Avoiding Employment Litigation

By ARTHUR F. SILBERGELD

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tten end up defending companies in employment litigation in federal, state bench or jury trials because they have inadvertently failed to comply with provisions found in the California Labor or Government codes. Plaintiffs’ attorneys, hunting for clients and claims, feed on such employer oversights and seek huge sums in attorneys’ fees, back pay, and other damages, filing costly individual and class actions and claims under California’s Private Attorneys General Act. Here are some guidelines which an employer must follow (or cannot or should not do) that may help protect it from costly lawsuits:

• When hiring any new employee, an employer must provide written notice of the rate and basis of pay, the regular payday, the location and phone number of the employer’s office, the paid sick leave policy, and the name of its workers’ compensation carrier, and notify employees if this information changes.

• Do not, in a background check, obtain consumer credit reports on applicants or employees for most non-managerial jobs, except those with access to confidential information or signatory authority on bank accounts.

• Do not ask an applicant or employee for a user ID or password in order to access personal social media (Facebook, Yik-Yak, etc.) or discipline or fire an individual who refuses to give that information.

• Do not ask an applicant about family planning.

• Have employees sign at-will agreements, agreements to arbitrate disputes, and class action waivers.

• Unless scheduled to work under six hours, allow employees a 30-minute (unpaid) meal period starting by the end of the fifth hour of work and a second after 10 hours. Always document time out for meals.

• Provide employees a 10-minute paid rest break for every 3.5 hours of work and distribute a written policy on this issue.

• Pay overtime to non-exempt employees, even those on a fixed weekly or monthly salary. Do not treat salaried employees as exempt from overtime just because they get a salary.

• Be certain that exempt employees consistently do exempt work more than 50% of their working time. Pay exempt employees minimum California monthly salary, higher than the federal standard.

• Pay out of state employees who come into California to work, even briefly, at the daily, weekly and double overtime wage rates.

• Pay statements accompanying paychecks must be accurate, listing all information for the pay period and year-to-date required by the Labor Code. Hundreds of class action complaints alleging non-compliance are pending.

• Have written agreements with commission-based employees.

• In most cases, pay employees who spend substantial time before and after work stocking shelves or putting on and taking off uniforms and safety gear. Nordstrom settled litigation for $7.650 million after not paying commissioned employees who worked before and after stores opened.

• On the day of termination, pay final wages, including accrued and unused vacation pay or, if the employee quits without giving 72 hours’ notice, within 72 hours.

• Do not offset an employee’s debt (loans, advances) from a final paycheck without written authorization.

• Have written rules of conduct. Apply them consistently.

• Provide honest performance evaluations.

• Document the reasons for every employment separation.

• Keep pay records for three years and, if asked, give an employee a copy of his/her pay records within 21 days.

• If employing five or more, allow an employee from day one to take a pregnancy disability leave of up to 17.33 weeks and continue group health during that period.

• Do not retaliate against an eligible male or female employee who takes family or medical leave or is absent for other reasons allowed by the Labor or Government codes.

• Hold a job open for most employees on leave and do not decide to fire the employee because the temp performs better.

• Allow employees an unpaid leave for jury duty, to testify on issues of domestic violence, sexual assault, and stalking, and up to 40 hours a year to attend children’s school activities.

• Comply with federal non-discrimination standards (race, color, gender, national origin, religion, age) and also with California laws prohibiting sexual orientation, marital status, and gender identity and expression discrimination.

• Prohibit sexual harassment in writing. Take any claim of harassment seriously, investigate and, if valid, correct it and, if employing 50 or more, train all supervisors on issues of harassment, discrimination, retaliation, and bullying for two hours every two years. Too often, employee complaints are not taken seriously, “whiners” are fired, and expensive litigation and potential damage to goodwill follow.

• Prohibit employees from using the company’s communications system to view or send communications with pornographic or harassing content and monitor e-mails and filter out offensive content.

• Affirmatively engage in an interactive process with individuals who have or are believed to have a disability to determine reasonable accommodations that might enable the individual to perform the essential functions of a job. Complaints of disability discrimination have sharply increased.

• Provide a reasonable accommodation to a lactating mother, including space (other than a restroom) for privacy to express breast milk.

• Do not deny employees who have access to the company’s electronic e-mail the right to use the e-mail to communicate with co-workers about wages, hours and other terms and conditions of employment and union organizing activity.

• Begin paid leave compliance and accrual starting July 1, 2015.

Arthur F. Silbergeld, an employment and labor partner with Norton Rose Fulbright, is the author of Doing Business in California: An Employment Law Handbook (3rd ed.) from which these guidelines are taken. For more information, contact (213) 892-9235 or arthur.silbergeld@nortonrosefulbright.com

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Six Critical Components of a Corporate Immigration Policy

By MICHAEL BOSHNAICK and MITCH WEXLER

Establishing and following an immigration policy is essential for the enforcement and administration of a company’s immigration program. All size companies can greatly benefit from having a well-defined immigration policy; some companies prefer to call it a Guideline, recognizing the need for flexibility. An immigration policy can help a company contain costs, treat employees consistently, set employee expectations, and wisely use immigration sponsorship as a tool to attract and retain top talent. Some companies might have a one or two page policy while others might need a substantially longer document containing flowcharts, definitions of terms, I-9 procedures, etc.

Who owns the immigration function?

First, consider who “owns” the immigration function. Immigration might be handled by Recruiting, Staffing, Global Mobility, the general HR Department, or the Legal Department. If the company has multiple work sites, determine how local immigration-related activities, such as worksite postings, are carried out and by whom. Determine how the various immigration functions are delegated to and from, for example, initiating immigration matters or managing job market tests for permanent residence processing.

Who is authorized to sign immigration documents?

Be aware that the company’s representative signs under penalty of perjury. The signer must have knowledge that the representations made to the government are true and correct. Typically, it’s preferable to have this function centralized, so that the company can ensure consistency and adherence to the corporate immigration policy. In the event the principal signer for a long document is unavailable, have a backup in place.

Who qualifies for immigration sponsorship?

Consider who qualifies for immigration sponsorship. This might include certain levels of employees or certain job functions, or another category, depending on how the company is organized. Consider also who qualifies for permanent residence sponsorship. In sponsoring employees for permanent residence, the employer must establish specific criteria that must be satisfied before a case can be initiated. Typically, these include lengths of service with the company and performance rating, but may also include other relevant aspects of the individual’s employment. In some cases, an employee may legally be eligible for sponsorship under multiple permanent residence categories. Some companies pursue multiple permanent residence strategies simultaneously, while others will pursue only one at a time. It can be useful to benchmark within the industry or geographic area, or both, to determine how to stay competitive in the market. If the competitors in your industry and region are initiating permanent residence once an employee has three months’ experience with the company, you may lose or fail to attract talent if you require one year of service.

Who pays for what?

Most large companies will pay the fees and costs associated with immigration sponsorship, some of which can add up to several thousand dollars. However, certain costs may still be the employee’s responsibility. Other immigration-related expenses include: medical exams, immunizations, photographs; travel costs for employees and their families; and a $50 non-refundable application fee at a US consulate abroad. Decide if the company will cover such costs only for business-related travel or for certain levels of employees. Likewise, will the company pay for premium processing service only if it’s needed for business reasons or as part of a legal strategy? Will employees be permitted to pay for it on their own?

Immigration Attorney

In U.S. immigration case processing, the employer is the petitioner, and the immigration attorney represents the employer, even if representing the sponsor.

It can be useful to benchmark within the industry or geographic area, or both, to determine how to stay competitive in the market. If the competitors in your industry and region are initiating permanent residence once an employee has three months’ experience with the company, you may lose or fail to attract talent if you require one year of service.

Becoming a Great Boss for Your Company

Be inclusive. With a smaller operation, it’s possible to share the every day tasks like an equal and involved part of the team. A good employer is certain to treat each employee fairly, not only in terms of salary and other forms of compensation, but also in how that employee is involved in the daily function of the business. Encourage feedback, innovation and creativity so employees feel genuinely engaged. No boss can create an environment of integrity, trust and respect to make absolutely certain that every employee is truly treated fairly regardless of the differences they may have. It’s essential to be inclusive, because that keeps everyone on the same page, and that comes to the business’s long-term goals.

Mission, not just money.

A business operates out of sheer altruism, but that’s not to say that turning a profit is the primary philosophical and practical focus. Rather, an effective boss establishes a genuine business mission. How that takes shape depends both on the business and on the environment. For instance, the boss might want to set for. For instance, a restaurant owner may push speedy lunchtime service as a way of serving the time-strapped business community. By contrast, a medical supply outlet might emphasize how its products improve customers’ health. Not only can a clear mission serve to motivate employees, it can also influence a sense of importance in their jobs.

Nothing to fear but fear itself.

Many of us are bad at looking at things we are afraid of. Regardless of how comfortable or at home with a guillotine next to their desk calendars. Make one mistake on the job and feel free to make another one right in the blade. Conversely, an effective boss encourages his or her employees not to be shy about an occasional snafu along the road toward better job performance.

Don’t just lead — coach.

It’s common to hear a sports reporter observe that one coach out-coached another in a particular game. The same dynamic holds true for your business, in which you view your position both as a leader and a coach. A good coach must first lead by example. For instance, while you should point out mistakes by your employees, be sure to admit when you yourself make a mistake.

It’s their careers, too.

Don’t forget that the people who work for you are looking to you to help them navigate and advance their careers. As I said, it’s not all about you. But it is all about making your employees see how to improve and create meaningful careers for themselves. If an employee has a goal of becoming a manager or running his or her own business someday, nurture that goal. Tell them the traits they need to work on to achieve their ultimate plans.

Made, not necessarily born. One final aspect of being a good boss is recognizing that much of what goes into being an effective leader is, in fact, learned behavior. Of course, there always have been and will be bosses who seem to have a flawless touch in leading and motivating their team. Unfortunately, there are just as many top-flight bosses who got that way by attending management classes and seminars. An effective leader and, just as important, understanding that a good employer naturally attracts first-rate employees.

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Art Silbergeld
555 South Flower St., 41st Floor
Los Angeles, California 90071
+1 213 892 9200
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Never Stop Learning

To be competitive, working professionals need to continue their education in the pursuit of professional credentials and new skills.

The days of tying a career to a hard-earned undergraduate degree may be numbered. Professionals who envisioned themselves safe in their jobs at beginning of the 21st century were thrust into the job market thanks to the 2008 recession. Workers were forced to reassess their skill sets while employers reexamined what talents they needed from their employees.

The economic downturn has led waves of professionals back to the classroom, but not always in pursuit of traditional degrees. Many are seeking credentials reflective of the market's most sought-after skills.

"Showing up on time and sitting at a desk from 9 a.m. to 5 p.m. is no longer enough to guarantee employment, much less advancement," said Wayne Smutz, Dean of Continuing Education and UCLA Extension. "Today's global economy requires individuals to be critical thinkers with the latest knowledge and insights to advance their company's objectives and their own career goals.

While a bachelor's degree was once a guarantee of employment, hiring directors are viewing it as a proxy for higher-level skills according to a September 2014 report from the labor market analytics firm Burning Glass Technologies.

"The degree is only the first step," Smutz said. "Information is flying at us at an ever-accelerated pace. Technology is constantly reinventing how we do business with new fields emerging that didn't exist a few years ago. Workers need to be lifelong learners, willing to take the time to learn sought-after skills such as data-driven problem-solving, collaboration with global counterparts and the ability to adapt quickly to constant change."

According to recent employer surveys, workers need to have the following 10 skills to succeed in today's rapidly evolving work environment:

- Critical thinking and analysis
- Ability to communicate clearly (verbally and in writing) and solve complex problems
- Capacity for continuous learning
- Ethical judgment and integrity
- Intercultural skills
- Knowledge applied in a real-world setting (portfolio)
- Collaborative problem-solving
- Adaptability
- Managing multiple priorities
- Decision-making

Think you can wiggle around the need for these soft skills by going into a tech-heavy field? Think again. "The most sought-after skill-sets for recruiters are becoming less and less about proficiency in specific processes and coding languages and more about how you think systems through and work within the context of the team," writes Forbes.com's Meghan Casserly, quoting Rich Milgram, CEO of career network Beyond. "Learning a technology is the easy part. Having the mindset to apply it, having the mindset and logic to process it, being thorough and detail-oriented while doing so, these are the critical skills."

UCLA Extension strategic marketing instructor Robert Liljenwall advises working learners to make the most of classroom or online learning opportunities to develop key capabilities. "Polish your writing skills, learn how to think critically, be a good team player."

For the last several years, UCLA Extension has seen an influx of students at all stages of their professional lives coming back to the classroom seeking credentials. By the end of June 2014, more than 8,000 students were active in 169 UCLA Extension certificate programs, including 36 of which were offered and hosted by Extension for UCLA's professional schools. More than 2,000 certificates were conferred.

"While UCLA Extension includes undergraduate credits and a faculty of knowledge applied in a real-world setting (portfolio) and detail-oriented while doing so, these are the critical skills."

"In many ways, Fernando represents the spirit of innovation and transformation we empower," Smutz said of the two-time Instructor of the Year. "All of our students are here because of a desire for something better. Our job is to facilitate their success by responding to their needs, engaging them in the classroom, and showing them how the continual pursuit of knowledge can be of great value professionally and personally while still being affordable. Never stop learning."

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Employers Should Prepare Now for Sick Leave Changes

BY CYNTHIA GERMANO

One of the most talked about new laws of 2015 has many aspects that do not go into effect until July 1; however, employers should be preparing now by reviewing current policies, preparing new ones — as needed — and advising employees.

AB 1552, the “Healthy Workplaces, Healthy Families Act,” creates paid sick leave for both private and public employees, including full-time, part-time, temporary, per diem, migrant and seasonal employees. Small businesses are not exempt, with the exception of providers of publicly funded in-home support services. Employees covered by collective bargaining agreements with specified provisions are also exempt.

Under the new law, employers are required to provide paid sick leave for employees who work 30 or more days within one year of employment. Leave is accrued at the rate of one hour per 30 hours worked, with employees using up to three days a year, beginning on the 90th day worked. For exempt employees, assume one hour per 40 hours — unless an employee’s regular schedule is less hours per week. Companies that have adopted the growing trend of unlimited time off must still separately track sick leave accrual and use. Paid sick leave accrues beginning on July 1.

Employees are entitled to carry over sick leave, accruing up to six days. Unlike vacation time, upon separation of employment, there is no pay out to the departing employee.

Sick leave can be applied to a broad range of situations, including the illness of a child, parent, parent-in-law, spouse, domestic partner, grandparent, grandchild or sibling. Treatment, preventive care and diagnosis occurrences are also covered under the law, and it extends paid sick leave to victims of domestic violence who are seeking care and treatment. Employers that already have PTO or paid leave policies must offer, at a minimum, the same terms and conditions called for under the law. Your policy must be at least as beneficial to your employees by covering the same people, allowing for the same usage and carry over, and at least as generous of an accrual rate. If not, you will need to revise your existing policies or create new ones.

Employers are required to give notice to employees about the new law and their rights to use paid sick leave, starting Jan. 1. Employers are required to provide “Notice to Employee” that includes paid sick leave information. The Division of Labor Standards Enforcement has produced a new poster that must be posted in a conspicuous place. Employees must also receive a notice regarding how much paid sick leave they have accrued on their paycheck, or some other form that accompanies their paycheck.

Cynthia Germano is a Partner with Best Best & Krieger LLP, a law firm with nearly 200 attorneys in nine offices, including Los Angeles, that represents both public and private clients in a broad range of matters, including labor & employment issues.