The Three Biggest Myths Threatening Employers

by Mel Wathen
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Workplace attorney Joel Greenwald, Esq. believes that employers' belief in three myths could be hurting them. Those myths are:

1. "My salaried employees are never entitled to overtime."
2. "My top employee just left with my confidential information to work for a competitor, and there is nothing I can do about it."
3. "Since my business is in an 'at-will' state, I can fire anyone I want for any reason."

Overtime

In order for an employee to be exempt from earning overtime pay, that person's actual duties and responsibilities must meet certain definitions and must be backed up by written records, an accurate job description and company policies. Federal wage and hour law outlines several specific overtime exemptions, including the "executive exemption."

Under the executive exemption, an exempt employee's primary duty must be management. According to Mr. Greenwald, "That person needs to direct the work of at least two employees and have significant input into the hiring and firing process."

There are many other exemptions, including ones for certain types of personnel within the administrative, professional, sales and computer categories. Many expensive problems occur when employers label employees who are not exempt as exempt, citing an inappropriate exemption.

In addition to keeping thorough time and pay records, Mr. Greenwald suggests that employers have counsel assist them by using an organizational chart to figure out who should be exempt from overtime and ultimately draft job descriptions for each position. "Be conservative with these job descriptions and the salary ranges, and carefully review the new minimum and maximum compensation limits," cautioned Mr. Greenwald.

"The salary range limits for determining who is eligible for overtime can differ from state to state," he continued. "Under federal law, for instance, the minimum salary requirement for an overtime exemption is above $455 per week. However, just because an employee is making considerably more than $455 a week doesn't automatically exempt him or her from overtime."

According to Mr. Greenwald, employers should revise their policies and procedures regularly to accommodate changes in employment law and print them in an employee handbook which now should contain "safe harbor" provisions to protect the company against potential wage and hour violations.

"Above all," said Mr. Greenwald, "Management should be trained on legal compliance and proper workplace protocol, and be encouraged to rely on a knowledgeable 'point' person in the Human Resources department."

Losing an Employee or Information to a Competitor

With employee turnover much higher than in past decades, and the ease of transferring huge quantities of information from one computer to another in minutes, employers are quite concerned about employees leaving and taking their trade secrets and customer lists to competing companies.

Mr. Greenwald suggests that upon being hired, each employee sign either a confidentiality, non-solicitation, and/or non-competition agreement (depending on who the employee is) that also defines the company's proprietary information or trade secrets. Such agreements (or "restrictive covenants") should be included in the new-hire's packet and signed when the person is first hired. These agreements should be separate from the employee handbook.

"When you draw up a non-compete agreement," said Mr. Greenwald, "it must pertain to that specific employee and be reasonable in terms of geography, duration and scope, or, more than likely, courts will not enforce it."

"Likewise, you want to restrict the ability of your employees to take your clients with them when they leave for another firm. You also don't want entire departments moving to a competitor." A non-solicitation agreement is designed to restrict a former employee's ability to approach your clients and/or his or her former co-workers. "The more enforceable a non-solicitation agreement is, the more harm it prevents," according to Mr. Greenwald. "That's why you need the advice of counsel to draw up these agreements for each key person who may be able to harm you."

It is essential, cautions Mr. Greenwald, to seek the advice of counsel before having an employee sign any restrictive covenant, because laws differ from state to state. "In California, for example, non-compete agreements are against public policy," he explained.

According to Mr. Greenwald, a trade secret is defined as "information that has independent economic value; is not generally known to the public or in the industry; and that is the subject of sincere, reasonable efforts to maintain its secrecy."

Mr. Greenwald suggests that trade secrets be protected by restricting access to the information as needed, labeling select documents as "Confidential" and storing them in secured areas. You may also wish to explore copyrighting or patenting material that is essential to your company and auditing it as a valuable asset.

Mr. Greenwald also recommends using an exit interview form that confirms with the departing employee what the restrictions are on using the knowledge and contacts that have been acquired while he or she was working at your company, and that includes a post-employment confidentiality agreement.

If a violation occurs and a current or ex-employee steals your trade secret, Mr. Greenwald suggests going on the offensive immediately. "Don't wait for the harm to happen. In certain instances," he says, "imaging a suspicious, about-to-resign employee's computer hard drive may yield valuable information that you may eventually need."

Terminations in At-Will Employment States

In at-will employment states, like New York and New Jersey, one does not need a "just cause" reason to terminate an employee, according to Mr. Greenwald. Still, terminations without good reasons raise the possibility of lawsuits.

"Check with counsel first if you're thinking about terminating employees who have recently made complaints, whether they were about overtime payments, OSHA violations, sexual harassment, or asserting their Family and Medical Leave or other protectable rights," advised Mr. Greenwald. Such terminations could be deemed retaliatory.

To minimize the risk of being accused of discrimination or retaliation, an employer must have codified and enforced written and verbal disciplinary and termination policies and procedures that are printed and disseminated to all employees in employee handbooks and stand-alone policies.

Written records of the employee's poor performance, absenteeism, tardiness, criminal activity, or records of any disciplinary measures taken would help to support the decision to fire that person. In other words, the human resources department needs to create a paper trail that is justifiable and non-discriminatory.

In Mr. Greenwald's opinion, written performance appraisals, signed by the employee, form the backbone of the employer's paper trail if done on a regular, objective basis. These should follow the discipline policy that is codified in the employee handbook, with all oral warnings documented in writing in the employee's record.

Mr. Greenwald suggested that offering the terminated employee severance is an act of goodwill and is sometimes useful as a hedge against lawsuits as part of a separation agreement. He explained that a separation agreement should include extensive general releases to avoid future litigation with a terminated employee. "Make these documents as one-sided in your favor as humanly possible," he insisted. "And train management on proper workplace protocol using the best legal counsel to minimize liability on an ongoing basis."

Joel J. Greenwald, Esq., is the managing partner of Greenwald Doherty LLP, and has made labor relations and employment law for management the focus of his legal career. He and the other attorneys in his law firm exclusively represent management on the many legal issues arising out of the employer/employee relationship. Designated with a prestigious "AV" rating by Martindale Hubbell, Mr. Greenwald is a graduate of the Duke University School of Law and earned his B.A. at Johns Hopkins University. Mr. Greenwald may be contacted at (212) 644-1310, or via e-mail at jg@workplaceattorneys.com.

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