Ten Steps to Help Employers Avoid Employment-Related Legal Problems

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1. HIRE WITH CARE.

Naturally, an applicant’s skill and experience should match a job’s requirements, but don’t ignore the importance of matching a candidate’s business style with that of your company. Keep prospective supervisors and managers in mind when interviewing candidates, and even when you’re under pressure to fill a position, don’t make hasty hiring decisions.

Discriminatory hiring that adversely affects an individual in a protected group is prohibited by state and federal law. Either the Equal Employment Opportunity Commission (EEOC) or an individual may challenge hiring decisions. In addition to claims made on an individual basis, claims may be based on disparate impact or disparate treatment.

Title VII (of the Civil Rights Act of 1964) makes it unlawful for an employer to refuse to hire any individual on the basis of race, color, religion, sex or national origin.

The Age Discrimination in Employment Act (ADEA) prohibits discrimination in hiring based on an applicant’s age.

The Americans with Disabilities Act (ADA) prohibits discrimination in hiring based on an applicant’s disability when the applicant is able to perform the “essential functions” of the job. Those who make hiring decisions for the organization should evaluate each job applicant based on his or her ability to perform the essential, rather than, marginal functions of a job. The EEOC offers guidelines to help employers analyze jobs to identify their essential functions. In a series of cases decided last summer, however, the United States Supreme Court rejected the EEOC’s standing guidance that the determination of disability is to be made “without regard to mitigating measures such as medicines or assistive or prosthetic devices.” See, e.g., Sutton v. United Airlines, Inc., 527 U.S. 471 (1999)(twin sisters who applied for positions as commercial airline pilots, and who suffered from severe myopia, did not have a disability because they could
correct their vision to 20/20 or better); Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999) (corrective effect of blood pressure medication should be considered when determining whether employee has a disability under the ADA).

Connecticut law prohibits hiring discrimination based on marital status or sexual orientation. In addition, an employer may not inquire about matters relating to an applicant’s childbearing age or plans, pregnancy, function of the applicant’s reproductive system, use of birth control methods, or familial responsibilities – unless the inquiry is based on a bona fide occupational requirement.

These state and federal laws also prohibit retaliatory discrimination against any applicant because he or she has opposed an unlawful employment practice or participated in any investigation, proceeding or hearing under Title VII, the ADEA, the ADA, or applicable state statutes.

Policies that Prevent Problems:

• A regular review of application forms and interview checklists should eliminate questions that deal with such issues as race, sex, age, national origin, sexual orientation, religion, citizenship, maiden name, height and weight, child care arrangements. Inquiries should be structured to obtain only that information legitimately needed by the employer to determine the applicant’s ability to perform the job. For example, the ADA prohibits employers from inquiring about an applicant’s disability or any leave the employee may require because of a disability – however, an employer may state the attendance requirements of a job and ask whether the applicant can meet them. An employer may want to include an acknowledgement of the company’s employment-at-will policy for the applicant to sign.

• Don’t make assumptions about domestic responsibilities and availability for work based on gender – structure your inquiries on a neutral basis, for instance, state the hours required and then ask about availability – and ask the same questions of both male and female applicants.

• Application forms should be provided on request, whether or not there are job openings at that time – handing out applications to some but not others may be used to support an allegation of discrimination. Apply hiring policies evenly and consistently to avoid any inference of discrimination. If the company’s policy requires a candidate to complete an application, don’t make exceptions by offering a job to someone before he or she completes an application. And don’t set deadlines unless you’re willing to consistently enforce them – if you sometimes allow applicants to submit applications after a deadline has passed, you may be setting the stage for a discrimination claim.
2. THE INTERVIEW -- ASK OPEN-ENDED, PROBING QUESTIONS DEALING WITH JOB-RELATED ISSUES, AND DO A PROPER BACKGROUND CHECK.

A. Interview Questions

Be sure to keep the questions focused on issues related to the job, and ask questions that will let the applicant reveal attitudes and values. For instance, in addition to finding out about an applicant’s skills, ask “What did you like least about your last job?” or “If you could have changed one thing about your past employer, what would it be?” The candidate’s responses may give you valuable insight into the applicant’s expectations.

The ADA prohibits employers from asking applicants about the existence, nature or severity of disabilities before the employer has made a conditional offer of employment. Inquiries about an applicant’s general health can also cause subsequent problems if the question is viewed as one that is likely to elicit information about an applicant’s disability. An employer may, however, describe a job function and ask whether or not the applicant can perform it with or without a reasonable accommodation.

Train personnel who interview applicants and make hiring decisions. Interviews should be conducted in a professional manner and interviewers should avoid making offhand comments that may come back to haunt the company in the form of a discrimination lawsuit. While “stray remarks” alone are not sufficient evidence of discrimination, when coupled with other indicia of discrimination the remarks may be considered as indicators of discriminatory intent.

In Kirsch v. Fleet Street, Ltd., 148 F.3d 149 (2nd Cir. 1998), a salesperson claimed that his former employer discriminated against him on the basis of age when it took away his most lucrative accounts, cutting his pay by more than 50% and essentially forcing him to quit his job. As evidence of discriminatory intent, the plaintiff used comments the employer made while interviewing a job applicant (who ultimately received the plaintiff’s largest account). During the interview, the employer commented that the plaintiff probably would not be working for the company much longer because the company was looking for “new younger vision, new younger blood.” The court regarded these comments as evidence that the employer fired the plaintiff because of his age and upheld the lower court’s award to the plaintiff of $190,000 in damages.

B. Background Checks

An employer may not use background checks to ask questions it is prohibited from asking the applicant directly. Employers should make certain that any reporting agencies comply with the law.
(i) Credit Reports

If an employer chooses to obtain an applicant/employee’s credit report, the Fair Credit Reporting Act imposes duties on the employer that extend to both the job applicant or employee and the credit reporting agency. The employer is required to:

1) Provide the applicant/employee with a clear and conspicuous written disclosure that a report may be obtained by the employer. The disclosure must be in a document that consists solely of the disclosure (i.e. a separate document – not part of job application);

2) Obtain prior written authorization from the applicant/employee;

3) Certify to the credit reporting agency that these actions have been taken, and that the information will be used for a permissible purpose.

In addition, the employer must certify to the credit reporting agency that if any adverse action is taken as a result of any information provided in the report, the employer will provide two documents to the applicant/employee before the adverse action is taken. The first is a copy of the actual consumer report relied upon and the second is a summary of consumer rights (provided by the credit reporting agency when the employer requests a report).

After taking the adverse action, the employer is required to provide the applicant/employee with the following information:

1) the name, address and telephone number of the consumer reporting agency that provided the report;

2) a statement that the agency did not make the decision and is unable to provide the applicant/employee with specific reasons why the adverse action was taken;

3) a statement of the applicant/employee’s right to a free copy of the report (in addition to the one provided by the employer before the adverse action) by making a request within 60 days; and

4) a statement of the applicant/employee’s right to dispute inaccurate or incomplete information with the agency.

(ii) Investigative Consumer Reports

An investigative consumer report contains information about the applicant/employee obtained from personal interviews with neighbors, friends or associates. These reports require additional duties, disclosures and certifications.
A copy of the summary of consumer rights is available through the Code of Federal Regulations, along with required disclosure language. Certifications and releases are usually provided by credit reporting agencies.

(iii) Conviction Records

A blanket policy of refusing to hire anyone with a conviction record may result in a claim of disparate impact. The EEOC has ruled that, since a disproportionate number of minorities are subject to arrest and conviction, such a blanket policy has a disparate impact. The courts, however, have upheld more narrowly tailored policies that consider the gravity of the crime, how recently it occurred, and the nature of the job being sought.

Connecticut has enacted a law encouraging, but not requiring, employers to hire individuals convicted of crimes. Private employers are under no legal obligation to do so, but the state government and its agencies must comply with the statutory requirements.

(iv) References

A nondiscriminatory reason for employers to contact references is to verify and supplement information that is provided by a job applicant. Even when applicants are highly rated and received essentially positive references, employers may still choose among them on the basis of a comparison of their reference checks.

3. **PUT YOUR OFFER IN WRITING.**

An offer letter provides another opportunity to assert the company’s position as an employment-at-will employer. The letter should clearly state that no communications to the applicant, whether oral or written, should be considered an express or implied contract for a definite term.

Avoid references to job security and long-term time commitments – even stating the salary in yearly rather than weekly or monthly amounts can lead to problems. Clearly state any conditions of employment still pending – if the offer is contingent on any additional reference checks or a pre-employment medical exam, make sure the letter informs the applicant of the contingencies in no uncertain terms. Doing so will help the company avoid allegations that it fabricated contingencies to cover up discriminatory reasons for revoking its offer.

The letter should also state that its terms supercede any previous statements made to the applicant. Also, to safeguard against statements made to the applicant by company employees with “apparent authority,” include a statement in the letter that any changes in employment terms must be made in writing and signed by a company official (the CEO, President, or someone with specific delegated authority).
Use probationary periods for all newly hired employees to see if the individual is well suited to the company and the job position. The length of probation can vary (from 60 to 120 days is typical) but allow enough time for supervisors and managers to evaluate factors such as attendance, attitude, effectiveness, as well as technical job performance. If you don’t like what you see by the end of the trial period, don’t lift probation and hope for the best – new employees usually try to put their best foot forward, and personal attributes aren’t likely to change for the better.

When it’s time to review the employee’s performance, be thorough, and don’t downplay the importance of how the new employee fits into the department or company culture. No matter how technically skilled the new employee is, if requisite interpersonal skills are lacking, he or she won’t be effective. You may want to extend the probationary period in some circumstances (the company’s right to do so should be clearly outlined in the handbook), but when in doubt, terminate the employment. It will probably save you additional problems – and possible litigation – later on.

4. **DRUG TESTING IS AN EFFECTIVE SCREENING TOOL.**

Pre-employment drug testing is a valuable hiring tool. The actual testing will help the employer screen out drug users, and applicants who want to avoid discovery will probably withdraw their applications.

**A. Testing Requirements**

Under Connecticut law, employers must comply with the following requirements for testing a prospective employee:

1. the employer must inform the prospective employee in writing, at the time of application that the employer intends to conduct the test;
2. the test must be conducted according to certain procedures; and
3. the prospective employee must be given a copy of any positive test result.

The law prohibits testing of current employees unless the employer has reasonable cause to suspect drug use; however, an employee may waive his or her privacy rights by consenting to drug testing. Courts resolve the issue of voluntary consent to drug testing using the same analysis applied to fourth amendment privacy rights under the U.S. Constitution. In order for consent to be considered valid it must be “a product of that individual's free and unconstrained choice, rather than a mere acquiescence in a show of authority.” The courts will consider the “totality of all the circumstances” to determine whether the consent was voluntary. Poulos v. Pfizer, Inc., 244 Conn. 598, 694 (1998).

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1 The law requires use of “reliable methodology” and, if the initial test is positive, a second test, separate and independent from the initial test.
In Poulos v. Pfizer, Inc., 1999 WL 171453 (Conn. Super. March 15, 1999), a case remanded from the Connecticut Supreme Court, the court held that voluntary drug testing of an employee was proper, even though the employer did not have reasonable suspicion to require that he undergo the test. The employee was a raw materials clerk at Pfizer. He was observed placing a surge protector (which he had ordered for the company) in a box to take home. When a guard stopped him, he lied about the contents of the box and tried to disguise the new surge protector as an old supply that he was allowed to remove from the premises. After the incident, the employee’s overall performance was evaluated, and Pfizer determined that he fell within its definition of "aberrant behavior," which warranted a fitness for duty evaluation, including a drug test. The employee submitted to the test, which revealed cocaine use. The employee agreed to enter Pfizer’s employee assistance program. A few weeks later, however, the employee was terminated when a random drug test revealed drug use. (Connecticut’s drug testing statute allows an employer to require testing when it is part of an employee assistance program sponsored or authorized by the employer and the employee voluntarily participates in the EAP.) The employee argued that his initial drug test was improper because it was not based on reasonable suspicion. The court found, however, that because the drug test was voluntary, i.e., the employee’s continued employment did not depend on it, it was proper. According to the court, since the test was voluntary, Pfizer did not need reasonable suspicion to perform it.

B. Drug Testing Results as Confidential Medical Information

The results of drug tests must be kept with the employee’s other medical information, and must be accorded the same level of confidentiality. The results may not be released to anyone other than the employee, and may not be used in criminal proceedings.

Connecticut law also specifically allows employees or applicants to bring a civil action against an employer for any violations of the drug testing provisions (the statute was the basis of the Poulos case, supra).

Under the ADA, if the drug test reveals any information about an employee’s medical condition, other than whether he or she is using illegal drugs, that information must be treated as a confidential medical record.

5. USE THE EMPLOYEE HANDBOOK TO INFORM AND NOTIFY

The employee handbook is an effective way to underscore the company’s expectations for its employees. One of the first topics in the handbook should be a disclaimer of the handbook as an employment contract. Courts have placed special importance on whether the disclaimer is CLEAR AND UNAMBIGUOUS and CONSPICUOUS. Therefore, the disclaimer should be included in the first pages of the handbook, and it should state in clear, plain language – and in large bold lettering – the employer’s position that employment may be terminated by either the employer or the employee at any time, with
or without cause and with or without notice. It’s also a good idea to have the employee sign an acknowledgement form, confirming receipt of the handbook. Including the disclaimer on the acknowledgement form may help prove that the employee understood his or her at-will status.

Recently, in Gaudio v. Griffin Health Services Corp., 249 Conn. 523 (1999), the Connecticut Supreme Court reaffirmed its prior decisions on handbooks. The court upheld a jury’s finding that an employer breached a contract with an employee, arising in large part from an employee manual, when it terminated the employee without cause. In Gaudio, the employee, a security guard for a Connecticut hospital, was terminated after the hospital determined that he assaulted a psychiatric patient while attempting to restrain him. The employee alleged that his employee manual created an employment contract under which he could be terminated only for cause. The employee manual did not contain a disclaimer of contractual liability or at-will employment language. Although the employee manual did not use the phrase “just cause,” the court held that the jury could reasonably have concluded that the language of the manual, along with supervisors’ assurances of job security, created an employment contract. The court stressed that an employer can avoid liability for breach of an implied contract based on statements contained in personnel manuals by using appropriate disclaimers and eschewing promissory language.

Some important information to include in the handbook are policies regarding: vacations and holidays, sick leave and FMLA leave, personal leave, benefits and compensation, attendance rules, use of communication systems, transfers and promotions, and probationary periods. The handbook should also include the company’s policy against sexual harassment and the procedures for reporting harassment in the workplace.

In addition to other notices provided through the handbook, the company may want to include a notice to the employees of any electronic monitoring the employer conducts. A new Connecticut law, effective October 1, 1998, requires an employer to give its employees prior written notice when it electronically monitors their activities. As it’s defined in the law, electronic monitoring is the collection of information about employee activities or communications on the employer’s premises, gathered through any means other than direct observation. Specific examples provided in the law include the use of computers, telephones, radios, cameras, and electromagnetic or photoelectronic systems.

To satisfy the law’s requirements, an employer must inform employees about the types of electronic monitoring which may occur. For example, if employees have access to the Internet, most employers have systems that record when and how an employee uses the Internet. This information may include a list of web sites visited, time and duration of Internet use, searches performed, and search engines used. Since all this information monitors an employee’s activities, it should be listed in the notice of electronic monitoring.
Each current employee and new hire may be given this information individually, and an employer will satisfy the notice requirement by posting the information where employees are likely to see it.

If an employer fails to provide its employees with prior written notice of the monitoring systems in use, the Labor Commissioner may levy a fine of up to $500 for a first offense, $1,000 for a second offense, and $3,000 for a third or subsequent offense.

The law doesn’t apply in the following situations:

1) An employer is not required to notify employees when it monitors areas open to the public for security purposes, such as lobbies or parking lots.

2) When an employer reasonably believes that an employee is engaged in misconduct and electronic monitoring may produce evidence of the misconduct, prior notice is not required. (Misconduct includes violating the legal rights of the employer or other employees, or creating a hostile work environment.)

3) When a criminal investigation is conducted. In addition, any information obtained in the course of a criminal investigation through electronic monitoring may be used in a disciplinary proceeding against an employee.

Monitoring systems typically used by employers include:

**Telephones** – systems usually document telephone numbers of calls made from an employee’s telephone, as well as the date, time and duration of the call; some systems also document telephone numbers of incoming calls.

**Computers** – most network operating systems record information about an employee’s e-mail, Internet use, and use of applications like word processing and spreadsheets. The following information is typically recorded:

- date and time of an employee’s login/logoff, and the location of the computer used;
- date and time an application is accessed (e.g. word processing), the duration of use, the documents accessed within the application, quantity of data entered (e.g. amount of typing done). In addition, an employer’s network administrator can access documents on the network, and can restore some deleted documents;
- online research and Internet use – most networks track user identification numbers, searches performed, web sites visited;
- e-mail – most employers have access to any e-mail composed, sent or received by employees.
Security systems – access cards provided to employees have numbers that are recorded when the card is used to access a restricted area. The reading devices record the location, date and time of access.

6. GET THE WORD OUT -- SEXUAL HARASSMENT IS PROHIBITED.

Let employees know that no amount of sexual harassment is acceptable. In light of the United States Supreme Court’s recent decisions, dissemination of the company’s policy against harassment is essential to an employer’s defense. It is also vital to promptly follow up on complaints with thorough investigations and appropriate discipline, as “prompt and effective remedial action” may also help employers defend against a claim of sexual harassment.

A. Employer Liability for Harassment by Supervisors

Faragher v. City of Boca Raton, 524 U.S. 775 (1998). The plaintiff, a lifeguard at a city beach, claimed two of her three immediate supervisors sexually harassed her. She did not complain to higher management at any time during her employment, but did complain to the third supervisor who failed to report the alleged misconduct to his superiors. The City had a written policy against sexual harassment, but failed to distribute it to its department managers. The trial court found that the plaintiff had been subject to severe and persistent sexual harassment and that the City was liable for the supervisors’ acts. The City appealed, and ultimately the Supreme Court decided that the City was liable. It held that an employer is liable for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the victimized employee. The Court then went on to provide an affirmative defense available to employers. The defense may only be used when no adverse tangible employment action is taken against the employee (e.g., demotion, termination, or transfer to a less desirable job).

The defense is comprised of two elements:

1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and

2) the plaintiff/employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

The defense is not available when a supervisor’s harassment culminates in an adverse tangible employment action against the employee.

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998). In this case, the Supreme Court had to decide whether an employer is vicariously liable when a supervisor creates a hostile work environment by making explicit threats of adverse employment action, but
does not fulfill the threats. The plaintiff was employed for 15 months and never complained to higher management about her supervisor’s harassing behavior, even though the employer had a written policy against sexual harassment, and the employee was aware of the policy.

The Court applied the *Faragher* rule and held that an employee who refuses the sexual advances of a supervisor, yet suffers no adverse tangible employment action, may recover against the employer, but the employer may assert the affirmative defense.

**B. Employer Liability for Harassment by Co-workers**

When the harasser is a co-worker, rather than a supervisor, the employer will be held liable only for its negligence. In *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55 (2d Cir. 1998), the Second Circuit Court of Appeals reversed the lower court’s dismissal of the plaintiff’s claim and ordered further proceedings to determine whether the employer was liable for negligence when a co-worker allegedly harassed the plaintiff. The plaintiff reported four of the incidents to her supervisor, who did not take any steps to investigate until he witnessed an incident himself. The supervisor then spoke with the alleged harasser, but never reported the complaints to the company’s human resources department as required under the company’s sexual harassment policy. Because the supervisor knew of the harassment and was required to report it, the court ruled that: (1) the company had notice of the harassment and, therefore, was required to take reasonable steps to remedy the hostile work environment; and (2) the supervisor’s failure to comply with the company’s own reporting requirements was evidence of the employer’s negligence in its duty to promptly correct sexually harassing behavior in the workplace.

**C. Same Sex Harassment**

In another case decided in 1998, the Supreme Court ruled that Title VII prohibits sexual harassment between members of the same sex. In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), a male oil rig employee sued his employer alleging that three male employees threatened him with rape and sexually assaulted him on several occasions. The first two courts to consider the issue found that the case could not proceed because Title VII did not apply to male-on-male sexual harassment. The Supreme Court reversed because it found “no justification in the statutory language or precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII.”

**D. Policies to Prevent Sexual Harassment**

It is clear from the preceding cases that employers should:

1) have a written policy against sexual harassment and a procedure for reporting complaints (that includes a method for bypassing a harassing supervisor);
2) make sure that all employees are aware of the policy and procedure. Reprint the policy periodically and pass it out to each employee. (Be sure to include a statement that no employee who reports harassment or takes part in an investigation will be retaliated against);

3) provide sexual harassment prevention training to supervisors, with annual refresher courses;

4) respond promptly to complaints or incidents of harassment -- investigate thoroughly and discipline appropriately.

These steps will go a long way in defending against sexual harassment claims, and hopefully, will help to prevent harassment from occurring at all.

7. ATTENDANCE AND FMLA LEAVE.

The Family and Medical Leave Act (FMLA) requires private employers with 50 or more employees to provide up to 12 weeks of unpaid, job-protected leave in any 12-month period for employees to care for a newborn/newly adopted child, a seriously ill child, spouse or parent, or because of the employee’s own illness. The Connecticut Family and Medical Leave Act applies to employers with 75 or more employees and allows 16 weeks of leave in a 2-year period. The 2-year period begins to run from the first day of an employee’s leave.

In Sarno v. Douglas Elliman-Gibbons & Ives, Inc., 183 F.3d 155 (2d Cir. 1999), the United States Court of Appeals for the Second Circuit recently held that an employer did not deny, restrain, or interfere with an employee’s exercise of his FMLA rights by terminating his employment when he could not return to work following his twelve-week FMLA leave. The employee, who fell at work and aggravated a pre-existing hernia injury, informed his employer that he was “going out on workmen’s comp.” The employer notified the employee that his absence would be treated as unpaid leave under the FMLA. Because the employee could not surmise when he would be able to return to work at the end of the twelve-week leave, the employer terminated him. Citing federal FMLA regulations, the court found that if an employee is on a workers’ compensation absence concurrent with his FMLA leave and remains unable to return to work once he has exhausted his twelve weeks of FMLA leave, “the employee no longer has the protections of the FMLA and must look to the workers’ compensation statute or ADA for any relief or protections.” Accordingly, the court held that because the employee could not perform the essential functions of his position at the end of his leave, he was not entitled to reinstatement under the FMLA. The court also found that the employer in no way impeded the employee’s ability to return to work.

An employee is not required to identify his or her leave as FMLA leave. It’s the employer’s duty to decide and designate whether a leave is covered by the FMLA, even if
the employee doesn’t ask about or mention the FMLA. An employer must notify the employee that his or her leave will count against the FMLA entitlement – an employee’s leave may not be designated retroactively as FMLA leave.

Employers should have a system in place to track attendance and check absences to see if they are FMLA related. The system should include a process for sending out FMLA forms after a given number of days. Otherwise, days turn into weeks and months that aren’t counted as part of an employee’s FMLA leave.

Once leave is requested by an employee, the employer must choose to designate the leave as FMLA leave, and must notify the employee of the designation. In the notice, the employer must include a statement of the employee’s rights and obligations with respect to the leave. The notice should also include any requirements for the employee to furnish medical certification. A prototype notice is available through the U.S. Department of Labor. If leave has already begun, the notice should be mailed to the employee’s address of record.

8. WAIVERS AND RELEASES.

Waivers that are properly drafted in clear, understandable terms can save employers from litigation following an employee’s termination. An employee’s waiver must be knowing and voluntary, so be sure to include language that specifically refers to an employee’s rights under the law. An employee may not be asked to waive rights or claims that may arise after the date the waiver is executed. And a waiver may not be used to prevent an employee from filing a charge with the EEOC. It’s important to advise the employee – in writing -- to consult a lawyer before signing the document.

It’s also important to provide an appropriate length of time for the employee to consider the offer – in fact, some statutes require a specific minimum number of days. Under the Older Workers Benefit Protection Act (OWBPA), an employee being terminated on an individual basis (not part of an exit incentive or group termination) who is 40+ years old must be allowed 21 days to consider the agreement, and 7 days after signing to revoke the agreement.

Consideration in the form of severance pay or additional benefits must be given in return for the employee’s waiver, and the consideration must provide value in addition to what the employee is already entitled to. The waiver should include a clause requiring the return of whatever benefit the employee received if he or she subsequently brings a lawsuit.

Failure to comply with OWBPA may make the release of claims unenforceable. In Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998), the United States Supreme Court refused to enforce a release that barred a former employee from asserting an ADEA claim, even though the employee accepted the consideration the company provided for the agreement. The employer in that case gave the employee 14 days to consider the offer.
instead of 21; did not give the employee 7 days to revoke the agreement; did not specifically refer to the employee’s rights under the ADEA; and did not advise the employee to consult an attorney before signing the agreement. The company claimed that by accepting and not returning the consideration, the employee had ratified the agreement. The court disagreed, but added that nothing in the OWBPA precludes an employer from countering the suit with a claim to recover the consideration.

See also, Suhy v. AlliedSignal, 44 F.Supp.2d 432, 436 (D. Conn. 1999)(“Strict compliance with each provision of the OWBPA is . . . necessary, as `a release cannot be deemed knowing and voluntary unless all of the technical requirements of the OWBPA have first been satisfied’").

9. **KEEP YOUR WAGE AND HOUR PRACTICES CURRENT.**

Employers should regularly review both state and federal wage and hour laws and regulations to be sure current company policies and practices are in compliance. Be sure that exempt employees are actually performing exempt work, and that hourly employees are being properly paid for overtime. Make certain that payroll and other records contain the required information. You should have a system in place to maintain the records for required time periods. Your company may be subject to fines if a Department of Labor investigation reveals a failure to comply, even inadvertently, with wage and hour laws. Some penalties can be doubled if the company hasn’t made a good faith effort to comply with the law.

In addition to federal law, Connecticut has specific wage and hour statutes and regulations. For instance, Connecticut employers are allowed to make deductions from an employee’s wages only if written authorization is given by the employee on a form approved by the Labor Commissioner. Employers must also get permission from the Department of Labor to keep payroll records in a facility outside the place of employment, and to pay wages at an interval other than on a weekly basis.

10. **KEEP SUPERVISORS AND EMPLOYEES WELL-SCHOOLED IN COMPANY POLICIES.**

    **A. Provide Training Regularly**

Frequent training sessions are essential to ensure that supervisors and employees are aware of current company policies. Not only will the company be able to better defend itself in employment discrimination litigation, some problems may be avoided altogether by reducing or eliminating sexual harassment, by complying with FMLA and ADA requirements, and by establishing and consistently using sound hiring and evaluation
practices. Connecticut law requires companies with 50 or more employees to train newly hired or promoted supervisors about the laws and company policies prohibiting sexual harassment in the workplace. Training must be provided within six months of a supervisor’s date of hire or promotion. Conducting regular training sessions for all supervisors will assure compliance and help reinforce policies.

### B. Be Sure Supervisors Understand Their Legal Responsibilities

First line supervisors should know that their legal responsibilities go hand in hand with their daily operational responsibilities:

- Dual standards of discipline cause problems – though supervisors may be tempted at times to overlook misconduct of favored employees, such uneven applications of policies will surely surface in any discrimination claim.

- Avoid having supervisors or Human Resources keep two or three different job descriptions for jobs that are essentially the same, because this practice can be used to discriminate against protected workers.

- Be sure protected workers are not excluded from temporary openings from which they could gain experience for possible promotion later.

### C. Terminating Employment – Document Support for the Decision

Supervisors and managers are critical to well-managed decisions to terminate employment. An employer can significantly reduce legal problems by consistently documenting an employee’s performance and behavior.

Employers sometimes avoid documenting an employee’s failure to meet expectations. But taking the time (and the pains) to honestly evaluate an employee’s performance and document expectations may prevent future legal difficulties. Many employers have experienced the problems that arise when firing an employee who has had performance problems, but whose personnel file contains a seemingly spotless record. To that end, in addition to evaluations, all warnings and memoranda of disciplinary actions should be kept in the employee’s personnel file. The records will provide concrete support for performance evaluations, and help dispel notions that discrimination was at the root of the supervisor’s adverse employment action.

Exercise caution before terminating employees – no matter what the reason. To avoid violating an employee’s legal rights, take time to evaluate the situation before the decision is made. Review the personnel file and analyze legal exposure. If necessary, issue a suspension and remove the employee from the building while making this assessment, but don’t terminate first and ask questions later. Be sure thorough investigations of misconduct are done before a termination decision is made. And examine the employee’s personnel file for support for the decision. Ideally, there will be documents that show the employee was aware of his or her performance problems. If the
employee is in a protected class, check the personnel file for information that might make
the employee believe he or she is being terminated for a discriminatory reason, rather
than the company’s legitimate business reason.

Helpful Web Sites:


http://www.ctdol.state.ct.us/ – Connecticut Department of Labor