

Comply with Employment Laws -- Painlessly

August 01, 2001

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Content provided by The Edward Lowe Foundation

We're lucky we're not some giant corporation bogged down with a bureaucratic HR department. We're still small, like a big family. All of us are in this together. We don't worry about employment-related lawsuits here.

If this sounds familiar, think again. Just because you're a relatively young business with a few-dozen employees doesn't mean you're exempt from the threat of employee litigation.

Your most important challenge: knowing which laws apply to your business. And that depends on your head count. The Equal Employment Opportunity Commission (EEOC) counts all employees, including part-timers and temps, in determining whether a company must comply with the laws that it oversees. Other examples:

- Companies with 15 or more employees must comply with the Americans with Disabilities Act (ADA), the Pregnancy Discrimination Act (PDA) and Title VII of the Civil Rights Act.
- Companies with 20 or more employees must comply with the Consolidated Omnibus Budget Reconciliation Act (COBRA) and the Age Discrimination in Employment Act (ADEA).
- Companies with 50 or more employees must comply with the Family and Medical Leave Act (FMLA).

State or local civil-rights laws add another layer of legal compliance. For example, more than a dozen states have their own anti-bias laws that apply to businesses with at least one employee. These laws may define how you should determine who's an "employee" — and there's no single standard. And if you have federal contracts, you may be exposed to anti-discrimination laws based not on your employee count, but on the value of your contracts.

States may impose a separate set of regulations above and beyond federal rules. Take New Hampshire, where private employers with six or more employees fall under a more expansive state anti-discrimination law, in which employers cannot discriminate based on marital status and sexual orientation. These two protected categories are not included in the federal civil-rights laws, which cover age, race, religion, color, national origin,

gender, pregnancy and disability.

Although an employment attorney can tell you which state and federal laws apply to your business, you can also find out for yourself. The U.S. Department of Labor offers free publications on various federal laws, many of which fall under the Wage and Hour Division. Your state labor office should provide similar information.

An attorney might tell you not to worry about certain employment laws if your company consists of you and one or two others. But compliance requires constant vigilance as your head count grows, especially if you ramp up hiring quickly.

The dreaded 'H&D'

"H&D" is legal shorthand for "harassment and discrimination." Many employment lawyers keep busy defending entrepreneurs and their senior managers against H&D claims.

Why? In the fast-paced environment of growing companies, managers with superb technical skills may suddenly be thrust into people management. They may improvise in their efforts to manage diverse personalities and lack even the most basic supervisory training.

As a result, they may speak or act in ways that offend employees. Their uncouth or inappropriate behavior may not trigger a lawsuit. But workers may file complaints, quit in bunches or threaten to get a lawyer — all warning signs that can lead an entrepreneur to seek legal counsel.

To add to the problem, more employees are suing their bosses for negligent infliction of emotional distress that results from harassment and discrimination. Aside from the legal defense costs that a company incurs, the manager who allegedly acted inappropriately may face personal exposure.

Many business owners find that today's employees or prospective employees are knowledgeable about their civil rights. They're often aware of discriminatory hiring practices or anything that might qualify as workplace harassment. And they may be more likely to file a lawsuit if they're upset at the treatment they receive from their bosses, colleagues or even job interviewers.

Errors in hiring often occur when a small company rushes to fill job openings. It's tempting to skip background checks or calls to references. But the real legal trouble begins when hiring managers ask the wrong questions in job interviews.

Never ask whether a candidate is married, divorced or planning to have children. If the interviewee makes a casual comment that reveals personal information, such as hopes of "having a family one day," don't pry. Stick to a prepared list of job-related questions — and use the same list in every interview so that you don't mix and match questions with different

applicants.

The ADA prevents you from asking, "Do you have any medical problems that might prevent you from performing this job?" Instead, you must give a conditional job offer, and then make it contingent on the candidate's physical ability to perform the job.

Yet there are ways to comply with the ADA and still hire quickly and efficiently. For instance, it's okay to ask all applicants whether they can perform specific job-related duties. Questions such as "Can you lift 50 pounds?" are fine as long as you limit your inquiries to the physical requirements of the job.

Exempt or nonexempt?

Many employers assume that if they pay an employee a salary, that worker becomes exempt from overtime. But the legal reality is far trickier.

Employees are generally exempt if they're paid on a salary basis *and* meet the definition of an exempt person under the federal Fair Labor Standards Act (FLSA). This definition takes into account the worker's job duties. Certain employees in jobs that the FLSA labels as executive, administrative and professional are exempt if they meet specific tests.

But the FLSA is a complex law. It sets the minimum wage and defines both overtime rules along with wage and hour record-keeping procedures. To comply with the FLSA, your managers must track employees' hours worked and understand the difference between an employee and an independent contractor.

Fast-growth businesses tend to gloss over these issues and wind up running afoul of the law. A common example: You assume your supervisors are exempt because you view them as managers. Yet your supervisors don't really supervise full-time. They rotate between exercising managerial duties and performing manual labor or routine office work.

The FLSA entitles nonexempt employees to time-and-a-half of their regular rate for time worked beyond 40 hours a week. You can be liable for unpaid overtime reaching back as far as three years; multiply that by however many employees you mistakenly classified as exempt, and you can face a steep bill.

How do you get caught? In some cases, a terminated employee sees an attorney about filing a wrongful discharge claim. The attorney may figure there's more to gain by filing a suit for overtime violations.

Take these steps to comply with FLSA exemptions requirements:

Match exempt status with job duties. Don't classify workers as exempt just because their title sounds professional or managerial. Titles such as "assistant manager" or "staff supervisor" mean nothing if the individual

primarily does hands-on labor. An exempt worker's title and job description must truly reflect that person's duties.

Track hours. Play it safe and have all entry- and mid-level employees monitor their hours. By collecting time logs from them or having them sign in and out, you'll be able to show a federal auditor that you know the number of hours that even your exempt employees work. But check with a lawyer before you track hours of a salaried exempt employee; this has been used by some courts to show that the person was not actually paid on a salary basis.

Dock pay with care. You must generally pay exempt employees their full salary for any week in which they perform work. That means you cannot dock an exempt employee's salary, even if the worker was late with no good reason. But because of variations in state law, you should check with your state department of labor to determine if any planned deduction is allowable under the law.

Encourage accurate reporting of employees' hours worked. Beware of requiring workers to clock out at a specific time, such as "by 6 p.m." Even if they comply, they may remain at their desks later to complete pending projects or organize their paperwork. If you do not pay nonexempt employees for this additional work, you can violate FLSA rules.

The FLSA also distinguishes between an employee and an independent contractor. In recent years, some employers who misclassified employees as independent contractors have been sued for overtime-pay violations. The plaintiffs have successfully argued that — as employees — they're entitled to earn overtime.

The IRS and the courts apply a series of tests to decide whether individuals qualify as employees. Examples include:

- The degree of supervision and control that the company exerts over workers.
- Who supplies job-related equipment and materials.
- How workers are paid.
- The extent to which workers can sell their services to others.

Misclassifying workers can create a significant tax liability if you don't withhold or pay Social Security taxes on behalf of your employees.

Even if you agree in writing with a particular worker that he or she is an independent contractor, such a "contract" will not necessarily stand up in court if you control the work that's done. Make sure you state in writing that the contractor will control the details of the work. Also stipulate that you'll pay the contractor by the project, not by the hour. Other tips:

- Require the contractor to pay for all tools and supplies needed for the job, all work-related taxes and workers' compensation insurance

- for the contractor's employees.
- Do not limit the contractor's ability to work with other firms by including a noncompetition clause in your contract.
 - Ask your accountant for an opinion letter about the status of your workers.
 - Specify in writing that the contractor does not qualify for any benefits from your company.

Keeping trade secrets

Your intellectual capital largely drives your growth, whether it's proprietary data, inventions or trade secrets. Though you may have employees sign confidentiality agreements to prevent them from blabbing to your competitors, such agreements are often hard to enforce.

Departing employees might decide to abscond with confidential information about your business model, marketing plans or customer database. Once that material falls into a rival's hands, resorting to litigation to punish the offender may not repair the damage.

Prevention works better. Limit the number of workers exposed to proprietary information. For instance, only tell a handful of need-to-know employees the password needed to access computer files that contain customer lists or ingredients for your company's recipes. Discourage printouts of such sensitive documents, and require any hard copies to be locked away rather than kept in plain sight.

Beware of consultants, job applicants or other nonemployees who propose inventions that they think your company should adopt. If your employees are already pursuing a similar idea, outsiders may later claim you stole their idea and sue you for, say, misappropriation of trade secrets. Fast-growth companies are prone to such lawsuits because their surging success can be a magnet for litigation.

Reject all unsolicited ideas from outsiders. Train everyone from your receptionists to customer service reps to refuse mail or phone calls from anyone suggesting that your company launch new products. Draft a form letter that states your company policy is to return to sender all unsolicited proposals.

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About This Item

Category: Legal & Tax Considerations

Subcategory: Laws & Regulations

Keywords: Disability, Diversity, Employee Relations, Laws

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The Edward Lowe Foundation was created by Ed and Darlene Lowe in 1985 to "champion the entrepreneurial spirit." Headquartered near Cassopolis, Michigan, the foundation works with entrepreneur support organizations nationwide to encourage peer learning among second-stage business owners. Before his death in 1995, Ed Lowe, the creator of Kitty Litter, had become an advocate for entrepreneurship as the key to the success of the free-enterprise system.

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