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ESTABLISHING THE EMPLOYMENT LAW AUDIT/A PREVENTIVE TOOL

I. DOCUMENTS TO BE REVIEWED

The internal audit necessarily involves a review of all procedures and policies relating to the four distinct stages of the employment relationship: (1) hiring; (2) employee evaluation or retention; (3) employee discipline or termination; and (4) post-employment. To accomplish this task, all existing written documents that incorporate personnel practices and procedures, such as handbooks, policy statements, orientation materials, recruitment material, and related documents, must be gathered by the employer and forwarded to counsel. It is recommended that the employer send a general memorandum to all employees requesting that all such documents in their possession be copied and forwarded to the human resources department in connection with the internal audit.

In addition, in order to ascertain whether unwritten or “outdated” policies exist, supervisory personnel should be interviewed by counsel. Individuals involved in the hiring process also should be contacted to discuss the substance of communications made to prospective employees, orally or in writing, regarding the organization or employment matters. Furthermore, documents used by the company to record data with respect to employees, e.g., “applicant logs”, should be obtained for review.

II. GOALS OF THE AUDIT

Once the employer has ascertained all written and unwritten employment-related policies, the review process should provide answers to several important questions regarding the application of these policies. The internal audit should be able to determine whether the policies are being applied in a consistent manner. Inconsistent application of existing policies or practices could make an employer susceptible to discrimination claims based on disparate treatment or serve as evidence of “unfair treatment” in an abusive discharge litigation. From a practical standpoint, inconsistent application of policies and practices can have a harmful effect upon employee morale. While an organization is by no means required to have the same policy for all groups of employees, e.g., a more lenient attendance policy for management level employees as opposed to clerical employees, the audit should establish

whether the policies are being applied uniformly to all employees intended to be covered by them.

In addition, the audit should enable an employer to determine whether the employment-related policies are equitable. To make such a determination, the internal auditor should obtain similar policies used by competitors or organizations located in the same geographic area. In this way, the employer can determine whether a particular policy is the norm both within the industry and within the community in which the organization operates.

Furthermore, the audit should reveal the methods and means of communication of employment-related policies. Here, too, the important factor is whether there is consistency of communication of the policies utilized by the employer. For example, if the established mode of communication is an employment handbook or personnel policy manual, all policies should be included in the manual, and communication of such policies should be limited solely to this written medium. Oral, communication of policies should be strictly avoided.

The internal audit procedures should also provide insight as to which individual(s) within the organization are responsible for the implementation and enforcement of employment-related policies. It is essential that every organization, including those organizations without a human resources department, have at least one individual whose job responsibilities specifically include the implementation, interpretation, and enforcement of employment-related policies.

Finally, the internal audit should distinguish between policies that are applicable to nonunion employees and the terms and conditions of employment for any employees who are represented for the purposes of collective bargaining by a labor organization. All collective bargaining agreements governing the latter should be reviewed as part of the audit to determine how, if at all, changes in the negotiated provisions relate to nonunion employees. Moreover, the employer must be aware that policy changes that purport to affect all employees may have to be the subject of negotiations with the appropriate collective bargaining agent. As such, those practices that on their faces appear to be applicable to both organized and unorganized employees must be examined to determine whether a specific exclusion exists for unionized employees.

III. REVIEW OF SPECIFIC EMPLOYMENT-RELATED PRACTICES AND POLICIES

1. Handbooks and Personnel Policy Manuals.

2. The Hiring Process.

a. Interview:

It is imperative that the internal audit ascertain the substance of the communication made by the organization's interviewers to prospective employees.

- i. Elements of the job in question;
- ii. Description of the salary and fringe benefits policy of the company;
- iii. List of the other individuals who will interview this applicant; and
- iv. A written summary of the interview.

b. Offers of Employment:

The internal audit also focuses on how an offer is communicated once a decision to hire the applicant is made.

c. Employment Application:

Here, again, a properly drafted employment application can be substantially reduce the company's vulnerability to wrongful discharge claims.

3. Managing Existing Employees

a. Probationary Period

b. Performance Evaluation:

An important part of the internal audit is the review of an organization's policies governing the performance evaluation of incumbent employees. An employer should have established a periodic performance appraisal system to provide the organization with a basis for deciding upon promotions,

demotions, pay increases, transfers, and terminations. Ideally, the performance evaluation process should be a two-way communication device pursuant to which the organization not only indicated to employees their strengths and weaknesses in their current positions, but learns from the employees the strengths and weaknesses of the organization.

The achievements of a proper performance evaluation system requires constant monitoring as to its effectiveness and as to whether the criteria used to assess performance is being applied on a consistent manner. An internal review of the organization's appraisal system should include an examination of the following issues:

- i. How often are formal evaluations done?
- ii. Are there instructions for filling out the evaluations forms?
- iii. Are the evaluators trained on how to prepare an evaluation?
- iv. Are the evaluators familiar with the employee's performance?
- v. Is the evaluation based upon job-related objective criteria?
- vi. Does the evaluation list both the strengths and weaknesses of the employee?
- vii. Is the evaluation reviewed by someone senior to the initial evaluator?
- viii. Does the employee have the opportunity to comment on the evaluation?
- ix. Is there an employee appeal process?
- x. How is the evaluation communicated?
- xi. Is there central evaluation of the appraisal system?
- xii. Is there adverse impact on any "protected" group?

- xiii. Are there mutually negotiated timetables and action plans to correct poor performance?
- xiv. Are there informal evaluations?

4. Termination

- a. Was the employee aware of the performance standard or work rules leading to termination?
- b. Was the termination decision consistent with prior similar situations?
- c. Was there compliance with any progressive disciplinary requirements?
- d. Were there mitigating circumstances that suggest a less drastic action?
- e. What is the employee's side of the story?
- f. Were state practices and procedures of the company followed?
- g. What was the employee's prior record?
- h. Can the decision be supported if challenged? In essence, the ultimate consideration in assessing the propriety of the termination is whether the punishment fits the crime. If termination appears to be objectively excessive, further consideration of the decision might be warranted.

5. Post Employment

- a. Employment References:

The issue whether an employer should give an employment reference on behalf of a terminated employee, and the content of said reference has become increasingly important as the courts show willingness to find an employer liable for the tort of defamation on account of statements made to a prospective employer about a former employee.

- b. Retention of Records

Finally, the internal audit should focus on the employer's policy regarding the retention of employment records.