

CLIENT ALERT

Common Mistakes Which Employers (Still) Make; 8 Things That Employers, Regardless of Size, Should Do Now

By: Marc R. Engel, Esq.

Below are twelve things that employers still do (or still fail to do) that create work for plaintiffs' employment lawyers and unnecessary legal exposure for employers.

1. Assuming that mid-level managers, new managers, and newly promoted managers know how to effectively manage employees. The silent danger in many organizations is that mid-level managers (and newly hired or promoted managers), despite being knowledgeable about their substantive job duties, are not trained in how to effectively manage employees, how to interact effectively with the Human Resources (HR) Department and senior management, and how to request timely assistance from senior management concerning personnel issues. The costs (financial, legal, reputational, and otherwise) of this lack of communication and failure to act can be significant. Poor communication at management levels and a failure to act allow employment problems -- which could be remedied relatively easily and with little drama -- to fester and become far more serious. Organizations should address this issue *proactively* by regularly training managers on how to interview legally, conduct effective performance evaluations, and effectively work with the Human Resources Department and senior management.

2. Failing to understand the scope of the at-will doctrine. Many employers believe, incorrectly, that if employees are at-will they can terminate them for any reason -- good or bad,



lawful or unlawful. This is a dangerous misunderstanding. Employers, as a general matter, can terminate employees for any lawful reason so long as the reason is not discriminatory, does not violate an express or implied contract, and is not done for a retaliatory reason. A good rule of thumb to remember is that when an employer terminates an employee within a few months following a complaint made by an employee of unlawful conduct (*i.e.*, harassment, discrimination), the employee can ordinarily assert that the termination was done for an unlawful retaliatory reason. Employers, of course, can rebut this presumption by establishing that a legitimate business reason exists for the decision.

3. Failing to properly characterize employees as exempt or non-exempt. Wage hour claims, and particularly claims based upon violations of the Fair Labor Standards Act (FLSA) or comparable state statutes, continue to be filed at alarming levels. At the core of this increase in litigation are claims based upon an employer's designation of certain employees as exempt from the overtime requirements when, in fact, they are not (or may not be). In many instances, this comes from a basic misunderstanding of the requirements for exempt status. The three most common exemptions to the overtime requirements are the administrative, professional, and executive exemptions. Job titles alone do not determine exempt status. Employers often fail to create or, as the case may be, fail to update job descriptions to make sure that they accurately reflect the work being performed by employees. As a result, they make avoidable mistakes in characterizing employees as exempt, when in reality they are non-exempt (*i.e.*, eligible for overtime). The stakes are often very high. The mischaracterization of employees can lead to the filing of collective actions, significant money judgments, liquidated damages, and awards of substantial attorney's fees.



Perhaps the most common mistake that employers make in this regard is failing to appreciate the distinction between a salaried employee and an exempt employee. As a general matter, the salary requirement is only the first step in a two-step analysis. The second step that must be satisfied is the “substantive duties test” associated with each of these major exemptions (*i.e.*, administrative, professional, executive). There is a computer exemption as well, but it is generally reserved for high end software design positions.

A second common mistake that employers make is docking the pay of exempt employees for partial day absences. This can destroy the exemption. Employers can ordinarily deduct partial day absences from paid time off (PTO) leave banks of exempt employees, but not reduce their salary for partial day absences.

4. Borrowing employee handbooks and other employment documents.

Unfortunately, some employers believe that employee handbooks are a commodity that can be borrowed from friends or lifted from the internet, and then distributed to employees without a professional review by experienced counsel. They fail to understand that agencies investigating discrimination and harassment claims routinely inquire whether organizations have legally sound handbooks, whether they accurately reflect the current state of the various employment laws, and whether the handbook is being applied and enforced consistently. Employers that borrow other types of employment documents (e.g., restrictive agreements and offer letters) often face similar perils.

5. Failing to update job descriptions as well as update lists of interview and reference questions. Proper job descriptions can serve as a useful road map for employees, and a guide for employers in conducting performance evaluations and making recommendations for promotion. Employers can prevent many wage hour and wrongful termination claims by making



sure that the job descriptions accurately reflect the work presently being performed by employees, and by appropriately incorporating the substantive duty requirements set forth in the applicable overtime regulations. In the same regard, inspired and proactive employers regularly review and update their lists of interview and reference questions to tailor them to their organization, and in so doing, improve their odds of hiring job candidates who become successful.

6. Failing to appreciate why employees leave and why they file claims. Far too often in my experience, employers fail to fully and openly assess why employees leave. There are many reasons why employees leave their jobs and pursue a new one. Employers can improve retention of their best employees by understanding why employees quit; this can involve asking key, relevant questions of employees *before* they leave. In a similar vein, employment claims are often preventable. Many employment claims are filed because of the *perception* that an employee has been mistreated and/or disrespected. Plaintiffs' attorneys find a label or legal theory to attach to the underlying circumstances, but at the core of the claim is an abiding sense by individuals that they have been mistreated and/or disrespected. Often, this is a function of employers (i) failing to follow their own policies and procedures; (ii) failing to properly define and communicate expectations at the outset of employment (which results in a lack of alignment); (iii) failing to spend the necessary time to determine why certain employees have been successful in their organizations and others have not; and (iv) failing to treat employees consistently.

7. Failing to handle employment separations respectfully. Perhaps nothing is as upsetting to employees as being terminated (i) under circumstances where they had no idea that the termination was forthcoming and (ii) in a manner which they consider to be disrespectful. It



is important to properly document personnel issues and adequately communicate all performance problems in a respectful fashion early on. As for the second issue, terminating employees in a public manner, or “taking the bait” and engaging in destructive discussions with employees, is often a prescription for a claim or lawsuit. Employees who believe that they have been publicly humiliated are more likely to file claims and/or use social media to express their frustrations.

8. Failing to pay employees all monies that they are owed. Generally, employers are required to pay employees all sums which they are owed through the last day of employment, regardless of the reason for termination. Some employers operate under the mistaken belief that they can withhold a final paycheck unless and until the employee returns all information, documents, equipment, etc. belonging to the employer. Similarly, employers need to be careful that they are properly compensating employees for commissions and bonuses which have been earned.

Perhaps the most common mistake that employers make in this regard is failing to pay employees unused, accrued PTO upon the conclusion of employment. Generally, and subject to applicable state and local law requirements, employers can decide not to pay for accrued PTO upon terminations provided that the employer communicates to the employee at the inception of employment any restrictions on the payment of PTO upon the conclusion of employment.

9. Failing to take employee complaints seriously and failing to train managers how to identify personnel issues. The timely investigation of claims of harassment and discrimination, in particular, is critical in order to preserve important employer defenses to such claims if they are actually filed. Employees who believe that their complaints are routinely ignored often have little hesitation in contacting an attorney to evaluate their case, make a demand for payment, voice their displeasure on social media, and/or file a claim.



10. Failing to manage leave of absences properly. One of the most difficult issues an employer faces is managing situations where employees may be covered by one or more of the Family and Medical Leave Act (FMLA) (or some comparable state statute), the Americans With Disabilities Act (ADA), and/or the workers' compensation laws. Employers that fail to designate leave as FMLA may inadvertently extend the period of job protection provided by that statute to eligible employees. Furthermore, employers who mistakenly believe that once employees have completed their FMLA leave, they no longer have any legal protections may run afoul of the ADA which, among other things, generally provides that one form of accommodation can be a leave of absence (although courts have generally held that the length of such leave is dependent upon the facts and circumstances of a particular situation and that requests for indefinite leave of absence are suspect (if not inappropriate)). The challenge is even greater in light of the sharp increase in the number of state and local sick and safe leave laws.

11. Failing to appreciate that the employment laws apply to "small" employers. Where the employment laws are concerned, there is generally no such thing as a "small" employer. In order to be subject to various federal employment laws, employers must have the requisite number of employees (i.e., employers must have at least 50 employees to be subject to the federal FMLA). That said, there are numerous analogous state and local laws to which small employers are subject. For this reason, there is no safe haven for small employers to discriminate or to fail to compensate employees appropriately. One of the anomalies of the employment laws is that often small employers face disproportionately greater liability than do larger employers. For example, large employers are subject to Title VII, where there are caps on compensatory damages based upon the size of the employer.



12. Failing to appreciate that the employment laws apply to non-profits. Another prevalent myth is that the employment laws do not apply to non-profits. Employees often work for non-profits not only because they believe in the mission of the organization, but because they believe that non-profits provide a greater level of job security. In other words, many employees of non-profits believe that they are not ordinary at-will employees, and that even if they are, the organization will only terminate them for “cause”. This mistaken belief can and does lead to employee claims of wrongful termination. Compounding matters is the mistaken (and dangerous) belief which some non-profits have that they simply are not subject to the employment anti-discrimination laws and other employment statutes (e.g., wage and hour laws).

8 Things Employers Regardless of Size Should Do Now

1. Train managers how to identify personnel issues and the importance of reporting them to HR and/or senior management in a full and timely manner.
2. Create complete and accurate job descriptions and, as the case may be, update them to reflect changes in work which is actually and currently being performed. Include discretion and independent judgment factors where appropriate.
3. Identify and address performance issues early and be consistent in disciplining employees.
4. Update standard employment documents including, among other things.
 - a. Employee Handbook
 - b. Offer letter
 - c. Confidentiality Agreement (with appropriate additional restrictions)
 - d. Application forms
 - e. Evaluation forms
5. Make sure that all employees are being fully and properly compensated at all times.



- a. Pay accrued PTO leave upon termination unless all applicable state and local requirements for non-payment have been satisfied.
 - b. Be careful about conditioning the payment of bonuses on the employee being employed with the employer at the time of payment.
 - c. Do not withhold monies from an employee's pay unless specifically authorized in writing by the employee to do so. Even when the authorization is provided, be careful not to deduct in a manner that would reduce pay below applicable minimum wage levels. In all instances, comply with applicable state and local laws governing payment of wages to employees upon the conclusion of employment.
6. Particularly for organizations with 15 or more employees, conduct in-person anti-harassment training. If the training prevents one claim it will pay for itself 20 times over. Also, the training often results in learning about "hidden" employment issues and problems.
7. Create or, as the case may be, update AI policies which address, among other things, acceptable use of generative public and private AI tools.
8. Consider Employment Practices Liability Insurance (EPLI), and regularly review the nature and scope of insurance coverages (and exclusions).

Marc R. Engel, Esq. is a shareholder at Lerch, Early & Brewer, Chartered, and a member of the Firm's employment and litigation groups. He advises employers of all types of employment issues, performs human resource audits, and conducts training on a variety of employment issues, including strategies for improving hiring, performance management, retention and avoiding discrimination and harassment claims. He also litigates and mediates employment and business disputes and counsels clients on litigation avoidance strategies. For more information about human resource audits or the employment practice, please contact Mr. Engel at (301) 657-0184 or by email at mrengel@lerchearly.com. For more information about the firm, please visit our website at www.lerchearly.com. **This article is not intended to provide general legal advice or legal advice as to any specific matter. Consideration of any legal implications of an issue(s) referenced in this article involves a review and assessment of all relevant facts and circumstances.**