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AM I PERMITTED TO MONITOR MY EMPLOYEES' TELEPHONE CALLS?

Yes, when they are made to or from company-provided phones. But owners and managers must comply with federal and state requirements. With phone monitoring, it is prudent to consult competent legal practitioners.

Under federal law, we may monitor employee calls in one of two ways. First, we may use listening and recording devices provided by telephone service providers. We may monitor only business-related calls. If we determine the call is of a personal nature, we must cease monitoring that call.

The second federally permissible means for monitoring calls requires that we secure employees' prior consent to monitor. To accomplish this we should have a telephone policy in place stating that employee calls are monitored. We must have each employee read and understand the policy. Also, we need to have each employee sign a statement at hire acknowledging that the employee understands the policy.

Several states require consent from all parties prior to monitoring. With requirements such as this we should play an announcement at the beginning of all calls informing the parties that the call is being monitored or recorded for quality or training purposes.

AM I PERMITTED TO TERMINATE EMPLOYEES FOR MOONLIGHTING?

Check state requirements on this. Some states have moonlighting laws. At-will employees may be terminated at any time and for any reason. If there is union representation, the labor agreement may have restrictions on company actions in the matter. If company policy forbids employees from moonlighting, you may discipline them for violating your rules within the limitations above. If there are not contrary guidelines, at-will employees may be terminated for any reason and at any time.

AM I REQUIRED TO GIVE EMPLOYEES ACCESS TO THEIR RECORDS?

State laws vary on this subject. We should check for guidance before taking action. Some states may require employers to provide access to employee records upon request, require that employees be allowed to make copies of file contents, guarantee employees access to their records a limited number of times within a given period or may limit what employees may see. Other states may not address the matter at all.

ARE THERE LEGAL ISSUES RELATED TO REFERENCE CHECKING?

To avoid discriminatory treatment, the same safeguards we apply in interviewing applicants should be applied in checking references. We should ask only those questions which are directly related to the position being filled when contacting an applicant's references. Inappropriate questions asked of a former employer can be cause for discrimination. Also, we must ensure that we check references for all candidates so there is no potential for discrimination or inequitable handling. Checking references for only certain classes, e.g., women applicants, can be cause for sexual discrimination. Employers are best served to have candidates provide written releases to perform reference checks.

ARE WE LIABLE IF WE SERVE EMPLOYEES ALCOHOL AT PARTIES OR OTHER EVENTS?

Yes, we may be liable for harm caused by employees who get drunk at company-hosted or sponsored events where alcohol is served. If serving of alcoholic beverages is required, a prudent caution to take is to provide free taxicab rides to employees who have had too much to drink.

ARE WE PERMITTED TO REASSIGN EMPLOYEES WHO ARE OR WERE ROMANTICALLY INVOLVED WITH CO-WORKERS?

Owners and managers are free to transfer employees as long as the transfers aren't discriminatory or retaliatory. When addressing this situation, be certain to treat employees equally so as not show preference by gender, for example. Preferential or inconsistent treatment may lead to claims of discrimination.

The prudent action is to have in place a policy for office romance. With such, management's response is standardized, documented, disseminated and not subject to charges of arbitrary action if the policy is followed.

ARE WE REQUIRED TO GRANT EMPLOYEE REQUESTS TO HAVE ANOTHER EMPLOYEE OR PERSON PRESENT DURING INVESTIGATIVE MEETINGS?

No. This is not required unless the employee is represented by a union. Even in union environments we only have to allow representation during meetings which may result in discipline.

ARE WE REQUIRED TO PROVIDE VACATION OR HOLIDAY TIME OFF FOR OUR EMPLOYEES?

No, these are employer-provided benefits. No law requires the time off. It is up to the employer to establish their vacation policy and determine what holidays will be observed. Vacation and holiday time off often is highly valued by employees and they are valued benefits which can attract, motivate and retain employees.

The Bureau of Labor Statistics (BLS) indicates that more than 90% of medium and large organizations offer annual vacation time. Surveys indicate that the national standard for medium and large companies is approximately two weeks off after one year of service. Normally, as employees increase company service, they are granted more vacation time. Typical practice for larger organizations is to add weeks of vacation after five and then 10 years of service. Companies often require employees to work six months before becoming eligible for vacation time.

CAN I COLLECT THE COST OF DAMAGED, LOST OR STOLEN COMPANY EQUIPMENT?

Yes, with some considerations. It is important to have policies and rules in place to deal with these situations. If we have policies in place, under most circumstances owners and managers may collect reasonable costs for violating the rules. Some states have requirements for such matters; so check state guidelines. Many states require that the employee sign an agreement ahead of time approving periodic deductions from their wages. Also, some states disallow imposing fines which take the employee's wages below minimum wage for the pay period. Another course of action is to bring suit against the employee to recoup the costs. However, this can be more costly in the long run than the cost of the company property. The company should weigh the decision to bring suit.

CAN OUR COMPANY PROHIBIT OUR EMPLOYEES FROM DATING ONE ANOTHER?

Yes. Owners and managers may prohibit employees from dating, living together or engaging in platonic relationships as part of the employment-at-will doctrine.

Owners and managers are prudent to be careful in taking action in this area. Employees may perceive blanket prohibitions on romantic involvements as invasions of privacy, which can cause morale difficulties. The prudent action is to establish guidelines for employee behavior broadly outlining inappropriate workplace conduct, forbid favoritism and prohibit sexual harassment or whatever the relationship between the individuals.

CAN WE UNINTENTIONALLY CREATE EMPLOYMENT CONTRACTS?

Yes. Employers can inadvertently create employment contracts. A common example is including language that appears to guarantee employment for a specific length of time in an employment offer or in employee handbooks. This can restrict an employer's freedom to terminate employees at-will.

Following are suggestions that may mitigate inadvertently establishing employment contracts:

In offer letters, compensation should be quoted in the lowest dollar amount. For example, quote an hourly wage or in terms of your company's payroll cycle, e.g. dollars per week. If employees are paid weekly and a new hire is quoted an annual salary amount, we may be held to a one-year employment contract.

In any employment offer, state clearly that your employment offer is not an employment contract and does not guar-

antee employment for any specific period of time.

Include a statement in your employee handbook that all employment is at-will. This will allow you to fire employees, if necessary, or they can quit at any time.

Employee handbooks must be worded carefully. Avoid statements that might suggest employment is anything other than at-will. For example, making the statement that an employee can only be terminated if grounds for termination exist changes the at-will relationship to one where the employer must prove employees failed to perform their jobs satisfactorily or the employees were guilty of wrongdoing before terminating them.

Check your state requirements because state law may restrict employers' rights to terminate at-will employees.

DO I HAVE TO PROVIDE BENEFITS TO EMPLOYEES I TERMINATE?

Yes. Under federal law we have certain legal obligations to employees we terminate. These include health care continuation, unemployment insurance eligibility notification, vested retirement benefits and, in some states, severance pay.

We must continue pension or profit-sharing benefits from qualified retirement plans if the terminated employee is vested under the terms of the plan. Non-qualified arrangements or arrangements established pursuant to employment agreements are governed by the terms of the agreements.

We are required to notify employees of possible eligibility for unemployment insurance benefits. If we fail to provide this notice, we may be sued if the employee is eligible but fails to file an unemployment claim in a timely manner.

COBRA, the federal Consolidated Omnibus Budget Reconciliation Act, requires us to offer covered employees and their covered dependents temporary opportunity to continue their health insurance at group rates. However, if we terminate employees for gross misconduct, they are not eligible for continuation coverage under federal law.

Although there is no federal requirement to provide severance pay to terminated employees, some state laws mandate such. We need to check state requirements.

DO STATES REGULATE TERMINATION PAYMENTS?

Yes, and it is important to check your state's requirements. Depending upon the state, requirements may include:

How we may use final paychecks to recover shortages, unpaid advances, loans, cost of damaged or unreturned equipment or property, etc.

Pay for unused accrued leave or other vested benefits.

Where and how final paychecks are to be delivered. It may be that checks must be made available at the usual place of payment or mailed to employees at their request.

That final paychecks be issued by a certain time, e.g. the next regular payday after termination.

Requirements vary the final payment deadline based upon the amount of notice given, type of the termination (lay-off, voluntary quit, strike, involuntary discharge).

HOW CAN AN EMPLOYMENT AGREEMENT HELP US?

An employment agreement is a legally binding contract between employees and employers. The agreement sets out specific terms of employment. These agreements can be helpful in retaining key personnel, making sure the covered employee meets performance expectations and setting out non-compete arrangements.

Employment agreements are helpful for the above reasons; however, they can pose some problems. If not carefully written, they may affect employee rights under federal or state law. Check your state requirements. Additionally, the agreement can invalidate employment-at-will.

HOW CAN I GET TEMPORARY WORK VISAS FOR PROSPECTIVE EMPLOYEES?

We have to file Form I-129, Petition for Non-immigrant Worker, with U.S. Citizenship & Immigration Services to request non-immigrant visas or extensions of previously issued visas. We should file a petition at least 45 days—but no more than six months—before our worker's employment is scheduled to begin or before the existing visa is scheduled to expire. If we don't file the petition in a timely manner, we run the risk that petition processing and subsequent visa issuance might not be finished before our new employee is needed or before the prior employment authorization ends.

Keep in mind that the visa application process can be complicated and lengthy. If we want to assist applicants in applying for non-immigrant employment visas, we would be prudent to first consult an immigration attorney.

HOW CAN I PROTECT MY COMPANY WHEN PROVIDING EMPLOYMENT REFERENCES?

An employer who gives false or negative information to a prospective employer can be sued by former employees for defamation. Owners and managers can protect themselves from defamation lawsuits in a variety of ways, including:

Departing employees can be required to complete waivers absolving a company from future legal action if truthful information during a reference check is provided. A waiver may be required separate and apart from or as a complement to a negotiated statement.

Negotiating statements prior to an employee leaving the company. Acceptable reference statements can be negotiated with departing employees as part of the exit-interview process. Content should be checked with state requirements.

Providing only limited information release. Owners and managers may limit the information released regarding former employees to dates of service, provided state laws do not require employers to provide service letters. It is important to check state requirements.

Standardized responses we give to requestors. When an inquiry is made, a company's HR representative should have a standard statement prepared to answer questions related to performance, rehire eligibility and reason for termination. This statement should state that it is against company policy to release any additional information regarding the employee. Management personnel and current employees should be advised by that they are not to answer questions about terminated employees.

HOW DO I KNOW IF THE IDENTITY AND EMPLOYMENT ELIGIBILITY DOCUMENTS OF MY NEW HIRES ARE AUTHENTIC?

Employers are responsible for verifying the employment eligibility and identity of our workers. The Immigration Reform & Control Act makes it the law. We are required to review documentation presented by all new hires and record the information on Form I-9, Employment Eligibility Verification.

We need only review the documents. We do not have to prove they are authentic or not. That is the job of the authorities. We are to be reasonable in accepting the documents. If we accept a document that is not genuine or one that does not belong to the individual who presents it to us, we are not held responsible as long as the document reasonably appears be genuine or related to the person offering it

The I-9 Form gives helpful instructions for reviewing documents. We should check for the following:

Applicants and employees must choose the documents they wish to present from the lists of acceptable documents shown on the I-9 Form. Owners and managers cannot specify which documents they will accept for verification.

Generally documents are to be original and from the issuing authority. Certain photocopied birth certificates are acceptable.

Reasonableness prevails. We must accept documents that reasonably appear to be genuine. They must reasonably relate to the person presenting them. If we are unreasonable in rejecting such documents we may be carrying out an unfair immigration-related employment practice.

Usually expired documents are unacceptable. Exceptions are certain documents establishing identity, for example, expired U.S. passports.

Contact the nearest field office of the U.S. Citizenship and Immigration Services for assistance if you suspect a document is not genuine. These offices often are listed in the government section of the phone book.

HOW DO IMMIGRANT AND NON-IMMIGRANT VISAS DIFFER?

An immigrant visa gives permanent residence to foreigners entering the U.S. It allows immigrants to work anywhere in the U.S. These visas may require several months up to several years for approval. There are limits on the number of visas issued each year.

Non-immigrant visas permit foreigners to enter the U.S. only for temporary stays. These visas put restrictions on the type and duration of jobs holders may perform. Under certain circumstances, the person may be prohibited from being employed altogether. Normally non-immigrant visas are received more quickly than immigrant visas and usually they are more widely available.

HOW DO WE HANDLE UNUSED VACATION TIME?

It is up to the employer to establish his/her own policy. Vacation is at the discretion of the employer. Following are common practices.
Encourage employees to take vacations. Time off can contribute to the health and well being of employees.
Allow carry-over of unused time. Many organizations allow employees to carry over unused vacation days into the following year. Often employees are limited in the number of days they may carry over.
Some organizations buy back unused time. This practice can be costly and it does not enable the employee time off to rest and relax.
A growing trend is for organizations to buy or sell vacation days. Frequently this option is available through employers with cafeteria or flexible benefit plans. With these arrangements, employees can choose from a “menu” of benefit options. Often larger employers include vacation days in a cafeteria plan. Employees may buy additional vacation days or they may sell some (or all) of their days to increase their earnings.

Another policy is use-it-or-lose-it. Here the employee is required to give up any unused days. Some states may disallow an organization to adopt a use-it-or-lose-it policy and may require it to pay out the vacation days, so it is prudent to check.

HOW LONG MUST I KEEP RESUMES AND APPLICATIONS?

Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act require that employers keep information related to employment applications and resumes for at least one year. Federal contractors are required to keep employment applications and resumes for at least two years, as per the Office of Federal Contract Compliance Programs. If a discrimination charge is filed against an organization, the records relevant to that charge must be kept until the case is settled.

HOW SHOULD I RESPOND TO REFERENCE CHECKS ON EMPLOYEES WE FIRED?

The effective approach is to limit the amount of information offered regarding former employees' performance or rehire eligibility or the reasons for their terminations. Doing so reduces liability for defamation, discrimination or negligent hiring. Employers may establish information release policies limiting information offered to only dates of employment and job title. Company representatives may corroborate pay; however, they should not voluntarily provide pay history detail without signed consent from the former employees.

It is appropriate to designate selected personnel to address reference checks. Supervisors and co-workers should be instructed to refer all reference requests to designated personnel to ensure that this policy of restricting access to employment information is strictly maintained.

Check legal and regulatory requirements, as many states have laws addressing employment reference.

HOW SHOULD WE APPROACH AN EMPLOYEE WHOSE DRESS IS INAPPROPRIATE FOR OUR WORKPLACE?

We should make sure that we have a dress policy in place. We should meet with the employee in private to review the policy, clarify the employee's understanding, identify what provisions were violated and then explain what appropriate dress is for the company. This can be a sensitive subject with employees. We should strive to be business-like, non-embarrassing for the employee and to clarify what is proper dress.

If the employee does not change the behavior, discipline is an appropriate consequence. When addressing this situation we must ensure consistent, fair and non-discriminatory action across all employees.

IF WE WANT TO DEVELOP A DRESS AND GROOMING POLICY INVOLVING WEARING BODY-PIERCING JEWELRY OR OPENLY DISPLAYING TATTOOS, WHAT MUST WE CONSIDER?

Carefully consider the overall impact of the policy. Decide how broad or specific your rules should be. Take into account company culture, workforce characteristics, and your customers. Resolve if strict dress and grooming policies are worth the potential reaction in terms of recruitment, retention and morale. Competent legal advice in this matter can be valuable.

IS IT MANDATORY TO PERFORM BACKGROUND CHECKS ON CANDIDATES I INTEND TO HIRE?

State or federal laws require background checks under certain circumstances including:

Some state licensure or accreditation agencies require education checks to verify an applicant's degree(s) and/or courses.

For positions involving safety, trust or children, criminal records checks sometimes are required.

For positions which require operating motor vehicles, driving records checks may be required.

Check your state's specific requirements.

MAY I ASK FOR AN APPLICANT'S SOCIAL SECURITY NUMBER ON A JOB APPLICATION?

Yes. No law forbids employers from requesting Social Security numbers of candidates on job applications. After hire, an employer may also request to see an employee's Social Security card for payroll purposes. Remember that an employer cannot require that s/he see a Social Security card as part of the I-9, Employment Eligibility Verification, process. The new employee may choose which document to present to establish employment eligibility.

MAY I ASSIGN EMPLOYEES TO A DIFFERENT JOB THAN WHAT WAS OFFERED WHEN I HIRED THEM?

Yes, in most states. Here is where the doctrine of employment-at-will applies in most states. This doctrine means that employers can change job descriptions or responsibilities with or without notice to employees. Employees may be assigned other duties when reporting for work. At the same time, it means employers may terminate employees at any time for any non-discriminatory reason.

Both employees and employers have the right to terminate at-will employment relationships. If employers change the ground rules and employees do not like the change, they are not required to stay.

There is an exception. When employers and employees enter into employment contracts specifying the type and extent of employment, wages and responsibilities, the employer may not change the terms without revising the contract.

At-will employment requirements vary between states. Check your state requirements.

MAY I DECIDE FOR MY EMPLOYEES WHEN TO TAKE THEIR VACATION?

Vacation leave is a benefit offered at the employer's discretion. The company may assign vacation. Because vacation time off is often highly valued by employees, imposing vacation and scheduling can be demotivating. It is good practice for the employer to establish a leave policy which allows employees some discretion over selecting the time off schedule. Such a policy should include consideration of eligibility, restrictions, notice requirements and legal considerations. Owners and managers recognize that they have final authority for approving and scheduling vacation.

MAY I HAVE JOB APPLICANTS TAKE DRUG TESTS?

Yes. Employers may require drug testing at any point in their recruiting process. A key consideration is to have all candidates in the particular job category be similarly tested. Also it is important to determine a course of action and to develop a policy on how to respond to false-positive results.

To avoid discrimination, employer-sponsored drug testing policies must comply with guidelines established by the

Equal Employment Opportunity Commission and the Americans with Disabilities Act. Often states have laws regulating drug testing so it is prudent to check state requirements.

The Americans with Disabilities Act does not consider illegal drug use a disability and such tests are not considered medical examinations. Owners and managers may require drug testing of potential candidates before they receive a conditional job offer.

MAY I MONITOR MY EMPLOYEES' E-MAIL AND INTERNET USE?

Yes, but we must be sure to comply with applicable federal and state laws.

Most state laws and the federal laws on electronic monitoring permit monitoring of the content of employee communications, including e-mail and Internet usage. Some states require employers to give employees advance notice that their e-mail and Internet use will be monitored. Regarding e-mail, certain states require employers to obtain consent from both parties to the e-mail before it can be read or copied by the company.

Companies should have an electronic communications policy in place. It should specify obligations of employees when using company electronic communications systems, including desktop or laptop computers, personal digital assistants, pagers and cell phones. Employees should be required to sign acknowledgments affirming they read, understand and agree to comply with the policy.

It is helpful to conduct training sessions to review the electronic communications policy and work through scenarios which may come up for employees. The company should monitor frequently and in a fair manner across appropriate employee groups. Lost productivity, potential for loss of company information and potential liability for inappropriate behavior are compelling reasons to monitor use of company-provided electronic equipment.

MUST BUSINESSES POST WORKPLACE NOTICES IN MULTIPLE LANGUAGES?

Some federal laws require employers to post notices in languages easily understood by employees. An example is the Family & Medical Leave Act. The Employee Retirement Income Security Act requires that summary plan documents contain a notice offering assistance in the language best understood by participants and beneficiaries.

Other laws, such as the Worker Adjustment & Retraining Notification Act and the Occupational Safety & Health Act, however, do not require employers to provide notices in the native languages of affected workers. Some states require posting workplace notices in languages understood by employees. We should check our local state requirements.

Employers with workers who are not fluent in English should consider providing translations even if the laws do not require posting in other languages. Translating essential employment information for employees is a practical and proactive safeguard to avoid employment related issues.

MUST I HELP MY FOREIGN EMPLOYEES GET THEIR VISAS?

Certain types of visas require us to file petitions on behalf our non-citizen employees. Some foreign nationals can obtain visas without involving U.S. employers.

Usually those seeking employment-based immigrant visas must have an employer's support.

Employers must have a full-time position available for which the immigrant worker is qualified. Employers must request a labor certification from the U.S. Labor Department's Employment & Training Administration. This certifies that there are no qualified U.S. workers willing to work for prevailing wages in the specific occupation and the geo-

graphic area where the job opening is. Employers are to submit an approved labor certification to U.S. Citizenship & Immigration Services (USCIS) using Form I-140, Immigrant Petition for an Alien Worker. If the USCIS approves the petition, the State Department will assign an immigrant visa number and the foreign worker may apply for permanent resident status.

U.S. employers may sponsor certain types of non-immigrant temporary workers or trainees by filing Form I-129, Petition for a Non-immigrant Worker, and supporting documents with USCIS. In certain cases the sponsoring employer must first file a labor condition application with the Department of Labor and receive an approved labor certification. Once the I-129 is approved, most non-immigrants are required to apply for visas and their employment is restricted to the sponsoring employer.

MUST I PAY A SEVERANCE?

Federal law does not require severance payment. However, under certain circumstances, selected states may require such benefits. Check your state requirements.

Choosing not to pay severance should be weighed against the potential negative impact it may have on the employee and on public perception of the company.

MUST WE PROVIDE TERMINATION LETTERS TO TERMINATED EMPLOYEES?

Federal law does not require termination letters be provided. However, many states require employers to provide terminated employees with notices of separation or letters outlining dates of employment, job titles and reasons for termination. Such written communications can be helpful for documentation purposes, particularly when they corroborate that the reasons for termination were not discriminatory. With such matters it is prudent to check state requirements.

MUST WE SEND REJECTION LETTERS TO APPLICANTS WE INTERVIEW AND REJECT?

The answer is no. There are no laws specifically requiring us to send rejection letters. However, doing so is a good business practice for public relations and documentation purposes. For the applicants, even though they are rejected, the notifications relieve anticipation and anxiety.

ONCE WE VERIFY OUR EMPLOYEES' EMPLOYMENT ELIGIBILITY DOCUMENTS, MUST WE PERIODICALLY FOLLOW UP TO MAKE SURE THEY'RE STILL VALID?

The answer is yes. With the Immigration Reform & Control Act, we're required to verify the identity and employment eligibility of workers we hire. We must review the documentation the person provides and record it on a Form I-9, Employment Eligibility Verification.

Normally this is all we must do. But if our new hire is a foreign national and his or her work authorization has an expiration date, we must re-verify the person's employment eligibility on or before the expiration date. The employee may furnish either a new work authorization or a document showing that the original work authorization has been extended for verification. If we rehire former employees after breaks in employment exceeding three years, again we are required to complete a new Form I-9. We must redo the Form I-9 even if the original documentation the person provided is still current.

WE ARE PLANNING A REDUCTION-IN-FORCE. WHAT SHOULD I CONSIDER?

When facing a reduction in force (RIF) there are several avenues to consider before having employees leave the organization:

Consider offering voluntary retirement. With enhanced benefits to qualified employees, this action may achieve required staff reductions with less damage to morale than layoffs.

Consider transferring employees to other positions or locations. This can mitigate overstaffing in selected units and minimize the need for some layoffs.

Consider alternative scheduling programs, job sharing, etc. to reduce the need for a RIF.

If these and similar interventions do not resolve the situation, first check with state and federal guidelines for RIFs. In particular, the federal WARN Act (Worker Adjustment & Retraining Notification Act) may have a bearing.

Identifying candidates for the RIF requires care. Appropriate, objective layoff criteria should be established and applied uniformly across employees. Particular care is needed to avoid discrimination by age, color, disability, gender, national origin, race, religion, veteran status or any other characteristic protected by state or federal law.

Communication is critical to orderly and effective RIFs. Inform employees of the reasons for the layoffs and of the criteria used to determine who will leave. Be attentive to employees needs; however, ensure that fair and equitable treatment is shared among employees. Be as attentive to employees remaining as you are to those leaving. For those leaving, explore the value and services of outplacement firms which can aid in getting employees re-employed as well as reduce animosity among both departing and remaining employees.

Consider severance agreements and utilize competent advice to prepare the agreements, considering the pros and cons of their use. Enhanced severance packages offered in exchange for employees signing waivers releasing claims against the company can avert wrongful discharge lawsuits.

WHAT ACTIONS SHOULD I TAKE IF WE DETECT EMPLOYEES DISTRIBUTING ILLEGAL DRUGS IN THE WORKPLACE?

This is a serious situation which requires attention and action. If there is strong evidence indicating employees are dealing illegal drugs at work, the prudent course of action is to contact the police. Owners and managers must take prompt action to ensure the safety of other employees and the legal position of the company. Failing to take action may lead to charges against the company for negligence, particularly if an employee is injured or affected by the drugs. Employers with federal contracts are covered under the Drug-Free Workplace Act and also can be penalized for failing to maintain a drug-free workplace.

Owners and managers should:

Not act on frivolous accusations.

Provide only relevant facts, not conjecture, when information must be provided.

Avoid sharing information regarding possible employee drug involvement with anyone who does not have a need for the information.

Take disciplinary action with employees who knowingly and falsely accuse co-workers of workplace drug dealing.

Companies should establish comprehensive written drug policies which include a prohibition against the use, sale, possession or transfer of illegal drugs. Owners and managers must apply the policy consistently. Disparate enforcement can lead to discrimination claims against the company.

Check state requirements. Many states have laws regulating drugs in the workplace.

WHAT ARE MY CHANCES OF OBTAINING A CANDIDATE'S SALARY HISTORY FROM A PREVIOUS EMPLOYER WHEN DOING A REFERENCE CHECK?

During the hiring process, generally we can obtain verification of basic facts provided by applicants from their previous employers. To obtain salary history information, it is prudent for owners and managers to ask job candidates to sign information release forms authorizing their former employers to provide salary verification.

Often states have laws specifically covering employment service letters by former employers. Check your state's requirements.

WHAT ARE MY REQUIREMENTS FOR REPORTING INDEPENDENT CONTRACTORS AND FREELANCERS AS NEW HIRES?

Regular full-time, part-time, seasonal or student employees and those rehired after a layoff or other significant break in employment are required to fill out W-4 forms within 20 days of hire in most states. Some states go further and define anyone receiving pay for services as a new hire. This broader definition may include independent contractors, sole proprietors or shareholders of a corporation or the sole member of a limited liability company. In this matter, it is prudent to check with federal and state enforcement agencies for clarification.

WHAT CAN I DO WITH AN APPLICANT TRACKING SYSTEM?

Applicant tracking systems are automated systems used to post job openings on corporate Web sites, process resumes and e-mail interview requests to candidates. They help employers avoid the resume crush and ensure that good candidates are not overlooked. Also referred to as candidate management systems, they can be any software or paper system which manages a company's resume and application process to match candidates to job openings.

WHAT DOES CONSTRUCTIVE DISCHARGE MEAN?

Constructive discharge happens when a person resigns because s/he feels conditions at work are so intolerable that a reasonable person would feel compelled to leave the organization rather than submit to continued abuse. Situations of this nature can be very individualistic. Common examples may include sexual harassment, racial discrimination, significant demotions designed to embarrass employees or similar circumstances.

Courts carefully evaluate these situations on a case-by-case basis. Courts must determine whether the conduct is so intolerable that a reasonable person would resign. If the resigning employee proves that constructive discharge occurred, the employee may be eligible for back pay, damages, reinstatement and attorneys' fees.

WHAT EFFECT DOES THE EMPLOYEE POLYGRAPH PROTECTION ACT HAVE ON EMPLOYERS?

The Employee Polygraph Protection Act (EPPA) prohibits employers from subjecting most employees or job applicants to polygraph or lie-detector tests. Also employers must post notices informing employees of their EPPA rights. The federal EPPA has minimum protections for employees. However, the law allows states and localities to impose more stringent restrictions on polygraph tests. We should check state requirements and it can be helpful to get qualified legal advice.

The EPPA has general prohibitions against requiring polygraph tests. There are exceptions. The federal government is permitted polygraph tests for consultants and contractors providing services to defense, intelligence and certain

other agencies. Private employers may require polygraph testing of employees providing security for nuclear power facilities, public water supplies, public transportation, radioactive and other toxic materials, currency, precious commodities or proprietary information. Employers that manufacture, distribute or dispense controlled substances may administer polygraph tests to applicants for positions that provide direct access to the manufacturing, storage, distribution or sales of these substances.

Although we may qualify for an exception, there are restrictions on how we may administer tests. Test subjects must be given advance notice of the tests along with a written explanation of the nature of the test and employee rights under the law. Test administrators must follow specific guidelines before and after testing. Administrators may not ask questions about religious or political beliefs, race, sexual behavior or union activity.

Violation of the law may result in lawsuits by affected employees for damages and fines from the Department of Labor, which enforces EPPA.

WHAT GOES INTO NON-COMPETE AGREEMENTS?

Non-compete agreements are contracts established when the employer and the employee agree that the employee will not compete with the employer after the employee terminates employment with the employer.

Certain considerations are important:

Employees should receive some form of consideration in return for signing non-compete agreements which may limit their choices of future employment.

Reasonableness should be applied to the duration of the non-compete period and to the limitation on the geographical area where the employee may not compete.

The agreements should be written and co-signed by the employee and an authorized representative of the company, preferably as part of an employment agreement.

Obligations on the part of the employer and the employee should be set out with mutual agreement between the parties. Pay, benefits, training, etc. should be stipulated. Employee obligations to the employer should be set out.

These agreements should be narrow in scope, protecting only the employer's legitimate business interests from what work the employee is doing at the time of the agreement's signing.

Prudent owners and managers seek competent legal advice to draft the agreements in accordance with state and federal law. Courts determine the enforceability of non-compete agreements by evaluating their reasonableness. Employers are required to demonstrate a legitimate business need for the agreement and show how violation can be detrimental to the employer's interests.

WHAT HOLIDAYS ARE TYPICALLY OBSERVED?

According to the Bureau of Labor Statistics (BLS, www.bls.gov) the majority of U.S. employers offer six to 10 paid holidays annually. Most organizations follow state and federal holiday observances. A newer trend is for organizations to offer floating holidays to accommodate employees' personal needs. Often organizations schedule the holiday similar to federal offices, e.g. the U.S. Postal System.

The most common paid holidays observed include New Year's Day, Martin Luther King, Jr. Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day.

Some businesses grant federal holidays in addition to those above. Often banks and financial organizations observe

Columbus Day, Presidents' Day and Veterans Day.

The value of floating holidays is that they are an inexpensive retention incentive that gives employees more flexibility to plan and balance their personal and career needs. Floating holidays enable employers subject to the Civil Rights Act to comply with religious accommodation mandates. It is common for organizations to offer one to six floating holidays annually. Owners and managers should check state guidelines for local practices.

WHAT IS MEANT BY AN EMPLOYMENT AGREEMENT?

The legal relationship between employers and employees is defined by an employment agreement. This agreement identifies the employer's obligations to employees, such as pay and benefits, and the employee's obligations to employers, such as the employee's duties and responsibilities. An employment agreement can make the employment relationship more secure and predictable for both the employer and employee. Top executives have long been provided with employment agreements. Today, employment agreements are becoming a widespread practice for all levels of employees. However, employment agreements can invalidate the at-will employment relationship. Employers should weigh the value of the employment agreement with the advantages the employment-at-will doctrine provides.

In employment agreements it is crucial to address each employee's specific situation. The contract must be reasonable, specific and enforceable. Vague language in employment contracts is particularly problematic should the employer be taken to court.

WHAT IS PAY IN LIEU OF NOTICE AND MUST WE PROVIDE IT?

In some situations, when employees terminate, owners and managers determine it best if the employee leaves the job and premises promptly. Typically, at-will employees give two weeks' notice. However, for morale, security and other reasons, employers may pay the employee for the wages they would have been paid had they worked out their notice. This is pay in lieu of notice.

Some states require that employers pay employees wages for the time they would have worked under the notice had the employer not required earlier separation. Check your state requirements for effective handling.

WHAT MUST I DO TO BRING A NON-CITIZEN INTO THE U.S. FOR PERMANENT EMPLOYMENT?

Hiring foreign workers for permanent employment in the United States requires approval from several government agencies. The filing of applications for approval and certification is your responsibility, not the alien applicant's.

The employer must:

Consider consulting with an immigration attorney.

Recruit for the job and contact a state workforce agency to get a prevailing wage determination for the job.

Complete and file Form ETA 9089, which is the Application for Permanent Employment Certification. This is done at the appropriate Employment & Training Administration application processing center.

Post notice of the application filing at the specific location for 10 consecutive business days. Publish the notice in hardcopy and electronic recruiting media regularly used for recruiting. Provide notice to any bargaining representatives.

Retain copies of applications and related collateral for five years from the date of filing the application.

Complete Form I-140, Immigrant Petition for an Alien Worker, when the Department of Labor approves the labor certification application. Then send the I-140, a certified Form ETA 9089 and filing fees to the U.S. Citizenship & Immigration Services.

WHICH FEDERAL POSTERS ARE WE REQUIRED TO POST IN THE WORKPLACE?

The list of required federal postings is lengthy and should be verified routinely. Included are Age Discrimination in Employment Act, Americans with Disabilities Act, Davis-Bacon Act, Employee Polygraph Protection Act, Equal Pay Act, Executive Order No. 11246 (prohibiting discrimination in employment by federal government contractors), Executive Order No. 13201 (concerning the application of union dues to political lobbying), Fair Labor Standards Act, Family & Medical Leave Act, Occupational Safety &Health Act, Rehabilitation Act, Service Contract Act, Title VII of the Civil Rights Act of 1964, Vietnam-Era Veterans' Readjustment Assistance Act and Walsh-Healey Act.

Posters on these laws are to be in a conspicuous place where all employees and job applicants can see them. Many posters are available online and at no charge from respective government agencies.

WHICH VISAS AUTHORIZE NON-U.S. RESIDENTS TO WORK IN THE U.S.?

Only certain non-immigrant visas allow foreigners to work for U.S. employers. Non-immigrant (or non-resident) visas permit foreigners to enter the U.S. for temporary stays before they return to their home countries. Following are visas permitting work in the U.S.:

H-1B visas — people employed in specialty occupations

H-2A — temporary or seasonal agricultural workers

H-2B — temporary or seasonal non-agricultural workers

L-1 — key employees transferred from a foreign entity to a U.S.-based entity of the same company

O — people with special knowledge, skill and ability in the sciences, arts, education, business, or athletics

P — artists, athletes, and entertainers who are recognized internationally

TN — Canadian and Mexican nationals seeking admission to the U.S. to provide professional services in selected fields specified under the North American Free Trade Agreement

There are three visa categories which permit students, scholars, and certain other exchange visitors to seek employment while in the U.S. These include:

F-1 — aliens enrolled full time in U.S. colleges or universities

J-1 — international and government personnel, professors, scholars, students, teachers, trainees, teachers and specialists,

M-1 — foreign nationals admitted to the U.S. to pursue a full course of study at an established vocational or other recognized non-academic institution

There are other types of non-immigrant visas allowing persons to work in the U.S. under limited circumstances:

B-1 — visas for non-immigrant visitors for business

D — alien airline or maritime crew members who need to land temporarily in the U.S.

I — foreign journalists coming to the U.S. specifically to work in a press capacity

K-1 — fiancés or fiancées of U.S. citizens

Q — participants in certain international cultural exchange programs

R-1 — aliens in religious occupations

WHO SHOULD BE PRESENT WHEN WE TAKE DISCIPLINARY ACTION WITH AN EMPLOYEE?

When giving a warning for performance, the employee's immediate supervisor and a witness, preferably another management person of the same gender as the employee, should be present. In the case of a disciplinary meeting, the employee's supervisor and the supervisor's immediate supervisor should be present. The immediate supervisor should never meet with the employee alone. It is prudent to have another management person of the same gender as the employee being addressed in the meeting to mitigate claims of inappropriate behavior.

It is good practice and a courtesy to the employee to confidentially pre-notify the employee about the meeting and its general purpose. It is preferable to do so in writing.