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Q. WHY SHOULD A SMALL EMPLOYER ADOPT AN EMPLOYEE MANUAL FOR ITS WORKERS?

A. THE ANSWERS ARE IN THIS NEWSLETTER

A CPA friend recently asked us to provide a brief summary of why a small employer should retain our law firm to help it adopt “an Employee Manual¹ that is right for its business...and what the process might cost.” The purpose of this Newsletter is to provide that summary. But first, some Q&As:

Q. Is there any law requiring a company to publish an Employee Manual?

A. No, but many federal, state and local laws require companies to publish certain policies, notices and other employment related matters, in writing, and distribute them to the work force². Compliance is facilitated by putting all those items in an Employee Manual, that can readily be provided to each new hire and to each other worker as necessary.

Q. Isn't my company too small to need an Employee Manual?

A. Any company that has one or more employees might be the target of an employee claim. The policies in an Employee Manual should help avoid claims and prevail on those claims that are asserted. If, however, one is looking for a relatively safe minimum number, the New York State Human Rights Law³ excludes companies with less than four employees. However, many employment laws are not subject to this minimum...a notable one being the 2018 Sexual Harassment Prevention Act.

Q. What does an Employee Manual actually do for an employer?

¹ The terms Employee Manual and Employee Handbook are interchangeable in our humble opinion...although some practitioners prefer Employee Handbook...for reasons they were unable to convincingly articulate.

² COBRA and the 2018 Sexual Harassment Prevention Act (SHPA) to name just a couple.

³ Executive Law, Article 15; Section 292 (5) states “The term “employer” does not include any employer with fewer than four persons in his or her employ

A. An Employee Manual should fulfill three major functions: (1) codifying human resources policies and procedures (2) summarizing legal requirements to aid legal compliance efforts and (3) employing sound risk management tools. These will be discussed at greater length in the following sections.

Q. Why not just download an Employee Manual from the internet or buy a cheap one from Legal Zoom or a payroll company?

A. For the same reason that you should not just download a Web MD article when treatment by a board-certified medical doctor or other properly credentialed health care practitioner is required.

HUMAN RESOURCES POLICIES AND PROCEDURES

By this we mean the many internal rules that govern the employment relationship at the company in question, such as:

- Holidays
- Work Hours
- Paid Time Off (vacation, sick days personal days)
- Jury Duty
- Other Leaves (Bereavement, Maternity/New Child)
- Attendance
- Communications with Management
- Punctuality
- Bonuses and Raises
- Performance Reviews
- Computer Use
- Telephone Use
- Dress Code
- Smoking and Controlled Substances
- Group Health Insurance
- Other Benefit Plans
- Confidentiality
- Disciplinary Rules
- Internal Discrimination and Harassment Complaint Procedures
- Employment at Will Policy
- And infinitely many more that vary from workplace to workplace.

Every employer should put these rules to writing in a place that is easy for management and staff to find, i.e. in an Employee Manual. This has the salutary effects of: (1) avoiding repetitive employee questions and (2) helping avoid the possibility of giving two different answers to two different employees!

COMPLIANCE WITH LEGAL REQUIREMENTS

A less obvious, but very important, function of an Employee Manual is to support the employers' legal compliance efforts. An Employee Manual should include summaries of certain federal, state and local employment statutes, with links to government agency websites and/or the phone numbers of those agencies, where additional information may be obtained directly from the agency that administers the statute. Our clients' Employee Manuals often include summaries and links to government agency websites for many statutes including:

- New York Paid Family Leave Act
- New York State and City Sexual Harassment Prevention Laws
- Federal and State Jury Service Procedures
- Federal Overtime Wage Laws (“time and a half” rules)
- Federal and State Employment Discrimination and Harassment Laws
- Federal and State COBRA laws
- Federal Occupational Safety and Health Law Protections (OSHA)
- National Labor Relations Act Protection (NLRA)

For example, since October 2018 the New York State Sexual Harassment Prevention law has required that each New York employer adopt and circulate a written Sexual Harassment Prevention policy...a very efficient way to comply with that requirement is to include the mandated policy in the company's Employee Manual.

RISK MANAGEMENT

Another less obvious function of an Employee Manual is in the area of risk management. It has been reported by the New York Law Journal that 20 percent of all civil law suits filed in the US District Courts in New York are employment claims!

Moreover, the US Equal Employment Opportunity Commission and the New York State Division of Human Rights⁴ have concurrent jurisdiction to assert and/or adjudicate various employee claims including claims that the employer illegally discriminated against a worker on the basis of sex, religion, disability, national origin and age. Under various federal and/or state statutes, sexual orientation, gender identity, military status, marital status, domestic violence victim status and criminal history may also be protected criteria. Please note that sexual harassment is a category of sex discrimination, so the agencies can and do assert and/or adjudicate sexual harassment claims. This is an area of extreme risk for all employers in the “me too” era.

Similarly, the US Department of Labor and the New York State Department of Labor each have authority to adjudicate certain employee claims, and are particularly effective for claims under

⁴ And the New York City Human Rights Commission for companies that have NYC based employees.

the so-called “wage and hour” laws⁵, i.e. the laws that regulate: (a) minimum wage and (b) “time and a half” for hours worked in excess of 40 hours per week.

While all employers run a substantial risk of a claim brought in court or an administrative agency, they may take appropriate steps to manage that risk. One obvious step is to adopt appropriate policies and procedures and include them in the Employee Manual:

Disciplinary Procedures. It is not surprising that many if not most employee claims are asserted by employees that have been subject to discipline of one sort or another, but most often following an involuntary termination.⁶ Intent to discriminate may be inferred in many ways from the circumstances surrounding the disciplinary act. Therefore, the best way to manage this risk is to adopt well-structured disciplinary procedures and to follow those procedures each time an employee is terminated or otherwise disciplined.

Sexual Harassment Prevention Policy. Since October 9, 2018 every New York State employers must adopt and circulate a written Sexual Harassment Prevention Policy. We believe the most efficient way to comply with this requirement is to include it in the Employee Manual that is provided to each new hire when she joins the company.

Equal Employment Opportunity Policy. Although not mandated by law, an Equal Employment policy is obviously a necessary spoke in the any company’s risk management wheel...and it belongs in the Employee Manual.

Equal Employment Opportunity: Internal Claims Procedures. In 1998 the United States Supreme Court⁷ ruled that an employer is liable for sexual harassment by a supervisor unless it takes "reasonable care" to prevent and stop harassment and offers employees a viable in-house complaint mechanism. Thus, adopting a viable complaint procedure may provide a defense to a sexual harassment claim. Once again, we can think of no better place for a company’s internal claims procedure to be enumerated than in its Employee Manual.

New York State Paid Family Leave Law. The New York State Paid Family Leave (PFL) website states: “Employers must ensure that their employees are aware of the Paid Family Leave program and that their organizational policies comply with the law.”⁸ Including information about the PFL law and procedures in the Employee Manual should go a long way in managing the risk of a PFL based claim against the company.

EMPLOYEE MANUALS ARE GENERALLY REQUIRED BY EMPLOYEE PRACTICES LIABILITY INSURANCE CARRIERS

Another valuable means to manage employee claims risk may be to secure Employee Practices Liability Insurance (“EPLI”) coverage. While this coverage tends to be somewhat limited and

⁵ US Fair Labor Standards Act of 1938, as amended. 29 U.S.C. 201, et seq

⁶ Often referred to as an “adverse employment action” under employment discrimination law.

⁷ *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)

⁸ See https://www.ny.gov/sites/ny.gov/files/atoms/files/PaidFamilyLeave_BusinessOwnerFactSheet.pdf

carries exclusions, the premium costs have gone down in recent years, so it is now cost efficient for more small employers. EPLI underwriters generally require the applicant company to have an Employee Manual...thus, the underwriters obviously recognize the risk management benefits of a manual.

PRICE

The fees may vary from case to case based on many different circumstances. We will happily provide an estimate after a conference call where those circumstances can be explored. Please call us to talk about your situation and generate an estimate.

CONCLUSION

A properly structured Employee Manual should be an employer's first line of defense in managing the risk of employee claims and labor department claims and audits as well as the risk that results from labor law non-compliance. By "properly structured" we mean one that is custom tailored for your company by experience professionals; as opposed to a generic manual obtained from a payroll company...or is down-loaded from the internet.

Richard H. Waxman, PC has been crafting Employee Manuals for our clients for decades, so we have the expertise and depth of experience that allows us to prepare an effective manual for your company at a reasonable price.

If you have any questions about Employee Manuals, or about any other facet of employment law, please contact Richard Waxman at:

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