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Spring Cleaning: Is Your “Employment House” in Order?

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Spring is here (for most of us we hope) with warmer weather, fresh flowers, yard work and outdoor activities. Now is also a good time to ensure your “employment house” is in order. Here are some items for your employment to-do list to see what seems ripe to address and/or prepare for.

One of your first priorities following the New Year (which like most employers gets pushed down the list) is to ensure that your policies and procedures are up to date. For years, one of the most oft-repeated statements from clients to lawyers is “I want to get you my handbook so it can be reviewed and updated for the New Year.” Well, April is almost over, and my guess is many employers with good intentions have still not crossed this item off their list. So, let’s get that moving and do the following:

1. Update your handbook to include all new and modified policies, and then provide them to your legal counsel for review. If you have acquired or established new operations, these need to be integrated into your existing policies and procedures.
2. Provide a timeline for when you would like the review completed and set a date for implementation.
3. As appropriate, prepare written (hard copy or electronic) copies for distribution. It may be the entire handbook or just various sections for distribution, with the entire handbook updated and available for review online.
4. If necessary, with wholesale changes or new policies, you may schedule employee meetings for discussion or add them to the supervisory pre-shift meetings.
5. Ensure that you obtain employee acknowledgment forms confirming receipt of the updated handbook and/or newly issued policies.

Now that your handbook review is underway, similar steps need to be taken to update any current restrictive covenant agreements (noncompete and non-solicitation agreements). This is especially true given the onslaught of state legislation and court decisions denying and/or limiting enforcement of noncompete agreements. Additional changes are forthcoming with the Federal Trade Commission (FTC) releasing its final rule banning noncompete agreements. Litigation by employer organizations challenging the rule was filed on April 24, 2024, in federal court in the Eastern District of Texas. The FTC first proposed a near total ban on noncompete agreements in January of 2023 arguing that such agreements interfered with the free market and labor competition. Released on April 23, 2024, the FTC’s new rule bans noncompete agreements in most cases (which our firm addressed in a separate blog post). That being said, here’s what employers should focus on when updating their

agreements:

1. Make sure your restrictive covenant agreements are being applied to protect legitimate business interests and confidential information. Over the years we have seen these types of agreements extended to numerous levels of employment, even hourly workers in seemingly "benign" positions being restricted from changing jobs in their industry. Is the barista or sub sandwich designer really a competitive threat to your business?
2. Courts frequently bar the enforcement of noncompete agreements but are still receptive to enforcing legitimate non-solicitation agreements protecting bona fide business interests. Ask yourself: Can your business interests be protected by a properly drafted non-solicitation agreement (both as to clients and employees)? Is it reasonable to allow your employees to go to work for a competitor while restricting the use of your confidential information and keeping them away from your clients and employees for a reasonable period of time? Caution, the FTC rule may encroach on these provisions as well if it effectively bars the employee from going to work for a competitor.
3. Has your business structure changed? Not commonly thought of pre-pandemic by many employers, but more of your employees may now be working remotely, particularly sales reps and client relationship managers. Perhaps your current restrictive covenant agreements limit competitive business activities to a geographical area, like the primary business location or branch offices and competitors within X miles of the applicable location. But what if your employee, for example, lives and works in Ohio (serving Ohio and Michigan) and your offices are in Tennessee and Kentucky? By definition, if the restrictions are limited to a set distance from "brick and mortar" business locations, potential competitors located in Ohio and Michigan are employment opportunities for your employees. So, two things to consider: a) You should include the employee's remote location within the definition of your business location (but understand this, too, may be subject to legal scrutiny); and b) tighten up your non-solicitation protection to keep the employee away from your customers and prospective customers in those areas and with whom the employee serviced, had contact with and/or responsibility for.

Another possible item on your "spring cleaning" to-do list should be to review your job descriptions and employee classifications. The IRS and Department of Labor are both laser focused on identifying and correcting employee misclassification: the former for employees wrongfully classified as independent contractors and taxes not being withheld by employers, and the latter for independent contractor issues, as well as exempt versus non-exempt employee classifications. Your job descriptions should be reviewed to ensure that they are consistent with the duties of the job actually being performed. Oftentimes, job duties change due to business needs, but the descriptions are not updated. It's possible that such changes could convert an employee from non-exempt status to exempt status and *vice versa*. The physical requirements of manufacturing, production and manual labor positions must be monitored and updated. This becomes especially important in cases involving discrimination claims for an employer's alleged failure to provide reasonable accommodations under the Americans with Disabilities Act (ADA). Frequently, employers unknowingly rely on outdated job descriptions to support arguments as to why certain reasonable accommodations for a disabled employee's restrictions could not be accommodated and/or whether it was an "undue hardship." The majority of cases we see brought under the ADA today involve the reasonable accommodation requirement and the interactive process and relate to claims that employers have failed to *fully engage* in the interactive process.

Finally, have you committed to decreasing your employment records' footprint and moving file and record storage to electronic record-keeping completely? Having moved law offices at the end of

2023, it is amazing how much material we can accumulate even if you're thinking you have made a substantial commitment to keeping your records electronically. Now is the time to convert your hard copy records to electronic storage and/or discard them in a proper manner. Keep in mind that various employment laws and regulations have record retention requirements for how long employee and personnel records must be kept for both current and former employees. These time periods typically vary in length from one to seven years. Likewise, ensure that you have all the records that you are supposed to be keeping, e.g., employee I-9 forms. I often hear from clients who have discovered that certain employee I-9 forms are missing, were not completed, or are "incomplete." It is important to rectify the mistakes, complete the existing form or a new form, and "date it" with the current date and an explanation attached to the document explaining what was discovered and when it was corrected. Then place the corrected records in the proper place (which is not the personnel files). Do *not* back date these forms for any reason.

Now that your employment to-do list is completed -- or at least well underway -- enjoy springtime before the dog days of summer bring a whole new set of issues to deal with!

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