when materials (e.g., employment applications) are stale, outdated, etc.

DISCUSSION

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