

The Top Ten Things You Can Do To Prevent Employment Claims

By Karen Sutherland

Karen Sutherland is the Chair of Ogden Murphy Wallace, P.L.L.C.'s Employment Law Practice Group. She represents employers on workplace issues. Her employment law experience includes (among other things) investigating harassment and discrimination claims, sexual harassment training, employee handbooks, defending cities, counties and private employers regarding state and federal sex, age and disability discrimination law, breach of employment contract claims, Trade Secrets Act claims, tortious interference and defamation. Ms. Sutherland is licensed to practice law in Washington State only. This article is based on Washington State and Federal law.

Legal Background

Employment law has become increasingly complex over the last decade. Unfortunately, due to the competing needs of running an organization, many employers only think about legal issues relating to employment when a problem arises. Admittedly, there are not enough hours on the day to tackle every possible area of liability exposure. However, there are some key areas where a little proactive planning can pay off in the long run. This article focuses on several of those areas. Whether they are the top areas of “preventive medicine” for your workplace, depends on what your issues are. For a more complete analysis of your needs, schedule a “check up” with an employment lawyer to evaluate and prioritize the issues your organization may face.

Practical Guidelines

1. Review and revise your employee manual. Manuals become outdated quickly, both because the laws change or because your workplace needs or practices change. An employment lawyer should review your revisions to be sure they are consistent with current law.
2. Conduct sexual harassment and discrimination training. Having a policy against discrimination and harassment (which should be described in your manual) and conducting training to explain the policy and to encourage early reporting can be used as a defense should you ever face a hostile work environment claim. Live training sessions that are customized for your policy and your workplace work best because they give people an opportunity to ask questions of the trainer and to actively participate as a group in the training session. Live training is available through Karen Sutherland of Ogden Murphy Wallace and from other human resources professionals or attorneys.
3. Conduct an audit of your compensation practices for employees you treat as exempt from overtime. Misclassification of employees, engaging in practices that dock exempt employees' pay or that pay them extra for extra work, and failure to keep accurate records are probably the most common mistakes. Making sure that your classifications are accurate is especially important if you are downsizing and have combined the job responsibilities of two positions into one position because adding too many duties such as typing and filing, data entry, sales, or customer service to an exempt position will change it into a nonexempt position that requires you to pay overtime. An employment lawyer should review your procedures to be sure they are consistent with current law.

4. Develop a procedure for dealing with employees who have a disabling physical or mental condition, a serious medical condition, or a family member with a serious medical condition. If you are covered by the Family Medical Leave Act, remember to notify employees that they are on FMLA leave as soon as they are eligible. Use the government's forms for obtaining medical provider information about the serious medical condition, and for notifying the employee that he or she is on FMLA leave. Develop procedures for determining if employees or applicants are "disabled" under the state and/or federal law. For disabled employees, develop procedures for evaluating possible accommodations and for determining if the accommodations are reasonable.
5. Never underestimate the importance of documentation. Here are some examples:
 - Keep accurate records of nonexempt employees' wages and hours;
 - Document employee performance issues;
 - Document employee discipline;
 - Document that employees have read and understand your manual;
 - Document that employees have received sexual harassment and discrimination training;
 - Document harassment and discrimination complaints and investigations; and
 - Document efforts that you make to accommodate employees with disabilities.
6. Train your supervisors and managers on how to document employee performance issues and employee discipline.
7. Plan ahead for what you are going to say when you terminate an employee. If you "wing it," you increase the possibility of sending an inconsistent message or making a statement that could be used against you in a discrimination, harassment or wrongful termination suit.
8. Before you act on an employment issue, check to see if your manual or other documents address the issue and then follow their guidance. This is especially important if you have a collective bargaining agreement, Civil Service rules, or an employment contract with the employee.
9. Review the state guidelines on acceptable and unacceptable interview questions before interviewing job applicants.
10. If there is something about a job applicant's past that sets off alarm bells, do not hire the applicant without conducting a thorough review and satisfying yourself that the employee will be a good fit for your organization. The candidate who is described as a "rugged individualist" or "control freak," for example, may not meet your needs for working with a team. Worse, that applicant who leaves the question on your application about criminal convictions blank may have a criminal past and then commit a criminal act while employed by you, leading to a lawsuit against you for negligent hiring.

These materials are not intended and should not be used as legal advice or other recommendation. If you need a legal opinion on a specific issue or factual situation, please contact an attorney. Anyone using these materials should not rely on them as a substitute for legal advice.