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"Well, It Sounded Like a Good Idea at the Time!"

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As labor and employment lawyers representing management, we frequently encounter creative, enterprising businesspeople who try to operate their businesses in a cost-effective, practical, problem-solving manner. Of course, they want to comply with legal obligations as well. Frequently, however, common sense and practicality take a back seat to seemingly "gotcha"-type legal issues. This article will point out some recurring employment issues on which many employers stumble. While the saying, "If we've heard it once, we've heard it a thousand times" may overstate it a bit, many of the employment blunders noted below do occur with some frequency. Some could be avoided if employers consulted their employment lawyers in advance, rather than after "the train has left the station."

"I found this handbook on the Internet/I got it from a buddy in the industry."

An employee handbook not only serves as a valuable tool to convey a company's vision, goals and protocols. It also can become a key piece of evidence when legal challenges arise. Employee handbooks must clearly and adequately state the company's policies and procedures, and those policies and procedures must be legally compliant.

A generic "off the shelf" handbook may not do your business justice, because by its nature, it cannot account for features that are unique to virtually every company. For example, your company likely has various leave policies, some of which are required by federal or California law, and others you may have graciously provided as a benefit to employees. Federal and California law differ on what types of leave are required, and the laws also vary depending on the size of the employer. All workplace policies should be stated clearly and correctly. Otherwise, your handbook may serve as a golden ticket for plaintiffs' counsel to show a company failed to follow its own policies (or, worse yet, followed unlawful policies!).

"We haven't documented the file. Let's call it a 'layoff!'"

Employers frequently feel reluctant to discharge an employee for poor performance. Explanations vary. Sometimes, documentation is lacking (even when "everybody knows" the employee is awful). Sometimes, employers desire to "be kind" to employees, or to avoid confrontation. The light bulb goes on: "Let's call it a layoff!" Problem solved, right? Well, not exactly.

This "do-gooder" (or worse) approach can have serious negative ramifications for the employer. For example, if the "awful" (but "laid off") employee sues to challenge the separation (on virtually any theory), the employer then will have a terrible time explaining that "it really was a performance-based termination – honest!" The employer likely will appear disingenuous at best. That's a significant problem, because credibility counts hugely in employment lawsuits. Any near-term replacement of the "laid off" employee will simply add a further nail in the coffin of the employer's misguided personnel characterization.

"We rely on our payroll processing company to make sure paystubs are compliant."

Many companies rely on outside payroll services to provide properly formatted wage statements. Nevertheless, because California paystub requirements are so complicated, important requirements sometimes get missed. (Employers also must maintain records reflecting all information required on the paystubs – yet another trap for the unwary!) Plaintiffs' counsel seize on these opportunities, and typically tack them onto other claims to enhance potential recoveries. Penalties for violations of Labor Code Section 226 can be significant – $50 for an initial violation and $100 for subsequent violations (up to $4,000 per employee). Employees also can recover costs and reasonable attorneys' fees that can add up to more than the penalty itself. Trust, but verify, your paystubs!

"It's just an unemployment hearing. We don't really need to take it seriously."

Many employers don't like to contest unemployment claims. Frequently, they don't prepare carefully for unemployment hearings, even when a terminated employee may also pursue a civil lawsuit. That can be a huge mistake. Although the *outcome* of an unemployment hearing doesn't have a binding effect on future litigation, hearing testimony is recorded and under oath. A well-prepared plaintiff's attorney (normally not expected to attend an unemployment hearing) can ambush a company's unprepared representative and elicit sworn testimony that will prove helpful in the later lawsuit. Prior sworn testimony can be admissible in employment litigation, with devastating effect if it impeaches or contradicts a party's later-asserted position.

"It's his third 'final written warning,' but it's not as bad as the last two."

Although the oxymoron of "multiple final" warnings sounds funny, these situations do arise. Usually, at the "final warning" step of a progressive discipline process, the employer states its intention to terminate the employee "if another disciplinary violation occurs."

Sometimes, however, an employer then shows reluctance to follow through when the next violation does occur. This reluctance can manifest itself in one or more *additional* "final" warnings, instead of the promised termination. Indeed, the "next dischargeable offense" may seem less heinous than the first one, two or three. Then, if the employer still has failed to terminate, the employer may *really* feel stuck!

In law school, we all heard the maxim that "hard cases make bad law." A similar principle applies here. When an employer shows a lack of resolve in carrying out the consequences of "the next disciplinary offense," it can paralyze the employer's disciplinary system and breed contempt among employees for the employer's constancy and trustworthiness. Better to "say what you mean, and mean what you say."

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"Why put everyone's commission agreement in writing? We've never done that, and it'll be harder to change in next year's sales plan!"

Well, it is the law! California Labor Code § 2751 prescribes very specific requirements for any employer-employee agreement that involves the payment of commissions. It must be written, and the employer must provide each employee a signed copy of the employee's agreement *and* obtain a signed receipt for it. The agreement is "presumed" to remain in effect until superseded or until the employment ends. (Certain types of incentives – think retail "spiffs" – don't count as commissions.) Our experience suggests that many employers fall short of full compliance.

On a related note, many employers misunderstand the limited circumstances under which *inside* commissioned salespeople can properly be considered exempt from overtime. The law in this area is rather complicated. Regardless of their exempt status, however, inside commissioned salespeople likewise must receive legally compliant written commission agreements.

"But he said he *wanted to be* an independent contractor!"

Some companies think they can avoid certain employer responsibilities by classifying workers as "independent contractors" rather than "employees." Sometimes, workers even want it that way. Unfortunately, labels matter far less than facts. Whether a worker properly is classified as an employee or as an independent contractor depends upon a host of factors, such as whether you instruct or supervise the person; whether you can terminate the person at any time; whether the work being performed is part of your regular business; and whether you furnish the tools, equipment or supplies used to perform the work. Most importantly, does the worker have the right to direct and control the manner and means by which the work is performed? If not, the worker is likely an "employee," notwithstanding any agreement or understanding to the contrary. Penalties abound, so watch out!

"Why is this *my* problem? I'm using a temp agency!"

Employers sometime assume they have no exposure for workplace wrongs involving a temporary staffing employee, believing that only the temp agency – the "actual" employer – can be responsible. Unfortunately, not so. Under the "joint employer" doctrine, any entity that has the practical ability to prevent an alleged violation – *e.g.*, those parties with the power to "hire and fire," "set wages," or to tell workers "when and where to report to work" – could be found to be "the" employer. The practical effect of this doctrine? Both the temp agency and the company supervising the workplace can be found to be "joint employers," and held jointly liable for a host of employment law violations – even when the temp agency is the actual, paycheck-writing employer.

Other employer misconceptions abound, but we do have space limitations! Suffice it to say, common sense and practicality don't always carry the day in employment law. Keep your trusted employment counsel on speed dial!

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