Reducing Risks for Employers
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1. Discrimination Issues

What actions, policies, positions or practices of an employer that you review appear illegal?
You must be aware of the basis for illegal discrimination (protected classes and theories) to help you identify any discriminatory actions, policies and positions of an employer.

A. The Protected Classes: 1-Under Federal Law - Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) codified at 42 US Code Chapter 21: ANY color, race, sex, national origin, religion, age (over 40), disability 2-Under Florida Law – Florida Civil Rights Act of 1992 (FCHR), Florida Statutes, Chap 760 (760.10). – all of the above plus age (at any age under Florida Law) and marital status. 3- Under Local Law - some local governments have specific protection for certain classes not covered by State and Federal Law. For example, the City of Tampa has an ordinance that protects sexual orientation.

B. The discrimination theories which courts recognize that protect individuals: 1-Disparate Treatment – The normal case of being specifically discriminated by the alleged defendant based upon their treatment of the plaintiff. This requires intent to discriminate; 2- Disparate Impact - The condition where an employer's policy, position, or practice, although applied to all employees or job applicants equally, has a disproportionate adverse effect on a protected class that can not be justified under the concept of business necessity. This does not require intent to discriminate, just the facts of a disparate impact; 3- Opposition – where co-employee opposes discrimination towards others; and 4 – Retaliation-for reporting, witnessing or opposing.

Practice Pointer 1: An employer should, by creating their own workplace rules, not only require employees to obey the discrimination laws above but also prohibit actions and behaviors that fall short of being violations of these laws but are still inconsistent with these laws.

Why would an employer prohibit actions that do not amount to a full violation of federal or Florida discrimination laws? Because they can prevent the discriminatory activity that exposes an employer to liability under these laws BEFORE an actual cause of action arises for other employees and thereby limit the subsequent liability. These types of rules tend to prevent the culture or environment to allow the violations to exist.

Practice Pointer 2: Employer can and should require all employees, under threat of discipline, to report violations of law and their policies when they become aware of them. This shows good faith attempt by the employer to find out about and stop any such violations and inhibit an environment that allows them to exist. It also prevents an employee from storing up such violations until they have other reasons for reporting them.

Practice Pointer 3: Employers can and should require all management to take action when notified of a reported discrimination violation. This action would be explained in the policy as investigate, document, and discipline, (when appropriate). No confidential reporting allowed.

C. Application of Principles: Use to avoid illegal harassment: How can an employer use its policies to stop illegal harassment and limit liability? Illegal harassment is a subset of illegal discrimination because the courts have concluded that harassment is a symptom of or an indication of discrimination. Thus,

illegal harassment may be based upon any of the classes protected by law. It is important to distinguish between legal and illegal harassment. Illegal harassment requires that the harassing actions be frequent, severe, and interfere with one's ability to perform work. However, an employer can prohibit forms of harassment that fall short of illegal harassment and avoid the problem before it creates potential liability for the employer.

Example: An employer can limit harassment liability by using the employer's policies to:
-- Prohibit harassment actions that also falls short of illegal harassment (such as a one time racial slur); and
-- Require all employees (both victims and witnesses) to report such prohibited conduct when known or observed. This should limit late filings of law suits by employees who become disgruntled months after an alleged illegal harassment or discrimination occurs as not having brought it to the employer's attention is an admission of failure to follow the policies requirement to report or would be an admission that it was made up to create a complaint after becoming disgruntled; and
-- Require supervisors to take action (investigate, document, discipline) when reported. Don't overlook the requirement on management to follow through which prevents friendship influence.

2. Hiring Issues

What processes and policies are in place to help an employer reduce risks through the hiring process? The question of whether a job applicant has committed actions which amount to a violation of law or increased risk of harm to individuals is very relevant to the employer's risk of liability under theories of negligent hire and negligent retention. The truthful answers to this question must be viewed in light of the job duties.

Practice Point 4: Auditors should review questions on job applications and hiring policies to ensure they are properly worded to get correct info and avoid employer liability:

-- The law prevents employers from considering mere arrests when considering an applicant. Thus, do not ask for that information as the EEOC will likely conclude that the effect of considering such information is Disparate Impact discrimination (has a more than proportional adverse effect on minorities, even when applied equally to all job applicants) such as that which was found by the US Supreme Court in the Griggs v. Duke Power, 421 US 424 (1971).

-- The law prevents any absolute bar from employment based upon prior conviction unless the prior conviction is at a certain level felony and misdemeanor and directly related to job duties. See Florida Statutes Section 112.011.

Practice Pointer 5: The law does not prevent the employer asking if a job applicant has participated in actions that were violations of law or which increased risk of harm to others even when these actions have not resulted in criminal convictions or civil judgments. Even if the applicant is untruthful in response to this inquiry it will:

-- put the job applicant on notice that this kind of information is important to the employer and if they are a law violator or a negligent acting person, the employer is predisposed to not want to hire them, and

-- provide the basis for termination if the employer later finds out that the employee applicant factually did perform such actions but lied about it in their initial application or job interview.

-- create a record of the fact that the employer is asking these questions which can be shown to a jury to better defend a lawsuit for negligent hire or retention.

B) Auditors should review job application processes to determine what steps the employer takes to background check job applicants:

-- Some jobs such as those dealing with children or elderly require certain background checks by statute (see FS 110.1127 Employee security checks and FS Chapter 435 Employment screening).

-- Florida Statutes Section 768.096 provides for a statutory presumptions in favor of employers against negligent hiring if certain levels of background checks are done by the employer.

C) Auditors should review job descriptions of the employer to determine if job descriptions:

-- have been broken down to "essential job functions" and "marginal job functions?" This is important for American with Disability Act purposes because when an employee claims not to be able to perform a job function due to a disability, if it is already marked as an essential job function, there is no chance that the employee can claim it was so designated in retaliation for this employee identifying this function as the one they can not perform.

-- have been scrutinized to ensure that all job qualifications are "job related" and not considered to be a discriminatory barrier to employment. What is the scientific or factual basis to show that these "job related" requirements are in fact predictive of having a better performing worker in this position?

Practice Pointer 6: The law does not require the employer to give an applicant's or employee's requested accommodation, just that they participate in an interactive process with the requester and offer a reasonable accommodation that enables them to perform the essential functions of their job and not impose an undue hardship on the employer.

D) Auditors should review employer's procedures to determine if the employer has a reasonable accommodation process and policy to reduce liability under the Americans with Disability Act law. Does this reasonable accommodation process provide for the proper analysis of requests for accommodation from both applicants and employees? Does it have provision for the monitoring of the accommodation to ensure that it is and remains effective to eliminate any discriminatory barrier or enable the disabled applicant or employee to perform the essential functions of their job?

3. Termination Issues

First step for an auditor would to be to make sure you are dealing with "employees" as opposed to "independent contractors." Understand the distinction between the two and the implications for the employer to mischaracterize the differences. There are many reasons why employer and employees allow their real relationship to continue to be mischaracterized. However, the IRS can and will recharacterize the relationship if improperly labeled and they will use their 20 points to make the determination which will look at who controls performance, who supplies tools and work scheduling, whether the worker has a monetary risk at stake in the performance or project, whether the worker performs for other people or companies, etc.

Practice Pointer 7: The auditor should help an employer realize that the law will penalize an employer who has mischaracterized the real nature of the employment relationship. If an independent contractor is really an employee that worker may have a claim against the employer for past wages and benefits and thereby expose that employer to much more liability for this worker than previously thought including a tax liability which the employer thought they were passing on to the independent contract as well as FLSA Overtime liability. The IRS will make a determination as to the true relationship of the worker

using its common law 20 points, see http://ohioline.osu.edu/cd-fact/1179.html . See also, Vizcaino v Microsoft, 871 F.2d 1037 (9th Cir 1989) where Microsoft was held liable for computer workers who were wrongfully called independent contractors. Responsibility to account for a discrimination complaint before the EEOC and under Title VII will generate an analysis to see who has employer liability.

Once you are satisfied you are dealing with employees, you should ask, "What are some issues that auditors should look for in the termination procedures of an employer?"

A. The employer's policies and practices should make clear which employees are "at will" and which require "just cause" to be terminated? In Florida, employees are assumed to be "at will" and subject to termination at any time for any reason that is not an illegal reason (such as for illegal discrimination reasons). Employees change from "at will" to protected by a "just cause" requirement for termination usually by 1) contract, 2) collective bargaining agreements (which almost always contain a just cause firing requirement) and 3) statutory protection (such as a local or state law that protects a civil service employee). An employer may extend just cause protection to employees thought to be "at will" by actions inconsistent with this concept such as putting into employer's handbooks information to suggest that the worker is not "at will."

B. What are the employer's termination procedures? Does the employer have to follow some form of agreed upon procedure that is set forth in a collective bargaining agreement or a contract or a state or local civil service law? Are these procedures being followed and understood by the workforce?

C. In the absence of express termination procedures (see B above) an employer must consider whether there are any due process requirements for a pre-termination or pre-suspension hearing. Even when the law may not require such hearings, one must consider whether it makes sense to give an employee an opportunity to show management they are making a mistake by disciplining the employee and thereby avoid subsequent litigation costs and loses. Also, there may be a requirement for a "name clearing hearing." This requirement arises when there is a "presence of stigmatizing information" in a personnel file as part of a termination on the public record and so could be obtained by prospective employers, even though it had not been disseminated to any particular employer, *Buxton v. City of Plant City*, 871 F.2d 1037, 1045-46 (11th Cir. 1989). The Burton court found stigmatizing allegations that police officer Burton assaulted a person he was arresting was placed in both his personnel file and the public record. Thus, the court found constitutes sufficient publication to implicate the liberty interest under the due process clause of the fourteenth amendment to the US Constitution and the Florida Records Act (FS § 119.07) since it requires the public record to be inspected by any member of the public requesting to do so. The district court in Burton found that the truth of Plant City's allegations were in material dispute; the allegations were stigmatizing and likely to tarnish Buxton's "good name, reputation, honor, or integrity"; the allegations would likely foreclose Buxton's future employment opportunities; the allegations attended his discharge; and Buxton was not given a post-stigmatization opportunity to clear his name.

Practice Pointer 8: The law often requires a name clearing hearing but even if it does not, it makes sense for an employer or a custodian of the record to give the person who is being stigmatized by the information a simple opportunity to input their side into the record. Even under the federal Freedom of Information and Privacy Acts, there are provisions for attempts to clarify or rectify the formal record. This goes a long way to reduce liability for the organization which can not always arbitrate a good outcome when the facts are diametrically opposed.

4. **Pay and Fair Labor Standards Act (FLSA) Issues**

What are some areas that auditors should check when reviewing an organizations pay and compensation procedures?

A. Is the distinction between salaried (exempt from FLSA overtime) and hourly (subject to FLSA overtime when working over 40 hours per work week) accurate and clear to all?

B. Does the employer "suffer or permit" hourly employees to work more than 40 hours per work week without paying overtime? "Suffers or permits" means that the employee is doing anything that benefits the employer; in some circumstances, even if the employee is just present, but not actively doing anything, the employer has "suffered or permitted" the employee to work.

Practice Pointer 9: The auditor should check "suffer or permit" situations such as if hourly employees are using their company email to check work from home before or after normal work hours or coming in early to make coffee, etc. Has the organization issued a "suffer and permit" letter (see Pat Bean Letter of February 17, 2005) forcing employees to get written approval to work any overtime or be disciplined and requiring all employees to tell us then of any outstanding overtime claims. Auditors should be aware that FLSA litigation is growing and private attorneys are aggressively seeking cases which are easy to claim and include attorney fees.

C. Furlough Issues and Rules unique for Public Employers. Furloughs cause problems with the pay cuts for salaried employees not hourly employees. Private employers normally only furlough salaried employees for full workweeks because of the FLSA, whereas there is a special exception for public-sector employers located at 29 C.F.R. 541.710(b), which states, "deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced." This means that salaried public employees must be treated as hourly employees in any week they are subject to a furlough.

Practice Pointer 10: The auditor can suggest that a letter such as the one we developed for our exempt employees and their supervisor (see Memo from Renee Lee to Exempt Employees of Oct 2009) be used to ensure that Furlough rules are understood and enforced correctly.

D. Is the employer properly controlling absences of salaried employees and deducting FMLA absences when granted salaried employees pay?

Practice Pointer 11: Auditors should be aware and willing to have a discussion with managers about how to handle an exempt employee who appears to be taking time away from work by instructing the supervisor that they control all time away from work for an exempt employee by granting or denying absences except for FMLA leave which is deductible hour by hour from a salaried employee's pay under 29 CFR 825.206 (c).

Practice Pointer 12: Auditors should help employers to adopt a general understanding how FMLA works and the need for an employer to initiate FMLA notice 29 CFR 825.300 and counting FMLA hours by using preliminary designation of FMLA leave 29 CFR 825.301. Also, auditors should check to make sure employers are making the logical written policy choice open to employers to require employees to be forced to use all paid leave in conjunction with any FMLA leave by written employer policy 29 CFR 825.207 and employers should choose the rolling 12 month looking back period to count the 12 weeks FMLA leave entitlement pursuant to 29 CFR 825.200(b)(4) as the most common sense choices for employers.

E. How does the employer reimburse employees who drive employer's vehicles and where are they being parked? This provides for a series of FLSA problems and claims associated with the driving and parking of employer's vehicles by hourly employees. An employer should presume that if an hourly employee is not being paid whenever they drive an employer's vehicle they need a specific authorization such as the Employee Commuting Flexibility Act of 1996, which is an amendment to Section 4(a) of the Portal-to-Portal Act of 1947 (29 U.S.C. 254(a)) adding the following: "for purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting areas for the employer's business or establishment of the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee."

Practice Pointer 13: Auditors should check the pay practices applicable to all drivers of employer's vehicles paying attention to parking status to determine the extent of possible liability for FLSA claims related to driving and parking of employer's vehicles.

5. Investigation Issues

A. What policies and procedures are used by the employer to investigate claims of wrongdoing, fraud, whistleblower claims, misconduct, discrimination, harassment, retaliation, etc.?

An organization is at risk for not having an adequate investigative vehicle to promptly and objectively investigate allegations of various types for the employer. An auditor should know the general state of an employer's investigative resources and determine if they are such that it exposes the employer to liability. The failure to properly investigate prevents an employer from taking necessary and proper action required by law. If the investigative resources does not give the employer a fair and objective view of the status of any claims or allegations, the employer may be making their situation worse by compounding matters brought the employer's attention. Auditors should know the employer's position on anonymous allegations and I believe they should be investigated at least to the extent that they can be with the information given in the anonymous complaint to assure the public that the employer is doing all it can to prevent wrongdoing, fraud, harassment, etc. Inquiries by an investigator into the areas open by an anonymous complaint are appropriate to put such allegations to rest and to make certain that employees who are afraid have a vehicle to inform management of problems that need to be addressed. Good organization management might include an Inspector General function for those that can afford such independent review and investigation arm.

B. What is the proper distribution of investigation function between an employer's professional investigator and the employer's managers? Normally, the complexity of the allegations and the technical expertise to perform such investigations will impact on the answer to this issue.

Practice Pointer 14: Be aware of the problem with any investigation conditions set forth by the employer such as Garrity warnings which are derived under the case of Garrity v. New Jersey, 385 U.S. 493 (1967),