

NEW YEAR'S RESOLUTIONS FOR EMPLOYERS

The start of the year is the perfect time to review existing employment practices and put new ones into place. In this edition of the *Employment Law Advisor* we suggest "resolutions" for the New Year concerning the implementation of preventive employment practices. The old adage "an ounce of prevention is worth a pound of cure" is certainly true with regard to employment matters, where the cost of preventive measures is usually far less than the cost of defending just one employment claim.

1. **DISTRIBUTE THE COMPANY'S SEXUAL HARASSMENT POLICY**

Massachusetts employers (of six or more employees) are required by law to have a sexual harassment policy, and to distribute a copy of it annually to each employee (as well as to each new hire). An efficient way to do this is to include it in a payroll mailing, so that you can be sure that each employee has been sent a copy. Of course, if you do not have a sexual harassment policy, you should adopt one now and make sure it complies with the specific requirements of Massachusetts law.

2. **GO FURTHER IN PREVENTING HARASSMENT CLAIMS**

Hold anti-harassment training for all employees. While sexual harassment training is not required by Massachusetts law, the statute does "encourage" it (note that employers are required to train certain employees in Connecticut, Maine and California). Conducting such training can help prevent harassment, as well as assist in the defense of any subsequent harassment claims. Further, consider broadening your company's existing sexual harassment policy to cover all types of unlawful harassment.

Another tool to use in preventing harassment claims is obtaining written employee acknowledgment of receipt of the policy and confirmation that he or she has not suffered harassment at your company in the past. Such acknowledgments may be obtained either in connection with training, the annual distribution of a sexual harassment policy, or at the time of an employee's yearly performance evaluation. While obtaining such forms might trigger uncomfortable discussions if an employee has an issue, it is in the employer's interest to get such problems out in the open and deal with them promptly, and potentially prevent more difficult complications later. Moreover, a signed

acknowledgement from an employee stating that he or she has not experienced harassment can be quite helpful in defending against any possible harassment claim that the employee might bring in the future.

3. **REVIEW AND UPDATE EMPLOYEE HANDBOOKS AND POLICIES**

An outdated, inaccurate, and/or poorly drafted employee handbook can be worse than none at all. Make sure that any changes in policy are reflected in a revised, dated handbook, and that all employees sign acknowledgement forms certifying that they have received the new version. Similarly, any written employment policies which have been amended should be reissued with correct information.

4. **CONDUCT A WAGE AND HOUR AUDIT**

Take this opportunity to make sure your company's practices are in line with both Massachusetts and federal wage and hour laws. Recent significant changes to the federal Fair Labor Standards Act may impact classifications of employees as exempt or non-exempt, requiring changes as to who must be paid overtime for hours worked over forty in a week. Additionally, Massachusetts and many other states have numerous and often misunderstood laws regulating whether businesses may be open on Sundays and particular holidays, and whether employees must be paid time and a half for work on holidays.

5. **TIGHTEN UP HIRING DOCUMENTS**

Review your company's employment applications, offer letters, and other hiring documents to make sure they comply with relevant laws and provide the company with as much protection as possible. For example, a good application should include an employee acknowledgement that any employment with the company is at-will, an equal opportunity employer statement, a reference release, a statement by the applicant that all information provided is truthful, and the statement concerning lie detector tests that is required by Massachusetts law. Similarly, proprietary information, non-disclosure and non-compete agreements should be reviewed periodically – check to make sure your agreements include up-to-date descriptions of confidential information and possible competitors, and insert language to guard against losing the effectiveness of a non-compete if the employee changes position or has a gap in employment.

6. **RESOLVE TO CHECK REFERENCES**

While everyone agrees that the decision to hire an individual is of critical importance, many employers still do not take the time to speak with references before making a hiring

decision. Try calling the applicant's supervisor at a former employer (rather than the human resources director), who might not know (or care) about a company's general policy against giving "references". Before doing this, make sure employment applications include language that authorizes the employer to contact the references provided and, further, releases the employer from any liability arising from such contacts. It is also helpful to include a separate line where the applicant must sign, acknowledging the applicant's agreement and understanding that the release prevents him/her from instituting any legal claim based on information provided by the reference.

7. REVIEW INDEPENDENT CONTRACTOR ARRANGEMENTS

Recent studies and our experience indicate that many employers misclassify workers as independent contractors rather than employees, and litigation regarding these issues is on the rise. Improperly treating an employee as an independent contractor can create significant legal exposure for an employer. For example, because employees (but not independent contractors) are protected by state and federal overtime and minimum wage requirements, and are subject to particular tax treatment, misclassification of an employee as an independent contractor can result in an employer becoming liable for years of back overtime and minimum wages, back taxes, and civil and criminal penalties. Additionally, Massachusetts law creates a rebuttable presumption that any worker performing services at an employer's place of business is an employee subject to the protections of state wage and hour laws, and provides for civil and criminal penalties if an employer fails to properly classify a worker as an employee.

8. CONSIDER NEW COMPENSATION DEFERRAL RESTRICTIONS

The recently enacted American Jobs Creation Act of 2004 contains important changes to the federal income tax treatment of most nonqualified deferred compensation arrangements. The new restrictions are broad in scope and impact many types of deferred compensation. The consequences for failure to comply with these new rules are severe, requiring the recipient to immediately pay tax on the deferred amount along with a 20% penalty. Any employer using nonqualified deferred compensation arrangements should consult with counsel to determine what changes need to be made to compensation plans to ensure compliance with the new laws.

9. PERFORM A CONSISTENCY REVIEW OF DISCIPLINARY ACTIONS AND COMPENSATION

Even small companies can run into trouble when different supervisors take inconsistent disciplinary actions against employees who have committed similar infractions. Take a few minutes to review the disciplinary actions of the past year, and identify any inconsistencies in treatment. Disparate treatment of employees who are similarly situated can impair morale and lead to discrimination and other employment-related claims. Employees performing similar job functions should generally receive similar pay, unless there is a legitimate reason for differences in compensation. It is good practice to review pay practices to make sure that unjustifiable pay disparities do not exist among employees performing similar or comparable jobs. Failure to do so may result in federal and state equal pay act claims, as well as discrimination claims.

10. PROVIDE SUPERVISORY TRAINING

Institute a program of regular EEO and supervisory skills training for supervisors. A yearly review of important legal issues for supervisors can help cut down on avoidable mistakes and resulting employee lawsuits. Providing supervisors with effective tools for handling difficult employee situations can improve employee relations for everyone involved and reduce legal exposure, including potentially providing a defense against punitive damages awards in discrimination claims.

11. CONFIRM COBRA COMPLIANCE

Make sure your company has a clear understanding regarding what is required to comply with COBRA. New regulations, which took effect on November 26, 2004, require the use of a revised Initial Notice and Election Notice and the use of two new notice forms in cases of unavailability of coverage and early termination of coverage.

12. BE AWARE OF REQUIREMENTS TRIGGERED BY GROWTH

Smaller companies should be aware that, as they grow, additional federal and state statutory laws will apply to their workforce. For example, Massachusetts anti-discrimination laws and the Massachusetts Maternity law apply to employers with six or more employees, but the Massachusetts Small Necessities Leave Act and the federal Family and Medical Leave Act do not apply until an employer has fifty employees.

*Happy 2005 from the MBBP Employment Law Group.
Please contact us if you would like assistance in keeping these New Year's resolutions.*

The MORSE, BARNES-BROWN & PENDLETON EMPLOYMENT & LABOR PRACTICE GROUP provides sophisticated legal services and practical advice to employers of all sizes, ranging from technology start-ups to Fortune 500 companies.

Robert M. Shea – rms@mbbp.com ♦ Mark H. Burak – mhb@mbbp.com
Donald W. Parker – dwp@mbbp.com ♦ Sandra E. Kahn – sek@mbbp.com ♦ Scott J. Connolly – sjc@mbbp.com

BUSINESS | SECURITIES | M&A | TECHNOLOGY + IP | TAX | EMPLOYMENT + IMMIGRATION

Reservoir Place ♦ 1601 Trapelo Road ♦ Waltham, MA 02451 ♦ (p)781-622-5930 ♦ (f)781-622-5933 ♦ www.mbbp.com