HR Compliance Overview: The Employee Life Cycle and Upcoming Legislation

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Areas of Discussion

- The Hiring Process
- Disabilities and Leaves of Absence
- Discipline and Termination
- New and Pending Legislation
The Hiring Process

- Creating the job ad
  - Avoid discriminatory language

- Reviewing resumes
  - Compare qualifications to KSA’s in Job Description

- Interview questions
  - Legal vs. illegal questions
  - Use job description to determine accommodations
  - Criminal history, salary history

- Pre-employment screening
  - Criminal background checks
Criminal Background Checks

NJ “Ban-the-box” law

• Prohibits NJ employers from inquiring about criminal history during the initial employment application process
  – Inquiry = oral or written
  – Initial application process = up through the first interview
  – Interview = live direct contact (phone, in person, video conference)
  – Voluntary disclosure from applicant allows early inquiry into further details
Criminal Background Checks

- Allowed to use criminal history after initial application process to determine suitability for employment
  - Exceptions: arrest records, expungements
  - No blanket rules on what is disqualifying
    - Be cautious of disparate impact
    - Determine how conviction ties to suitability for the job
    - Allow candidate chance to explain

- FCRA Compliance
  - Ensure all screened applicants complete FCRA compliant authorization form
  - Use of pre-adverse action and adverse action letters
  - Opportunity for Class Action lawsuit
Screening applicants through Social Media

- Slippery slope
  - May see something you can’t unsee
  - Best practice: have a neutral person conduct the search that is not involved in the hiring decision
Accommodating Employee Disabilities

Americans with Disabilities Act (ADA)
• Disability is defined as any limitation to a daily life activity (actual or perceived)
• ADA = Assume Disability Always

Interactive Process
• Must engage in interactive dialogue for compliance, regardless of outcome
• Document all efforts
• Check resources for accommodation ideas (jan.org)

Problem: Denying Accommodation due to...
• “We’ve never done it that way”
• “Then all employees will want it”
• “It will cost too much”
Leaves of Absence

Types of Leave:
- FMLA
- NJ Family Leave Act
- ADA
- Workers Comp
- NJ Short Term Disability*
- NJ Family Leave Insurance*

How do these all interact or overlap?

*only provides wage benefits – no job protection
Leaves of Absence

Common Issues

- Inflexible/absolute leave policies
- Not offering early leave or extended leave as accommodation
- Not considering ADA when other leaves do not apply
- Failure to document properly
- Over-documentation
Progressive Discipline

Progressive Discipline

• Formal process that provides employees an opportunity to improve performance

Counseling vs. Discipline?

• Counseling = may be a reminder of policy/expectation or retraining before formal discipline ("coaching")
• Discipline = formal discipline documented for personnel file (verbal, written, suspension)
Progressive Discipline

Best Practices

• Be fair and consistent
• Watch out for policy vs. practice
• Don’t wait to document
• Use objective language in counseling records (avoid subjective comments and don’t make assumptions)
• Review the issue with the employee
• Provide employee opportunity for their version
• Obtain employee signature
Termination

Common but bad reasons to terminate…

• At-will employment
• Probationary/Introductory period
• Not a good fit
• Going in a different direction

How to defend a termination decision:

• Concrete, specific, provable business reasons why you made the decision
• Documentation
• Comparables
New Legislation (NJ)

Diane B. Allen Equal Pay Act

• Effective July 1, 2018
• Prohibits discrimination in compensation on the basis of any protected class if performing substantially similar work
• Amends the Law Against Discrimination (LAD)

Key Language

• Compensation includes all forms or remuneration:
  - Commission - Car and gas allowance
  - Bonus - Retirement Plans
  - Profit Sharing - Insurance
  - Deferred Compensation - Expense Accounts
  - Paid Time Off - Other Benefits
New Legislation (NJ)

- **Protected Classes** include all categories protected under the LAD:
  - Race
  - Creed
  - Color
  - National Origin
  - Nationality
  - Ancestry
  - Age
  - Marital Status
  - Civil Union Status
  - Domestic Partnership Status
  - Affectional or Sexual Orientation
  - Genetic Information
  - Pregnancy
  - Sex
  - Gender Identity or Expression
  - Disability or Atypical Hereditary cellular or blood trait of any individual
  - Liability for Service in the Armed Forces
New Legislation (NJ)

Equal Pay Act (cont’d)

• **Substantially similar work** means the level of skill, effort and responsibility used on the job
  - not limited to job titles or job descriptions
  - must compare employees across all locations, not just a specific geographic area

Lawful Exceptions for Pay Disparities

• Seniority System
• Merit System
• Bona fide factor
  – Training, experience, education related to the job
  – Quantity or quality of production
New Legislation (NJ)

Equal Pay Act (cont’d)

Problem Areas:
• Cannot use salary history to justify pay disparity
• Cannot prohibit employees from discussing salary

Expanded Damages for Non-Compliance:
• Statute of limitations – changed from 2 years to now 6 years
• Treble damages (three times the pay differential)
• New claim of discrimination with each time an employee is paid or provided benefits
New Legislation (NJ)

Equal Pay Act (cont’d)

Getting Ready for July 1\textsuperscript{st}:

- Remove salary history from employment application (salary expectations are ok)
- Revise policies to ensure discussion of pay is not prohibited
- Create pay ranges and ensure only those trained are determining starting pay and pay increases
- Conduct an internal pay audit and correct inequities
New Legislation (NJ)

NJ Paid Sick Leave

• Effective October 29, 2018

• Requires all private employers that do business in NJ to provide 40 hours of paid sick leave per year
  - Accrued at 1 hour for every 30 hours worked
  - Can opt to front-load an allotment of 40 hours at the beginning of the benefit year
  - Can keep existing time off policies as long as the provisions are as favorable as the new law
  - Must allow carryover but do not need to permit over 40 hours at any time
  - No payout upon termination required

• Excluded employees
  – Per diem healthcare workers, construction workers covered under CBA, public employees already provided with sick leave benefits
New Legislation (NJ)

NJ Paid Sick Leave (cont’d)

Law dictates reasons for leave

• Diagnosis, care, treatment, or recovery for the employee’s own mental or physical condition (inclusive of preventive care);
• Diagnosis, care, treatment, or recovery for a family member’s mental or physical condition (including preventive care);
• Time needed as a result of an employee’s or family member’s status as a victim of domestic or sexual violence (including counseling, legal services, or participation in any civil or criminal proceedings related to same);
• Time when the workplace, school, or childcare is closed by order of a public official due to a public health concern; and
• Time to attend a school-related conference or meeting
New Legislation (NJ)

NJ Paid Sick Leave (cont’d)

Family member defined as…

“any individual whose close association with the employee is the equivalent of a family relationship”
New & Pending Legislation (NJ)

Human Trafficking Training

• Required for healthcare providers, schools, hotels/motels, taxi/limo drivers, emergency personnel, airline/airport workers, etc.
• Training required for existing employees and new employees within 6 months of hire

Upcoming/Pending:

• Legalization of marijuana
• Salary history ban
Questions?