Advanced Strategies For Hiring & Firing

The best way to handle a problem employee is to never hire him. With a well developed hiring practice, you can increase your chances of hiring only those quality employees who will benefit your company. In the often necessary event of having to part ways, it is important that your managers are utilizing best practices to ensure minimum liability.

- **What should your objectives be in hiring?**
  1. Screen out likely problem employees, and instead hire only the best possible candidates.
  2. Eliminate negligent hiring claims.
  3. Utilize non-discriminatory hiring practices.

- **Applications should be completed for every new hire – including rehires!**
  1. Make sure the application is completely filled out.
  2. Carefully review what is written.
  3. Don't make any notes on the application.

- **Red flags to look for on applications:**
  1. Declining pay.
  2. Gaps in employment.
  3. Suspicious reasons for leaving previous employers.
  4. "Forgetting" to answer certain questions.
  5. Failing to sign the application.

- **Make the interviews count!**
  1. Use the 80/20 rule – the person you are interviewing should be doing most of the talking!
  2. Ask open ended questions such as:
     - "What if" questions.
     - Tell me about your current supervisor?
     - What are some things you'd like to avoid in a new job?
     - Have you ever been fired or asked to resign from a job?
  3. Don't ask illegal questions!
     - Are you married? (marital status discrimination)
     - Where is your accent from? (national origin discrimination)
     - When did you graduate from high school? (age discrimination)
     - What church do you go to? (religious discrimination)
     - Do you have any physical problems? (disability discrimination)
  4. Observe the applicant's body language and facial expressions as they respond.
  5. Don't make notes on their applications, and always be mindful about what you are writing.
  6. Avoid statements that the applicant could misconstrue and try to use against you later:
     - after your probationary period you will become a permanent employee
     - no one ever gets fired here unless it is for a really good reason

- **Introductory Period**
  1. Uh oh – Did we make a mistake hiring this employee? Keep your eyes and ears open during an employee's first 90 days on the job. It is easier to explain why an employee is terminated early in his or her employment, there is less risk of legal action, and the employee (usually!) doesn't have a strong sense of entitlement.

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- **Termination for Poor Performance**
    1. Was the employee given fair warning of his/her shortcomings?
    2. Was warning documented?
    3. Was employee given sufficient time to improve?
    4. Have other employees had similar performance problems?
    5. Were they treated consistently?
    6. Does the employee know his job is at risk?
    7. Are there any "extenuating" circumstances that might explain the poor performance? (*i.e.*, how will this case look to a jury of the employee's peers?)

- **Termination for Rule Violation**
    1. Do we have all of the facts?
    2. Did we give the employee a chance to tell his side of the story?
    3. Do we have a written statement from the employee?
    4. Has someone personally interviewed all witnesses?
    5. Do we have written statements?
    6. Is the rule clear and sufficiently communicated?
    7. Does the employee admit violating the rule?
    8. Were there witnesses to the violation?
    9. Is discharge the appropriate penalty?
    10. How were previous violations of the rule treated?

- **Handling The Separation**
    1. Once you have determined that the employee should be separated, you need to ensure that the communication to the employee is handled appropriately.
    2. Have a witness lined up to assist in the process. Your witness should be prepared to listen closely and take good notes of all things said by you or the employee in the meeting.
    3. Prior to the meeting, put a few bullet points together of what you want to communicate to the employee regarding the reason for the separation.
    4. Listen to the employee's questions and concerns, but do not argue or debate the point.
    5. If the employee is being terminated immediately, be prepared to get all remaining property (or tell the employee what must be turned in and by when).
    6. Be prepared to discuss how you will respond to requests for references.
    7. Be prepared to answer the employee's question about pay for unused vacation (if any), sick time, health care continuation, and other similar issues.
    8. If the employee is being terminated immediately, be prepared to respond to the employee's question on unemployment eligibility.
    9. Do not discuss the reasons for the separation with other employees or third parties. Since each situation is unique, you need to determine the appropriate communication for each situation, recognizing that employment issues should remain confidential.

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Advanced ADA: 5 Strategies to Assure Compliance

The Americans with Disabilities Act was never intended to be a simple law because it was much more than a law mandating equal treatment of employees. Here are five strategies to assist you with compliance:

- **Job Interviews**. Use experienced interviewers familiar with the ADA. Interviewers may inadvertently explore job content areas which would violate the ADA. For example, it is not easy to understand the difference between asking "How many days did you take leave last year," versus "How many days were you sick last year." Train your interviewers how to handle applicants who volunteer disability-related information. The fact that an applicant volunteers information (which should be followed-up post-offer), is not an invitation to ask follow-up inquiries now.
- **Job Descriptions**. Clear and accurate job descriptions help define what is an "essential function" or what may be an "undue hardship." Is attendance essential for teamwork, client meetings, or other in-person meetings? If a function is not in the job description, it may not be considered an essential function. Conduct a job analysis. Consider why the position exists and, to the extent possible, include tasks in the job description that are unique to the position and any special skills or expertise required to perform the job. Standard information on a job description should include, a description of the tasks involved, job conditions, job standards, knowledge, skills, and abilities and the minimum qualifications for the position. Particularly important are the mental and physical requirements for the position. Review your performance appraisal process against the job description. Reviewing your appraisal documents can validate the essential functions (or conversely pinpoint possible concerns or holes between what is essential and what is being assessed). Once you have the job description, stick with it! Always go back to the description when determining whether something is an essential function and don't remove an essential function as an accommodation.
- **Interactive Process.** We all know that short of undue hardship, we have a duty to accommodate employees with disabilities. And we know speaking with the employee is key. Don't cut the communications short. The interactive process will often consist of many communications with the employee – engage in however many discussions are needed to determine the employee's needs and whether you can reasonably accommodate those needs. Ask the employee what he or she can do. Remember not to ask for a diagnosis, but rather instead how many hours the employee is capable or working or how much the employee can safely lift. The purpose is to identify the person's abilities and limitations, not to define the extent of nature of the disability. Be flexible and creative. Remember that cases are decided by judges and juries who are human beings. They are looking for "fairness." All your correspondence needs to clearly communicate that you are committed to working with the employee to identify a reasonable accommodation to perform the essential functions of his or her job. Avoid the language of discipline and use the language of essential functions. Avoid ultimatums – "this is it, this is all we are going to offer." Avoid telling an employee everything you are willing to do at once – make the accommodation and if that does not resolve the issue, move on to the next. Follow-up with the employee after implementing an accommodation to ensure that it is working. If not, start over again. Don't forget parties or other social functions – your duty extends to **all** benefits and privileges of employment**. Document and proceed as if someone will review every step**.
- **The Health Care Provider Dance.** We all believe that health care providers will sign anything their patients ask them to sign and write whatever will get their patient what the provider thinks the patient needs. Health care providers are often extremely vague in their responses to employers. To end this dance early and move on to the next partner, start with a well-written job description and include it with your inquiry. When requesting the health care provider to list the requested accommodations, ask the provider to also identify how each accommodation will allow the employee to perform the essential functions of his or her position. If the requested accommodations are unreasonable, ask for alternatives.
- **Undue Hardship.** The burden is on the employer to show the proposed accommodation would impose an undue hardship and it is analyzed on a case-by-case basis. There is no doubt that you have to spend some effort to accommodate an employee's needs. Some degree of hardship is to be expected – hence the test is "*undue* hardship" rather than "mild hardship" or "reasonable hardship." You should only conclude that an accommodation request will amount to undue hardship after careful consideration of all elements of the request, your ability to meet it, and consultation with legal counsel. Examples: **significantly** disrupts others ability to work, creates **significantly** more involuntary overtime, causes coworkers to work **significantly** harder & longer. Again, documentation is key.

Trends: Mental Disabilities, Pregnancy Claims, Phobias

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Common Mistakes on I-9 Forms and How to Avoid Them

1. **Storing I-9 Forms in the Wrong Place.** I-9 Forms should not be maintained in employee personnel files. Completing I-9 Forms requires collecting personal information about employees. Keep this in mind when determining where to store these forms and any corresponding documentation.

   Best Practice Tip: Keep I-9 Forms in a separate binder for current employees, and another for terminated employees.

2. **Using an Outdated Version of the I-9 Form.** On November 14, 2016, USCIS revised the I-9 Form. Employers must use the new version for all new hires. The form is revised about every three years.

3. **Failing to Ensure Section 1 is Completed in a Timely Manner.** Section 1 must be completed by the employee no later than the first day of employment for pay, but not before accepting a job offer.

4. **Failing to Ensure all Relevant Fields are Fully and Properly Completed**. Section 1 must be completed by the employee. However, the employer is responsible for reviewing and ensuring that employees fully and properly complete it. The employer is responsible for completing Sections 2 and 3.

   Reminders:
   - To ensure the form is fully completed, write "N/A" when appropriate. For example, if an employee does not have a middle name, make sure that field is not left blank.
   - Don't forget that providing an email address, telephone number, and social security number (unless the employer participates in E-Verify) in Section 1 is optional.
   - If an employee has two last names or a hyphenated last name, both names should be included.

5. **Completing Section 2 in an Untimely Manner**. Section 2 must be completed by the employer within 3 business days from the date the employee starts work for pay. However, if the employee is hired to work for less than 3 days, it must be completed no later than the end of the first day of employment.

6. **Telling Employees What Specific Documents They Must Present for Review and Verification**. Employees CANNOT specify which particular type of documents the employee may present.

7. **Reviewing Photocopies of Identity or Employment Authorization Documents**. Employers must physically examine original documents in the employee's physical presence. If the documents reasonably appear to be genuine and relate to the person presenting it, employers may accept that document to complete Section 2 of the I-9 Form.

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Best Practice Tip: Make a photocopy of the documents you review for all employees, and keep the copy with the I-9 Form – if it is your company's policy/practice to do so.

8. **Failing to Re-Verify Expiring Work Authorization Documents**. Employers must re-verify the employment authorization of certain employees before his or her employment authorization expires.

   Best Practice Tip: Set a calendar reminder to ensure deadlines are not missed.

   Reminder: You should not re-verify U.S. citizens or lawful permanent residents. Also, reverification does not apply to List B documents.

9. **Completing the Spanish Version of the Form**. Form I-9 is available in English and Spanish. However, only employers in Puerto Rico may use the Spanish version to meet the verification requirements of the law. Employers in the United States may use the Spanish version as a guide only, but the English version must be completed and retained for all employees.

10. **Non-Compliance with Retention Requirements**. Employers must retain an I-9 Form for each employee. If an individual's employment is terminated, the employer must retain the employee's form for either three years after the date of hire or one year after the date employment is terminated, whichever is later.

    Best Practice Tip: Conduct periodic self-audits to ensure compliance with these and other requirements.

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Employment Agreements: Separation, Non-Competition and Arbitration

Separation Agreements: One size does not necessary fit all

- Over 40 years old?
- Group layoff?
- State of employment?
- Previous restrictive covenant agreement?
- Include restrictive covenants by reference or add new restrictive covenants?
- Payout severance over time or in lump sum?
- No re-hire?
- Cooperation/Availability for assistance clause?
- Timing of termination and signature?

Restrictive Covenants: Non-Competition, Non-Solicitation and Confidentiality

- What are you trying to accomplish?
- Which restrictive covenants?
- What type of employees should be required to sign?
- In what states are your employees located?
- Geographic scope?
- Time limit?
- Likelihood of enforcement?

Arbitration Agreements: Does arbitration make sense for your organization?

- Class action waiver
- Initial expense
- Total expense
- Effect on early resolution
- Effect on likelihood of summary judgment
- Split-the-baby risk
- Limited pool of arbitrators
- Fights over enforceability

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FAIR CREDIT REPORTING ACT

WHAT EMPLOYERS NEED TO KNOW

April 20, 2017 BY DANA CHANG

1. **Increased Applicant and Employee Rights**

   Recent amendments to the rules governing the obtaining and use of background reports, known as "consumer reports," in accordance with the Fair Credit Reporting Act ("FCRA"), have significantly increased the rights of applicants and employees to receive certain disclosures and to choose whether to authorize certain background reports.

2. **What is a "Consumer Report?"**

   An employer triggers FCRA obligations when it requests a "consumer report," a term which includes a broad category of reports from a "consumer reporting agency" containing any information "bearing on a consumer's credit worthiness, credit rating, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." Reports such as driving records, criminal records, credit reports, and many other reports normally constitute "consumer reports" when an employer obtains them for employment purposes from a third-party, consumer reporting agency such as a credit-reporting company, a record-checking company, or an investigative firm.

3. **What is an "Investigative Consumer Report?"**

   A special subset of consumer reports, called "investigative consumer reports," contain information obtained by a consumer reporting agency through personal interviews with neighbors, friends, associates, acquaintances, or others with knowledge of the consumer. An investigative consumer report could include a report prepared by an investigator who interviews an applicant's former employers on behalf of the prospective employer. If an employer intends to obtain an investigative consumer report, the FCRA imposes additional disclosure requirements in addition to all of the requirements that apply to ordinary consumer reports.

4. **Can An Employer Obtain Information From Public Records?**

   Sometimes employers themselves go directly to original governmental sources to obtain records (such a department-of-motor-vehicles records, local or state criminal records, courthouse records, etc. Reports obtained in this manner are generally not considered to be FCRA-covered consumer reports. On the other hand, if an employer retains a third party to obtain and evaluate reports for employment purposes, the third party who goes to governmental sources for such reports will normally be considered a consumer reporting agency providing consumer reports.

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5. What is a "Consumer Reporting Agency?"

The term means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

6. What is an "Adverse Action?"

For employment purposes, the term "adverse action" means a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.

7. For employers using consumer reports, the FCRA requires the following steps:

i. Provide Prior Written Disclosure to the Applicant and/or Employee.

Disclosure of intent to obtain reports must be a "stand-alone" document containing only this disclosure, but it may also include a section for the applicant's or employee's authorization. The disclosure must tell the applicant/employee that a consumer report or an investigative consumer report may be obtained for employment purposes.

For hiring, employers should give both the consumer report and investigative consumer report disclosures as two separate documents to the applicant (NOT attached to the employment application). These documents may also be given to current employees and are designed to be used to obtain multiple reports over time.

ii. Obtain Signed Authorization from the Applicant and/or Employee.

The employer must obtain the applicant's or employee's signed authorization before requesting either a consumer report or an investigative consumer report

iii. Make the Certification to the Consumer Reporting Agency.
An employer must certify to the consumer reporting agency that the employer follows proper procedures and uses the reports only for employment purposes. An employer may send a consumer reporting agency a single certification to cover all future reports requested for employment purposes

8. Give Written Notice Before Taking "Adverse Action."

Before taking an adverse action (such as not hiring the applicant) based in whole or in part on information contained in a consumer report, an employer must give the applicant or employee the following documents:

- A copy of the consumer report or investigative consumer report
- A copy of the "*Summary of Your Rights Under The Fair Credit Reporting Act*" (copy included in Appendix 4).

An employer must provide the report and the *Summary of Rights* to the applicant or employee a reasonable period of time before actually taking adverse action. A "reasonable period of time" depends on the circumstances including such factors as the industry, the employer's business needs and past practice, and the information in the report.

9. Give Written Notice After Taking "Adverse Action."

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When an employer actually takes adverse action based in whole or in part on a consumer report or investigative consumer report, the employer must give the applicant or employee a written notice of the adverse action along with specific information about the consumer reporting agency which provided the consumer report. Appendix 6 contains a sample *"Adverse Action Notice."*

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FEDERAL CONTRACTOR AFFIRMATIVE ACTION COMPLIANCE

This document is intended to provide companies that provide supplies or services[1] for government contracts an overview of affirmative action compliance requirements. For more specific questions and analysis, please contact your labor and employment counsel.

The following compliance requirements apply to a federal contractor or subcontractor (including its subsidiaries or affiliates[2]) with 50 or more employees and government contracts or subcontracts of $50,000 or more, unless otherwise stated.[3] All requirements apply equally to any subcontractors whose work is necessary to the performance of the federal contract that generates the initial compliance requirements, except as otherwise noted.

Checklist for Determining Affirmative Action Obligations

Contractor:

Does the company, including its subsidiaries or affiliates, have a contract with the Federal Government? Yes ___ No ___

1. Is the amount of the contract $50,000 or more? Yes ___ No ___

   - ❖ If yes, affirmative action obligations under Executive Order 11246 and Section 503 of the Rehabilitation Act of 1973 (Section 503) apply.

2. Is the amount of the contract $150,000 or more? Yes ___ No ___

   - ❖ If yes, affirmative action obligations under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) also apply.

3. If there is no dollar value on the contract, are the purchases or sales of services or goods in a year expected to exceed $50,000/$150,000? Yes___ No___

   - ❖ If yes, then the affirmative action obligations under #1 and #2 apply.

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[1] Construction contractors' affirmative action plans (AAP) differ significantly from supply and service contractors' AAPs.

[2] The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has developed a 27-point questionnaire to determine whether companies are considered single or related entities for jurisdictional purposes. Centralized employment decisions are a key indicator of single employer status, although other factors are also considered.

[3] The basic compliance requirements related to the Vietnam Era Veterans' Readjustment Assistance Act arise when the contractor has a contract of $150,000, regardless of the number of employees, and affirmative action plans are required with a $150,000 contract and 50 employees. Other laws, including Executive Orders, apply where the contractor has a contract in the amount of $500,000 or $1 million. In addition, contractors with a contract of $5 million or more must establish a Business Code of Conduct policy and complaint reporting procedure, which typically includes a hotline reporting system. Further, some obligations attach to Federal Government contracts and subcontracts before the contract level reaches the $50,000 or $100,000 thresholds. For example, at $10,000, the Equal Opportunity clause must be incorporated, which now includes non-discrimination provisions for gender identity and sexual orientation.

Subcontractor:

1. Does the company have a contract to provide goods or services to a Federal Government contractor or subcontractor? Yes___ No___

2. Does the subcontract provide goods or services necessary to the performance of the ultimate federal contract? Yes___ No___

    - ❖ If yes, the company is a federal subcontractor.

3. Is the amount of the subcontract $50,000 or more? Yes ___ No ___

    - ❖ If yes, affirmative action obligations under Executive Order 11246 and Section 503 apply.

4. Is the amount of the subcontract $150,000 or more? Yes ___ No ___

    - ❖ If yes, affirmative action obligations under VEVRAA also apply.

Extent of Obligations

Federal contractors and subcontractors have virtually the same compliance requirements. The Company's obligations as a government contractor/subcontractor can be divided into six main areas: (1) preparation and annual updating of the affirmative action plans; (2) preparation of and submission of reports to the government; (3) recordkeeping and posting requirements; (4) compliance with a higher minimum wage and paid leave provisions; (5) participation in compliance audits; and (6) participation in complaint investigations.

1. *Preparing Annual Affirmative Action Plans (AAPs)*

The basic elements of an Executive Order 11246 AAP include:

a) Data collection and record keeping, including providing compliant voluntary self-identification forms to applicants and employees;

b) Taking an annual “snapshot” of the representation of minorities and females within each establishment’s workforce, by job group;

c) Conducting a job group analysis to identify and group jobs which are similar and will be used for statistical comparison (job groups are defined as groups of jobs with similar content, wage rates and opportunities);

d) Conducting a statistical availability/utilization analysis by job group to compare the representation of minorities and females with the internal and external availability and establishing placement goals where the categories are under-represented;

e) Preparing an applicant flow log (covering 12 months prior to the snapshot) that includes applicants' race and sex (Section 503 and VEVRAA AAPs also require a log that includes disability and protected veteran status);

f) Conducting statistical adverse impact analyses for personnel activity for hiring, promotions and terminations for the 12-month period prior to the snapshot. Statistically significant adverse impact may result in financial liability, including back pay and the requirement to engage in preferential hiring or promotion;

g) Conducting a compensation self-audit, recommended annually, by job group or job title, race and sex; and

h) Annually reviewing goal attainment. (Section 503 and VEVRAA AAPs require analysis of the applicable goals and benchmarks for individuals with a disability and protected veterans).

Additional obligations include supervisor training, internal dissemination of the AAPs, posting requirements and a mandatory equal opportunity contract clause for all subcontracts and purchase orders and other requirements.

2. *Reporting Obligations*

- EEO-1 Report - file annually (also required of non-federal contractors with 100 or more employees). The company must identify its status as a federal contractor on the form. Contractors with 100 or more employees must also complete the pay data and hours worked sections for the new EEO-1 Reports that will be due March 31, 2018 (replacing the September 30, 2017 reporting deadline).
- VETS-4212 Report - file annually (formerly called VETS-100 or VETS-100A report) identifying the number of protected veterans in its employment and the number of new hires that are protected veterans, if the contractor has a covered contract of $150,000 or more

3. *Recordkeeping and Posting Requirements*

- Post all job openings (except highest-level jobs and those filled from within) with the local or state job services agency.
- Post Employees' Right to Organize poster required by Executive Order 13496 in all areas where other employee notices are displayed, including electronically.
- Post the "EEO Is the Law" poster that includes the federal contractor language.
- Post Federal Contract Minimum Wage poster, if applicable.
- Post a notice to all applicants and employees that the non-confidential portions of the AAPs for individuals with a disability and veterans are available for review upon request during normal business hours.

- Post a notice to all applicants and employees that the contractor will not discriminate against applicants or employees who disclose or discuss compensation information, using OFCCP's Pay Transparency language.
- Maintain all employment-related records for 3 years to comply with the veterans and disability regulatory retention requirements, including pre-offer, post-offer, and all employee voluntary self-identification survey information.

4. Defending Compliance Audits

Compliance audits require that the contractor submit to OFCCP its complete affirmative action plans for the particular establishment being audited for a desk audit, as well as additional information specified in a letter sent to the contractor 30 days in advance of the deadline. That desk audit may lead to an onsite review, including interviews of managers and employees, review of records, and frequently, identification of problem areas, both monetary and non-monetary. These onsite reviews normally take 3-5 days per establishment. When the OFCCP identifies potential affected class issues, there is a likelihood that there will be monetary liability either in the required hiring of a specified number of minorities or females, the increase in compensation of current minorities or females, or the promotion of minorities and/or females, all of which include a back pay component. OFCCP also enforces perceived disparities impacting whites or males. The duration of an audit may vary from a few weeks to several years.

5. Contractor Wage and Paid Leave Requirements

Most contracts and subcontracts subject to the Davis Bacon and Service Contract Acts and concessions contracts with the Federal Government impose minimum wage and paid leave requirements for employees working on or in connection with the contracts. Currently the minimum wage is set at $10.15 per hour but it is indexed to inflation so it can change each January, and it is increasing to $10.20 effective January 2017. Employees working on or in connection with covered contracts must also earn 1 hour of leave for each 30 hours of covered work, up to a maximum of 56 hours per year. Current PTO policies may satisfy this requirement if the provisions for use and the accrual and carryover provisions are consistent with the regulations.

6. Complaint Investigations

Complaint investigations by the OFCCP are similar to investigations of discrimination charges by the EEOC with a significant difference. While the EEOC rarely undertakes an onsite investigation and typically makes decisions based upon initial submission of written materials, the OFCCP typically conducts an onsite investigation and interviews managers and employees as well as inspects records. It also usually requires additional documentation beyond what may be required by the EEOC. In addition, the government contract obligation creates additional protected categories, such as protected veterans, sexual orientation and gender identity.

Costs and Risks

1. Risks of Affected Class or Other Monetary Relief

Statistically significant adverse impact findings, generally defined by OFCCP as personnel actions (hiring, promotions or terminations) that result in two or more standard deviations and compensation differences that are not explained by justifiable factors, are treated similarly to class actions and may result in a Conciliation Agreement that includes back pay, interest, and benefits awards, as well as mandatory salary adjustments or requirements to create a preferential hiring list of the alleged victims. Contactors may also be debarred from participation in federal contracts and may risk having contract payments withheld, although those more extreme sanctions will not occur absent a hearing.

2. Discoverable in Litigation

The AAP provides a detailed and critical look at the organization, including significant employment data such as the adverse impact analyses referred to above. The AAP will likely be discoverable in litigation and may provide a source of unfavorable information to a plaintiff's lawyer. Underlying analysis, discussion and conclusions may also be discoverable, if the data is not protected by an attorney-client privilege.

3. Costs of Compliance

The cost of preparing and maintaining AAPs, both in terms of internal manpower and out of pocket costs, may be significant. Internal support for affirmative action compliance is often augmented by consultants or outside counsel. Defending an audit, even an audit that results in a positive outcome, is very expensive—in time and resources.

For assistance in working with the regulations, conducting a compensation self-audit, defending an OFCCP audit, or preparing affirmative action plans, contact your Fisher Phillips counsel or a member of the firm's Affirmative Action and Federal Contract Compliance Practice Group, including:

Thomas P. Rebel
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Managing the Difficult Employee Using Good Documentation and Communications

Who are your difficult employees? Excellent performers but don't get along well with others. Underperformers who blame others. Some are just negative and disruptive to the workplace.

Best management process: Address employee issues, small and large, in an immediate and positive way, following up with an appropriate writing, ensuring consistency in addressing performance or behavior issues.

Steps for Your Process

When an employee first begins to show the signs of a difficult employee (or if you have just inherited a difficult employee that other managers did not address properly), have a positive, honest conversation about what you have heard and have observed. Listen to employee's version. Outline expectations and a timetable for improvement. Offer resources.

Follow this conversation with a positive email thanking the employee for coming in to talk about how the employee can be a better contributor to the team (or whatever the issue was).

Monitor the situation; ask for feedback from others. Listen and watch for interactions (positive and negative).

Follow up with the employee. Discuss what you have heard. If you've received negative comments, you must address those with specificity (who, when, what, why). Get employee's version. Outline expectations.

Follow up in writing. If the feedback was negative, in your follow up document, (1) be specific about what you discussed the first time; (2) what the feedback was; (3) outline the expectations; (4) be clear that you expect the employee to make immediate and sustained improvement in those areas; and (5) outline consequences. Example: if we continue to have these issues, we will have to discuss whether you are a good fit for our office.

Employee Deflection. Sometimes, the employee will try to deflect and explain the bad behavior to justify it. Listen briefly and then reinforce your expectations. Document this issue.

If no improvement, separate. Continue to address issues in a positive, clear, and written way until you have either improved the person's performance or decided it is time to let him/her go.

Why the Push for Documentation?

Goal. Your goal is to adjust behavior or performance. If the performance or behavior does not improve, you want to have effective documentation in your file to show that (1) you brought concerns to the employee's attention; (2) you were clear and specific about the concerns; (3) you outlined expectations; and (4) you outlined consequences for the employee's failure to improve.

The employer needs a legitimate, non-discriminatory or non-retaliatory reason to terminate. If you are sued for a civil rights violation or if the employee claims you retaliated, you have to show that your termination was for *a legitimate, non-discriminatory reason*, such as failure to perform the job, a conduct violation, etc. You show legitimate reasons through various types of written notice: handbook policies, counseling and coaching documents, performance evaluations, written warnings, email communications, notes from meetings where deficiencies were discussed.

Good faith; fairness. You want to ensure that anyone looking at your processes can see you were fair to the employee.

Notice. You may have to prove that the employee had "notice" of your concerns. This is why you need to have the employee sign the document or evidence receipt of the email.

Consistency. Remember, the hallmark of discrimination is where the employer treats similar situations differently. Have you been consistent in how you addressed this issue when compared to how you treated other employees who have engaged in similar behavior (even if not the exact behavior)?

Resetting Expectations. If you have inherited an employee who has positive documentation in his/her file or the employee has slipped over time and has become a mediocre performer, then you need to reset the expectations by following the guidelines above. The faster you begin this process, the faster you will either see improvement or will be able to separate with a lower risk of claims.

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OSHA'S New Recordkeeping And E-Filing Requirement

OSHA's New Electronic Filing and Whistleblower/Retaliation Requirements:

- Published – May 11, 2016
- Effective Dates:
  - December 1, 2016 – Whistleblower provision (1904.36) and Injury and Illness reporting procedure (1904.35)
  - January 1, 2017 – Phase in of electronic filing requirements (1904.41) – will post data on OSHA public website (www.osha.gov)

New Injury And Illness Reporting Requirements (1904.35):

1. Inform employees of right to report work related injuries and illness free from retaliation.
2. Procedures for reporting work-related injuries and illnesses must be reasonable and not to discourage employees from reporting.
3. Employer cannot retaliate against employees for reporting work-related injuries and illnesses.

Note: Potential impact on safety incentive programs and drug testing

Recordkeeping Action Points Going Forward:

- Review Employee Injury and Illness Reporting Policy and other related recordkeeping areas, such as accident/root cause analysis and safety programs.
- Ensure OSHA Poster with employee reporting rights is posted.
- Eliminate word "immediately" from injury reporting policies.
- Check to see if it looks as if you discipline for safety when an injury occurs.

Auditing Your Recordkeeping Process:

- Consolidate injury and illness recordkeeping into one system (to the extent possible).
  - OSHA
  - First aid and FMLA
  - Workers' Comp
  - STD/LTD
- Self-audit logs for five years and make corrections, if necessary.
- In the audit, utilize certain workers' compensation or other appropriate records to check to see if some recordable injuries were overlooked.

Recordkeeping Action Points Going Forward:

- Audit Injury and Illness Records on a routine basis. Correct, if necessary.
- Train site personnel on proper recordkeeping.
- Develop measurements of safety and health programs that do not rely on injury and illness rates (leading indicators).
- Revise safety incentive programs.
- Prepare for OSHA recordkeeping inspections.
- Review drug-testing policies and practices.
- Review disciplinary policies related to Accident/Injury Reporting.

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TEN TIPS WAGE & HOUR

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1. Re-evaluate the status of exempt employees, especially in light of the possible changes to the federal regulations.
2. Maintain accurate records of hours worked by nonexempt employees.
3. Ensure all nonexempt employees get paid at least the applicable minimum wage.
4. Ensure all nonexempt employees are properly paid overtime on all of their compensation, including commissions and other incentive based bonuses.
5. Ensure that you are only deducting time for bona fide meal breaks, and not rest breaks.
6. Compensate nonexempt employees for training and travel time.
7. Ensure that employees paid on commission or bonus have written pay plan.
8. Review whether "independent contractors," "casual labor," "contracted employees," or "freelancers," should be non-employees or employees.
9. Ensure that deductions from pay are required by law or permitted under written agreement that complies with the law.
10. Evaluate whether nonexempt employees are working remotely and ensure that such time is being captured.

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For additional information contact**:** **David Buchsbaum** at 954.847.4730 or dbuchsbaum@fisherphillips.com

TOP 10 HANDBOOK UPDATES

1. **Attendance Policies – Ensure yours does not run afoul of the ADA.**
Employers must be careful how they treat a worker who is not eligible for leave under the federal Family and Medical Leave Act (FMLA) or who has exhausted such leave. He or she might still be eligible for leave under the Americans with Disabilities Act (ADA). Your handbook should note that a person might qualify for leave under the ADA as a reasonable accommodation.

   Employers are urged to perform a thorough individual assessment of each person who takes federally protected leave, and that practice should be emphasized in writing. Make it clear that workers will not be punished for legitimate absences from work. Steer clear of automatic termination provisions and no fault attendance polices that do not make adjustments for FMLA/ADA absences.

2. **Reporting Policies - Make sure handbook provisions do not discourage employees from reporting potential legal violations to government agencies.**
The Defend Trade Secrets Act of 2016 provides businesses with a legal remedy if trade secrets are misused. However, for employers to recover attorney's fees and punitive damages, they must provide workers with notice about their right to immunity if they report potentially illegal activity to a government agency or an attorney

   The Occupational Safety and Health Administration began enforcing new anti-retaliation provisions on Dec. 1, 2016. Under these rules, employers cannot retaliate against employees for reporting a workplace injury. The agency noted that it would be looking at employer policies to ensure they would not lead a reasonable employee to believe such retaliation may occur if they reported an injury. Automatic drug testing after every accident is viewed as problematic under the new guidelines.

   The Equal Employment Opportunity Commission and the Securities and Exchange Commission also have targeted any policy or agreement that may be interpreted to curb an employee's right to go to these agencies—or other agencies—to report violations of the law.

3. **Social Media Policies – Do they infringe upon your employees' rights to engage in protected activity?**
The National Labor Relations Act (NLRA) prohibits employers from banning employees from discussing items such as hours, wages, and other terms and conditions of employment on social media. However, employers can prohibit employees from sharing any proprietary information or trade secrets on social media. If your employees should not expect privacy when using social media on company devices, make sure they are aware of this information. Modify your social media policies to ensure they do not violate the NLRA but still prohibit certain types of conduct.

4. **Political Affiliation &Transgender Policies – Are you complying with the law and furthering company values?**
If you operate in a location with a local or state law that prohibits discrimination based on gender identity or political affiliation, then you should ensure that your equal employment opportunity, discrimination, and harassment policies, as well as your complaint procedures, are updated to reflect coverage. If you are a government contractor/subcontractor update your EEO policy to include gender identity and sexual orientation as protected classes.

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5. At-Will Statement – Ensure you have a comprehensive and robust at-will statement

Review your at-will statement and make sure that it states: 1) that the employer can terminate an employee with or without cause and with or without notice; 2) it supersedes any prior agreements or understandings; 3) it can only be changed in writing signed by the owner/president.

6. Retaliation Policies – They must cover alleged victims and witness

Many handbooks say the organization will not tolerate retaliation, but not all such passages state that they protect witnesses and others who participate in an investigation of a discrimination claim or oppose an unlawful practice. In addition, the handbook should state that the employer cannot promise confidentiality for people who make retaliation or discrimination complaints. Instead, it can say that their identities will be revealed only on a need-to-know basis. The process must be fair for both the person making the retaliation or discrimination claim and the individual who is being accused.

7. Drug Policy – Address changes to medical marijuana laws

Many states, including Florida, have now made marijuana legal, either for medical use or recreational use. It is, however, still illegal on a federal level, so your employee drug policy can simply state that no illegal drugs are allowed. You should also include information on your drug-testing policy.

8. Lactation Policy – Make sure you have one

The Patient Protection and Affordable Care Act (ACA) requires employers subject to the Fair Labor Standards Act (FLSA), (*unless they have fewer than 50 employees and can demonstrate that compliance would impose an undue hardship)*, to provide unpaid, reasonable break time for an employee to express breast milk for one year after her child's birth. Several states and some municipalities have similar requirements.

9. Salaried Exempt Employees Safe Harbor Policy – Ensure that have the safe harbor provision specifically articulated.

The Department of Labor (DOL) has provided employers with an affirmative defense if improper deductions are erroneously made by the employer. An employee will not lose his or her exempt status if the employer has a clearly communicated policy that prohibits improper deductions and sets forth a clear complaint procedure. The DOL has found that such a policy would be considered clearly communicated if it is published in an Employee Handbook or located on the company intranet. The employer must also include information that indicates how an employee should report the violation, such as to notify the human resources department, supervisor or owner in writing.

10. Other Stand Alone Policies

There are additional stand-alone policies and forms that you all should have.

a. FCRA Packet.
b. FMLA Packet.
c. Arbitration Agreement (if applicable).
d. I-9 procedures.
e. HIPAA procedures.

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