

Have You Addressed These Key HR Issues?

Human resource professionals have a never ending list of “basic and critical” issues that must be addressed and reviewed periodically to reduce litigation risks and keep things running smoothly. Of late, the following items seem to be of greater concern to our clients. How are you doing on them?

1. Designate FMLA Leave Appropriately

One of the biggest problems in administering the Family and Medical Leave Act is an employer's failure to tell an employee that his absence is a covered FMLA leave. Failing to make such a designation means that an organization cannot count the absence against the employee's 12 weeks of FMLA leave. Employers should closely monitor absences, even those of fairly short duration to determine whether they qualify as FMLA leave. Don't forget about intermittent and reduced leave as well. Then provide the employee notice of the leave designation as required.

2. Pay for All Overtime, Whether Authorized or Not

A quick way to anger you employees and pave the way for a visit by the Department of Labor is to fail to pay for overtime worked. This includes overtime that was worked but may not have been authorized. Even if your policy states that overtime must be approved in advanced, if an employee has performed the work, he or she must be paid. Your recourse is through corrective action, not docking pay.

3. Classify Independent Contractors Correctly

Deciding to pay someone as an independent contractor does not make it so. Legal tests, not labels determine whether someone is an employee or a contractor. An individual must meet certain tests to determine if she can appropriately be classified as an independent contractor. The main issue is does the company control how and when the work is performed or simply the result? Misclassifying employees as contractors can be expensive. Large settlements, back taxes and penalties can quickly add up.

4. Include Bonuses in Overtime

Don't forget that even though it can be a payroll nightmare, most bonuses, commissions, incentives, and shift differentials must be included when calculating overtime payments. A few discretionary payments, such as small Christmas bonuses may be excluded from the employee's regular pay rate and may not affect overtime calculations.

5. Handle FMLA Leave, Bonuses, Pay Increases and Performance Appraisals Properly

While organizations are generally careful to ensure that employees entitled to FMLA leave receive it and are reinstated as appropriate, there are other, more subtle ways an organization's managers can discriminate. In fact managers can unknowingly make pay or performance evaluation decisions that could violate the FMLA. For example, if a company has a bonus program based on attendance and an employee had perfect attendance before taking FMLA, he couldn't be disqualified from the program. However, if the bonus program were performance based (e.g., based on production goals) then the bonus need not be paid for the time the employee is on leave, unless employees on other types of leave received the bonus. Further, an employee on leave would be entitled to any automatic, cost of living increases that happened during leave, but not necessarily those based on time of service or seniority. Also, don't forget that employees shouldn't be penalized for using FMLA leave on any attendance related performance appraisal factors.

6. Your Exempt Positions Are Really Exempt and, You Treat Them That Way

Violations of federal and state wage and hour laws are probably the biggest legal risks a company faces. They're common and expensive. Wage and hour cases continue to escalate and related class actions are increasing. Misclassifying employees as exempt (not subject to overtime) is one of the most serious problems. Therefore it's important to regularly ensure that your exempt positions really meet the tests set out in the Fair Labor Standards Act. Once you've determined your positions are exempt, make sure you avoid making improper salary deductions or doing other things that jeopardize the exemption.

7. Implement and Distribute Effective Communication Policies

Many organizations still haven't implemented policies that address workplace electronic communication including email, voicemail, computer files, IM, blogging, internet use, etc. While many organizations are concerned about the productivity (or lack thereof) issues related to electronic communications, many legal issues swirl around these as well. They include harassment, discrimination, confidentiality, copyright infringement and trade secrets, to name a few. These policies and practices need regular review and updating to ensure they reflect current technology and organizational needs.

8. Workplace Violence and Bullying

If asked, most of us would express concern about the issue of workplace violence and that it's important for organizations to address the issue. This perception has only increased after the Virginia Tech shootings. But very few companies have established policies or plans. There also appears to be increased concern about the impact of domestic violence in the workplace. Additionally, more attention is being paid to bullying, harassment, intimidation, stalking, and other forms of emotional abuse that can escalate into physical violence. Under OSHA employers have an obligation to provide a safe workplace. That duty needs to be balanced against employees' privacy rights. It's a complex, evolving area of concern that HR professionals need to examine.

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