

## Recommended New Year's Resolutions for Employers

The start of the new year is a great time to review existing employment practices and put new ones into place. In this edition of the *Employment Law Advisor* we recommend some "resolutions" that, if kept, will help you to avoid employment-related disputes and liability. 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.

Thus, we recommend that you resolve to:

### Distribute Your 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 (and also provide it 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. You should also consider going beyond what Massachusetts law requires and broaden your policy to prohibit all forms of unlawful harassment. See <http://www.mbbp.com/resources/employment/newsletters/ela/ela%200104%20-%20sexual%20harassment.pdf>.

### Review Your Form of Separation Agreement

As we reported previously, employee separation agreements are coming under increased scrutiny, especially those agreements which purport to release federal age discrimination claims under the Age Discrimination in Employment Act. Courts have invalidated legal releases due to provisions that many employers (and their counsel) have considered to be standard. If

you have not done so already, seek a fresh legal review of your form of separation agreement. See <http://www.mbbp.com/resources/employment/newsletters/ela/ela%201006%20-%20separation%20agreements.pdf>.

### Review and Update Your Employee Handbook

In 2006 we observed an increase in breach of contract cases based upon provisions in employee handbooks. An outdated, inaccurate, and/or poorly drafted employee handbook can result in disputes or litigation. Having such a handbook in place may be worse than having no handbook at all. Thus, make sure: (i) that your handbook does not create any unintended obligations; (ii) that any changes in policy are reflected in a revised, dated handbook; and (iii) that all employees sign acknowledgement forms certifying that they have received the new version. See <http://www.mbbp.com/resources/employment/newsletters/ela/ela%200206%20-%20handbooks.pdf>.

### Review Your Exempt Classifications and Make Appropriate Corrections

Many employers continue to misclassify employees as being exempt from overtime pay. Being a *salaried* employee does not necessarily make one an *exempt* employee. To be properly classified as exempt an employee must also fit within one of the limited exemptions to the overtime requirements. Determining who fits within the "administrative exemption" to the overtime rules can be particularly confusing. Overtime claims are increasingly popular because they can be easy to prove and damages can be substantial, including overtime pay going back three years, potential triple damages, interest and attorneys fees. Take appropriate steps to ensure your pay practices are compliant. See <http://www.mbbp.com/resources/employment/>

[newsletters/ela/ela%200504b%20-%20new%20flsa%20regs.pdf](http://www.mbbp.com/resources/employment/newsletters/ela/ela%200504b%20-%20new%20flsa%20regs.pdf).

### Tighten Up Agreements That Protect Your Proprietary Information, Inventions and Good Will

Don't wait for an employee to leave and join a competitor before determining if your restrictive agreements are enforceable. Your non-disclosure, non-competition and non-solicitation agreements should be reviewed periodically and checked to ensure the agreements include up-to-date descriptions of confidential information and possible competitors, as well as language to guard against losing the effectiveness of a non-compete if an employee changes position or has a gap in employment. You should also resolve to take appropriate steps to improve your chances of successfully enforcing such agreements by, among other things, taking a rational and consistent approach with respect to what you treat as confidential, who you require sign these agreements, and how you police compliance. See <http://www.mbbp.com/resources/employment/newsletters/ela/ela%200306%20-%20noncompetes.pdf>.

### Check References and Conduct Better (and Lawful) Employee Background Checks

Bad hiring decisions hurt businesses in many ways: increased turnover and higher recruitment costs, as a bad hiring decision often eventually leads to resignation or discharge; lost productivity and decreased employee morale when a bad hire absorbs management time, causes hostilities and

creates distractions in the workplace; and increased risk of employee lawsuits. As employers are recognizing the need to conduct better employee screening, the ability to obtain personal background information on applicants quickly and inexpensively is expanding rapidly. However, the set of legal rules applying in this area is also expanding, as legislatures, regulatory agencies, and courts attempt to address sometimes competing concerns over employer rights, individual privacy, discrimination and workplace safety. Laws like the federal Fair Credit Reporting Act impose very specific requirements on employers using outside sources to obtain background information on applicants.

We suggest that employers review their employment screening process to ensure that they are doing everything reasonable and appropriate to avoid bad hires and complying with the law. Employers can obtain considerable information on applicants, but they must know and follow the rules when accessing and using such information. See <http://www.mbbp.com/resources/employment/newsletters/ela/ela%200906%20-%20background%20checks.pdf>.

### Improve Performance Management

Most employers struggle with the employee performance evaluation process. Difficult performance reviews are often avoided. When conducted, the reviews often lack honesty and candidness in their assessment of underperforming employees. Many managers are uncomfortable communicating criticism to people with whom they work each day. These managers frequently rate their subordinates' performance higher than justified and give only watered down criticism, even though the managers may re-

alize that their handling of the performance deficiencies is wrong and can lead to bigger problems down the road if a performance-related termination becomes necessary. In defending employee lawsuits, we repeatedly see the how the "mixed messages" received by employees in performance reviews lead to employee claims.

Make 2007 the year that you take constructive steps toward improving performance management. Review and consider revising your evaluation forms to provide a real range of performance categories. Require constructive criticism in the reviews. Train managers and supervisors to do a better job, and make the proper handling of subordinate evaluations a more important part of their performance reviews. Monitor the performance review process to ensure that the results are consistent with your objectives and reality. See <http://www.mbbp.com/resources/employment/newsletters/ela/ela%200606%20-%20performance%20issues.pdf>.

### Conduct Workplace Training

Although Massachusetts has yet to join the growing number of states (including Connecticut and Maine) that require employers to conduct workplace harassment training, the Commonwealth strongly encourages training. Massachusetts General Laws Chapter 151B, the principal state anti-discrimination law, states that employers "are encouraged to conduct an education and training program for new employees within one year of commencement of employment." Perhaps more importantly, the Massachusetts Commission Against Discrimination states that "an employer's commitment to providing anti-harassment training to its workforce may be a factor in determining liability or the appropriate remedy."

Governmental "encouragement" aside, harassment training just makes sense. Beyond exposing the business to legal liability, workplace harassment harms employee morale, poisons the work environment, causes disruption and lost productivity, and leads

to employee turnover. Accordingly, we too encourage employers to conduct harassment training.

In fact, we suggest that employers go a step further and institute a program of regular EEO and supervisory skills training for managers and 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. See <http://www.mbbp.com/resources/employment/newsletters/ela/ela%200705%20-%20education%20and%20training.pdf>.

*Please contact us if you would like our assistance in keeping these New Year's resolutions.*

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