In-house Counsel Employment Law Primer:

10 Tips For Identifying Risk, Minimizing Liability, Eliminating Confusion, And Creating Clarity

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1. Have A Solid Grasp Of The Most Frequently Litigated Employment Laws

- FLSA
- Title VII, TCHRA, Section 1981
- ADA
- FMLA
- Trade Secrets and Covenants Not To Compete
- WARN Act
- Retaliation (Dodd-Frank, SOX, OSHA, *Sabine Pilot*, etc.)

Educational sources from abound on the Web, including www.lawline.com and www.osattorneys.com.

2. Be Able To Recognize And Be Alert For Signs of Clear and Present L&E Law Danger

Some potential common examples:

- A letter from a plaintiff's lawyer comes in alleging an FLSA misclassification case on behalf of one employee, but there could be many more misclassified workers in the employee's department.

- A new male sales manager wants to fire the only female salesperson in his division out of 20 salespersons for poor performance, even though her historical performance reviews are favorable, there is no record of discipline, and he cannot clearly demonstrate that her sales are objectively any worse than her male comparators.

- Your paralegal gives you a draft EEOC Position Statement he prepared, and it gives reasons for terminating the Charging Party that are dramatically different than the reasons given for termination that are on other internal documents in the Charging Party's personnel file.

- See Tip Number 8 below for additional common examples.

3. When You Identify Danger, Give Management Concise And Realistic Assessments, Options, and Recommendations for Solutions

- "FLSA class actions are all the rage right now. This would be an indefensible FLSA suit, that could easily encompass many workers and cost us $3 million to $5 million. I recommend we use *Spring Break 1983* to confidentially settle with the sole ex-employee currently threatening suit, and then promptly implement the following changes to minimize and limit our exposure as to the other workers going forward."

- "This would be a thorny sex discrimination case to defend, and could end up costing us $200,000.00 to $500,000.00+. I recommend we put the employee on a 90-day PIP with clear objective metrics and then do things to support her in meeting those metrics. If she succeeds after that, great. If she does not satisfy the metrics, then we can take appropriate next steps, which could include a termination that would be far more defensible than terminating her right now. I also recommend we implement the following training for our managers concerning appropriate documentation and discipline."

- "Filing this Position Statement would likely make a case against the company difficult to defend in light of recent Fifth Circuit authority on this subject. Do not file this Position Statement. I will also give our paralegal some training on this subject."

4. Implement Programs and Processes To Reduce Common L&E Causes Of Lawsuits, and To Make Any Such Claims Less Risky And Easier to Defend

Some potential examples:

1. Roll out training programs on documentation and discipline for managers that you conduct, or that you do a "train the trainer" and let the new trainer conduct.

1. Implement anti-discrimination training for managers and employees to ensure your company can easily satisfy the *Kolstad* defense to punitive damages.

1. Implement or revise policies and procedures to ensure your company can easily satisfy the *Ellerth/Faragher* defense to supervisor-based harassment claims.

1. Make sure your company has an FLSA safe-harbor provision in its employee handbook. If an employer (a) has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism, (b) reimburses employees for any improper deductions, and (c) makes a good faith commitment to comply in the future, the employer will not lose the exemption for any affected employees unless the employer willfully violates the policy by continuing the improper deductions after receiving employee complaints. http://www.dol.gov/whd/overtime/fs17g_salary.htm

4. (cont'd) Implement Programs and Processes To Reduce Common L&E Causes Of Lawsuits, and To Make Any Such Claims Less Risky And Easier to Defend

5. Don't spend money needlessly, but if you see trends in EEOC Charges or litigation that raise the specter of a systemic problem of some sort, invest in proactive and privileged self-critical analysis to get a clear picture of the situation, so you can then take appropriate action yourself, instead of finding yourself at the mercy of the EEOC, DOL, Plaintiff's counsel, a Court, the AAA, etc. Ditto concerning an FLSA audit – something nearly every company could use from time to time.

5. Give management the pros and cons of arbitration agreements and if arbitration is selected, make sure your agreement includes a class waiver. Alternatively, if the company could consider using jury waivers rather than arbitration.

7. Implement a review system for terminations, so that managers cannot make termination decisions without some meaningful review from at least HR, and possibly the Legal Dep't.

7. Evaluate EPLI options and make recommendations on the best policy or policies to purchase given your company's situation.

7. Develop a training program covering the attorney-client privilege, with particular attention paid to best communication practices to preserve the privilege, and traps to avoid that can result in waiver of the privilege.

5. Be Careful What You Write In Responding To Demand Letters, Or Your Letter Could Be Used By Plaintiff's Counsel In Front Of The Jury

Rule 408 arguably does not cover your letter if it does not offer a compromise or settlement:

For example, in *Smith v. Lowe's Home Ctrs, Inc.*, No. Civ.SA-03-CA-1118 XR, 2005 WL 1533108, at *6-7 (W.D. Tex., June 29, 2005), the trial court concluded in a Section 451.001 and defamation case that the employer's in-house lawyer's pre-suit letter to the employee's lawyer was properly admitted into evidence and was not barred from admission by Rule 408.

As it turned out, the in-house lawyer's letter wrongly accused the plaintiff of theft. The jury relied on that letter, and other evidence, to return a verdict of over $4 million dollars against Lowes.

There are many other examples of this, as it appears some in-house lawyers think that any letter they write in response to a plaintiff's lawyer is covered by Rule 408. As *Smith* demonstrates, that can be a dangerously wrong assumption that obviously would not be a career enhancer.

The same warning applies to preparation of EEOC Position Statements. Specifically, a jury may view "erroneous statements in [an] EEOC position statement" as "circumstantial evidence of discrimination." *Miller v. Raytheon Co.*, 716 F.3d 138, 144 (5th Cir. 2013).

6. Proactively Review Noncompete And Other Post-employment Agreements To Ensure They Align With Management's Goals And Are Enforceable

It is not unusual for a top manager or executive to defect to a hated competitor.

Management may turn to you for help, sometimes with the desire to sue the defecting executive and stop them from working for the competitor.

That is not the ideal time to look at the defecting executive's noncompete agreement (if any) for the first time.

If you get ahead of this issue and ensure noncompetes and/or other agreements (*e.g. Exxon Mobil Corp. v. Drennen* (Tex. 2014)) are in place that align with management's goals and are enforceable, you could be a hero in these sorts of situations.

7. Cultivate Good Relationships With Governmental Agencies, Courts, Competitors, and Leading Industry Players

Long term fights with the government are rarely in a company's best interests.

- Having good relationships with a government agency's mediators, investigators, and lawyers can go a long way to resolving minor issues before they turn into major problems.

- It can also win you respect from internal management, and help make you a trusted resource and problem solver.

- Make sure your outside counsel is not making submissions or communications that undermine your company's efforts to develop good relationships with the EEOC, DOL, OSHA, TWC, other governmental agencies, and courts.

- Regarding competitors, often management in your company will want to know how a competitor or other leading industry player handles a particular legal issue. Being able to answer that question makes you a more valuable resource.

8. Be Able to Recognize The Most Common L&E Mistakes

1. Terminations Often Leading To Allegations of Discrimination or Retaliation:

    a. Bad, no, or contradictory documentation of the employee's alleged poor performance.
    b. Padded performance reviews.
    c. Inaccurate termination letters.
    d. Mishandled Unemployment Hearings.
    e. Management failed to follow its own policies or the employee handbook.
    f. Failure to investigate and confirm the basis for termination before terminating (especially when the employee has recently engaged in some legally protected conduct).
    g. Over-reliance on the "at will" rule.
    h. Rushed decision to terminate.

1. FLSA:

    a. Independent contractor misclassification.
    b. Exempt status misclassification.
    c. Off the clock problems.
    d. Not paying overtime on bonuses.
    e. Joint employment claims from governmental authorities and private lawyers.

1. ADA:

    a. Interactive process missteps.
    b. "Full duty" trap.
    c. Jumping to conclusions that an employee is a "direct threat."
    d. Refusal to make exceptions to policies or rules.

9. When The Best Advice Is Not The Advice Management Wants To Hear

Three tested options for handling this delicate situation:

- Using cautionary stories from real cases. *E.g.*, "I know this isn't the easiest approach in the short term, but I recommend it because terminating now could easily put us in the same position as XYZ company in the case of *Smith v. XYZ Co*. Let me tell you what happened there and why I want us to avoid that fate."

- Recommend obtaining a quick opinion from experienced and respected outside counsel. *E.g.*, "I know a leading lawyer at ABC law firm whose been at the forefront of this issue for 15 years. Why don't we reach out to her and get her quick take on this?"

- Repeat, recognize, and express respect for their problems with your proposed approach, reiterate why, nevertheless, you believe your approach is indeed the best one given all the circumstances, and agree that ultimately the decision is management's decision and your role is merely to advise (unless of course in extreme cases, such as when management's decision would be criminally illegal).

10. Keep Current On L&E Developments, And Respond Accordingly

For example:

1. Make sure your company's confidentiality agreements do not run afoul of the SEC's 2015 Interpretation of SEC Rule 21F-17, which provides that companies may not take action to impede individuals from communicating with SEC staff about possible law violations, "including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications." The SEC fined KBR $130,000.00 for having a confidentiality agreement that it contended ran afoul of this Dodd-Frank related rule.

2. Make sure your company's litigation hold process and letters are sufficient to withstand scrutiny in court, and also do not give rise to the problem that partially created SOX retaliation liability for Halliburton in *Halliburton, Inc. v. Admin. Rev. Bd.*, 771 F.3d 254 (5th Cir. 2014).

3. Assure compliance with new DOL Regs on FLSA's Salary Basis that will dramatically increase the minimum salary necessary to meet the Salary Basis test.

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