

How employers can avoid legal pitfalls in 2014

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After almost 20 years of counseling clients on employment-related issues, I have learned that clients can avoid some of the most problematic employment litigation by following a few simple tips. Preventing a claim before it happens is much cheaper and easier than dealing with an administrative proceeding or lawsuit.



1 Carefully draft and actively maintain a social media policy. Employers should implement policies governing employee use of the Internet, social networking and e-mail on company equipment. Those policies should be drafted so as not to run afoul of the National Labor Relations Act's protection of employees' right to communicate regarding the terms and conditions of their employment.

The NLRB has indicated that the most enforceable social media policies are those that are specific in the type of communication that would violate company policies. General prohibitions on negative comments in the workplace would likely be considered overbroad and in violation of the National Labor Relations Act.

Additionally, employer Internet and social media policies should require that if employees use accounts to market a company's business, the employees should use corporate accounts, not their personal accounts. Employers should control work-related equipment and consider carefully who should receive company laptops and mobile devices.

2 Establish a protocol for hiring. Those who interview prospective employees should be counseled not to ask questions that could lead to a claim that the applicant was not hired based on protected characteristics such as gender, race, religion or national origin. Questions pertaining to a person's age, marital status, children and politics should not be a part of the interview process.

Make every attempt to avoid even indirectly seeking protected information with questions regarding dates of graduation and even the celebration of holidays – i.e., Christmas. If an interviewee brings up those topics, try to steer the conversation back to

the job requirements and the applicant's qualifications. Equally problematic are questions that probe or could elicit disclosure of an applicant's confidential business dealings with their current employer. Stick to the issues of the job and the applicant's ability to do that job.

3 Be vigilant about statements made at work. Employers should be aware that every statement made in the work setting in the presence of other employees, even informally, could become part of an employment action.

Make sure your employees are educated on the company's non-discrimination and harassment policies and complaint procedures, including the identity of multiple individuals to whom a complaint may be made.

Employee reviews also should be honest and complete. Any issues with an employee's performance should be documented and the employee should be provided opportunities and suggestions for improvement, if possible. A positive review of a problematic employee can undermine company performance as well as complicate termination of that employee.

4 Make sure there is a procedure for investigating complaints and implementing corrective action. Your company or firm should have a procedure in place that allows the complainant to provide your company or firm with all of the facts, including what occurred, when, where and who was involved. The procedure should allow for the identification and review of any relevant documents and the interviews of relevant witnesses. If those witnesses consent, they should have the opportunity to sign witness statements.

When recommending any corrective action, make sure you have asked the complainant what he/she believes to be an appropriate remedy. Other factors to be considered in an investigation include whether or not any company policies were potentially violated by the alleged misconduct; the severity of the alleged misconduct; and the accused's overall record. Be consistent in handling employees or be prepared to defend your exceptions. Consistency will enable you to defend against any claim of discrimination.



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5 Be up-to-date on wage and hour laws. You must know the latest law interpreting the provisions of the Fair Labor Standards Act, applicable state wage and hour laws and the prevailing minimum wage laws. Timekeeping and payroll practices and exempt/non-exempt classifications should be reviewed.

Job descriptions also should be reviewed to ensure they are written to support any decisions on classifications. Any unpaid internships or independent contractor arrangements should be approached with caution and carefully reviewed for compliance with the law. Supervisors should be trained on your company's wage and hour policies, and have a reporting procedure in place for any wage and hour complaints.

6 Get a release. When terminating employees, if at all possible, have those employees sign a release. The release should be supported by adequate consideration. If the release is for an

employee over the age of 40, it should comply with the requirements of the Older Workers Benefit Protection Act. Make sure the wording of the release is clear and specific and that the employee is afforded the opportunity to review the release before signing. If the employee has left abruptly without notice, and/or has refused to sign the release, take the time to check for discrepancies in documents or records and try to ascertain that employee's future plans that may impact your business.

Margo Wolf O'Donnell is a Shareholder in the Litigation and Employment Practice Groups at Vedder Price. She has been recognized by Illinois Super Lawyers as one of the Top 100 Lawyers in Illinois and Law Bulletin Publishing Company recognized O'Donnell as one of 15 "Women Making an Impact" in the 2012 edition of Women in Law.