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deskbook

Emerging Life Sciences Companies

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Chapter 11

Employment Law Issues for Emerging Companies

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EMPLOYMENT LAW ISSUES FOR EMERGING COMPANIES

Emerging companies that lack the human resources experience and the internal support enjoyed by their blue-chip brethren are especially prone to making employment-related mistakes that can lead to employment lawsuits. Although no company can be made immune to litigation, focusing on the following issues will help reduce the risk of litigation, permitting your Company's executives to focus their time and energy on growing the business:

- Protection of talent and intellectual property (IP)
- Compliance with wage and hour laws
- Statutory compliance
- Employment policies and practices
- Performance evaluations
- Harassment prevention
- Hiring and firing practices
- Leaves of absence under the Family and Medical Leave Act
- Compliance with the American Jobs Creation Act
- Special issues related to employing foreign national personnel

Protection of Talent and IP

Protecting your IP and talent pool is critical to an emerging company's success. Virtually every employer will encounter a situation in which a key employee leaves to work for a direct competitor. In the life sciences industry, employers face such departures on a regular basis. Fortunately, there are several precautions that your Company can take to limit the likelihood that a former employee will disclose your trade secrets to a competitor and to ensure that a court will provide relief if he or she does disclose such secrets. Generally, an employer must take reasonable steps to ensure that confidentiality and secrecy of the information in question remains confidential and secret. Top priority should be given to protecting your IP and workforce through the use of noncompetition and

nonsolicitation agreements, IP development agreements, and other restrictive covenants. The type of protection needed will depend in part upon the particular industry and industry norms.

To ensure protection, your Company should take some or all of the following steps, depending on the information in question and your Company's particular circumstances:

- **Identify the types of information to be protected as trade secrets.** To keep this classification current, the Company, as an employer, should frequently consult its executives, scientists, sales employees, and technical staff regarding newly developed trade secrets.

- **Use confidentiality legends and document controls.** Documents, software, and other materials that contain sensitive information should be marked with proprietary legends such as "CONFIDENTIAL" or "TRADE SECRET." However, an employer should mark documents in a consistent and accurate manner to avoid arguments that the employer considered everything to be confidential (even publicly available information) and the employee did not know which information was actually protected.

- **Inform all employees of the Company's trade secret protection policy using the employee handbook or some other source.** The policy should identify what types of information the employer considers to be a trade secret or confidential. The policy also should clearly state that using such information for purposes other than on behalf of the Company, or disclosing such information to unauthorized persons, is grounds for discipline, up to and including termination.

- **Require all employees and third-party recipients to execute a confidentiality or nondisclosure agreement.** The agreement should identify the types of information that the Company considers to be trade secrets or confidential. Such an agreement serves to reinforce to recipients their confidentiality obligations to the employer. It also makes it difficult for former employees to argue that they did not know what types of information they were precluded from using or disclosing.

- **Consider using noncompete agreements.** Preventing an employee from working for a competitor for a particular amount of time after he or she leaves the Company's employ is one of the most effective ways to protect trade secrets. Employers must be careful, however, to comply with state laws governing noncompete agreements. Some states, such as California, prohibit noncompete agreements except in very limited circumstances. Many other states will enforce noncompete agreements subject to specific requirements and reasonableness standards that vary by state.

- **Restrict physical access to trade secrets.** Maintain trade secrets and confidential information in a secure location, and use locks on gates, doors, desks, and filing cabinets used to access particularly sensitive materials.

- **Restrict virtual access to trade secrets.** Use passwords, encryption, and firewalls to protect the unauthorized access to trade secrets and confidential information from the employer's computer networks via the employer's computer networks or via the Internet.
- **Do not post trade secret information, such as customer names or strategic plans, on your website.** By doing so, an employer may destroy its ability to argue that those customer identities are confidential.
- **Keep email communications containing trade secret or confidential information to a minimum.** Counsel employees to use caution in selecting what they send and to whom they send email. Employees should be instructed to always inform recipients of the confidential nature of an email.
- **Include an email policy in the employee handbook.** This policy should cross-reference the employer's trade secret protection policy, and remind employees that trade secrets and other confidential information should not be sent or downloaded without proper authorization. The policy also should notify employees that any violation of the email policy will result in discipline, up to and including termination.
- **Consider using monitoring software.** Software that tracks whether certain documents are downloaded, copied, or emailed is becoming more available and affordable.
- **Destroy documents, software, and other materials that contain trade secret information.** Use shredding machines routinely to dispose of trade secret materials, particularly faxes and superseded versions or drafts. Employers should also erase the memory of discarded computers.
- **Limit third-party accessibility to areas where trade secrets are maintained.** Carefully plan and monitor facility tours, have visitors sign in and wear passes, and prohibit visitors from using cameras, including cell phone cameras, or other recording devices.
- **Screen publications containing information about your Company.** Take measures to protect trade secret information from being disclosed in trade-show materials, magazine articles, and public speeches about the Company.
- **Promptly conduct an exit meeting with employees who have had access to trade secrets when they are separating from employment with the Company.** The meeting should be attended by a member of the employer's human resources department and the employee's immediate supervisor, who likely will know the most about the employee's possession of confidential information. In the meeting, the employee should be expressly reminded of his or her continuing confidentiality obligations and of any noncompetition obligations. Further, the Company, as the employer, should ask the employee to return all property and materials (paper and electronic form) in his or her possession including

those materials containing confidential information, company documents, manuals, laptop computers, and computer disks. Whether or not an exit meeting is conducted, the employer should convey this same information in writing to the employee or former employee.

- **Ask departing employees for information regarding their new positions.** Seek the name of a departing employee's new company, his or her new job title, and his or her responsibilities in any new position. It is particularly helpful if the employer can obtain any letters or other documents from the new employer that describe the departing employee's position and terms of employment.

Compliance with Wage and Hour Laws

It is important to realize that under the various federal and state wage and hour laws, some employees may be entitled to overtime pay regardless of whether the employer pays the employee a salary. Failure to properly classify employees from the outset, and to otherwise comply with the applicable wage and hour laws, can create significant legal and financial problems for an emerging company. A compliance audit by a government agency, or individual and class action wage claims, can result in an obligation to pay significant amounts in back pay plus penalties and can thwart or delay financing opportunities, a planned initial public offering (IPO), or a desired M&A transaction. The following sections provide an overview of the federal wage and hour law, the Fair Labor Standards Act (FLSA).

Scope of FLSA Coverage

The FLSA establishes federal wage and hour standards for covered employees in the public and private sectors.[1] Generally, the FLSA sets a minimum wage to be paid to all covered employees and requires additional compensation for hours worked in excess of 40 hours in a workweek. The FLSA also contains various provisions regarding child labor, recordkeeping, and discrimination between men and women with respect to wages. The Wage and Hour Division of the United States Department of Labor (DOL) administers this federal law. Some workers are not covered by the FLSA at all, and some are exempt from the overtime requirements but are still covered by the recordkeeping requirements.

The FLSA specifically provides that "no employer shall employ any of his employees who, in any workweek, is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."[2] There is no limitation in the FLSA on the number of hours that an employee may work

1. 29 U.S.C. §§ 201-219.
2. *Id.* § 207(a)(1).

in any workweek, as long as the employer pays the required overtime compensation to an employee for hours worked in excess of the maximum 40-hour workweek prescribed by the FLSA.

The FLSA sets only the minimum standards employers must meet. If an applicable state law provides for a higher minimum wage, more generous overtime compensation, or more restrictive standards for child labor, those state law standards, rather than the FLSA standards, must be met.

Awareness of state statutes is essential because state wage and hour laws often differ from the FLSA, and when this is the case, employers must follow whichever rules would be more favorable to the employee in each instance. Further, although the federal law is primarily concerned with the computation of overtime compensation for hours in excess of 40 per week, state law may deal more specifically with employer obligations to compensate employees for all work performed, regardless of whether or not the overtime threshold is met. For example, many states have laws that mandate break times and, if these break times are not granted, employees are entitled to double pay for those breaks.

Individual Employee Coverage

The FLSA presumes that all employees are nonexempt and, unless an employee meets the criteria for being exempt, these standards cannot be waived either expressly or impliedly. The FLSA broadly defines an "employee" as "any individual employed by an employer."[3] The FLSA defines "employ" as "to suffer or permit to work."[4] Generally, to fall within the meaning of "to suffer or permit to work," the employer must require some physical or mental exertion from the employee for the benefit of the employer and its business.

Emerging growth companies frequently retain the services of persons as independent contractors or consultants. The line between an independent contractor and an employee often is hazy. Although there is no "bright-line test" to determine whether an individual is an employee, the following factors should be considered:

- The degree of the alleged employer's right to control the manner in which the work is performed
- The individual's opportunity for profit or loss
- The amount of the individual's investment in equipment and materials
- The responsibility for hiring helpers
- The degree of specialized skill necessary to perform the work
- The permanency of the relationship between the alleged employer and the individual

3. *Id.* § 203(e)(1).
4. *Id.* § 203(g).

- The extent to which the services in question are an integral part of the employer's business

Misclassification of persons as independent contractors or consultants can create significant risks of noncompliance with various employment obligations, including for federal and state tax withholdings, employer taxes and tax penalties, FLSA and state wage and hour protections (including minimum wage, overtime, and breaks, if applicable), and employee benefits and benefit plan coverage and contributions.

Liability and Damages Under the FLSA

Failure to comply with the FLSA's requirements can result in extensive administrative investigations, awards of damages to aggrieved employees for lost wages (such as unpaid overtime), injunctive relief, and awards of attorneys' fees.[5] Willful violations of the FLSA may result in an additional year of recovery, the imposition of double damages, civil fines of up to $1,000 per violation, criminal fines of up to $10,000 per violation, and even imprisonment for up to six months for repeat offenders.[6] Either the aggrieved employee or the DOL can bring an action under the FLSA. An aggrieved employee can bring the action on a collective basis and seek to allow other similarly situated employees to "opt in" to the case. In light of this potential exposure to substantial liability, employers should pay close attention to the requirements of the FLSA to ensure continued compliance.

Under the FLSA, an employer "includes any person acting directly or indirectly in the interest of an employer in relation to an employee."[7] The term "person" means "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons."[8] Thus, the language of the FLSA provides support for the potential imposition of individual liability upon corporate officers, managers, and supervisors.

Employees Exempt Under the FLSA

The minimum wage and overtime provisions of the FLSA do not apply to persons who are not employees or those who are employees but are "exempt" from those FLSA provisions. Although the FLSA lists many exemptions, those most commonly used are for employees who earn certain levels of compensation and who are employed in a bona fide executive, administrative, or professional capacity—the so-called "white collar" exemptions. In addition, the regulations also create exemptions for persons employed as outside salespersons and for certain computer employees. Regulations established under the FLSA set forth the specific requirements for these exemptions. Because the white-collar exemptions cut broadly across industry classifications, virtually every employer must decide which of its employees may be exempt from overtime requirements under the FLSA. Each exemption is very specific, and it is always the employer's burden to establish the applicability of an exemption.

5. *See id.* § 216.
6. *Id.*
7. *Id.* § 203(d).
8. *Id.* § 203(a).

Statutory Compliance

Depending upon the size of your workforce, you will be subject to a variety of federal, state, and local statutes and regulations. As the size of your workforce grows with your business, the Company will become subject to an increasing number of laws. Therefore, it is critical that you regularly conduct an audit to determine which statutory and regulatory provisions are applicable to your Company and understand how compliance with those laws will affect your employment policies. Below is a list of federal statutes that govern the employment relationship and the minimum number of employees an employer must employ before it is subject to the statute.

Fair Labor Standards Act (FLSA)	No Minimum
Title VII of the Civil Rights Act of 1964 (Title VII)	15 Employees
Americans with Disabilities Act (ADA)	15 Employees
Age Discrimination in Employment Act (ADEA)	20 Employees
Family and Medical Leave Act (FMLA)	50 Employees
Worker Adjustment Retraining Notification (WARN) Act	100 Employees
Immigration Reform & Control Act (IRCA)	No Minimum

Employers should be aware that state and local laws also may regulate the Company's employment relationships in certain geographic locations.

Employment Policies and Practices

As your Company grows and hires more employees, the Company's employment practices, and its consistent application of them, become increasingly important. Ad hoc employment policies can often lead to inappropriate employee expectations and even claims of discrimination. An employee handbook that clearly conveys the Company's policies to employees may reduce litigation by clarifying Company rules and benefits and communicating expectations for behavior. It is important to be aware, however, that a poorly drafted employee handbook also can lead to potential breach-of-contract actions by employees and former employees, bolster claims of discrimination if you do not have an effective discrimination and harassment policy or do not apply an existing policy uniformly or consistently, and lead to potential problems with employee morale.

The following sections discuss fundamental principles with regard to employee handbooks, and are followed by a short list of points you should keep in mind with regard to the maintenance of an employee handbook.

Include Only Those Policies with Which You Intend to Comply

Although this may sound obvious, some employers fail to follow the policies set forth in their own handbooks. As a result, even if an employer is successful in arguing that a handbook is not contractually binding, the failure to comply with a handbook provision may provide an employee with an opening to argue that the employer's conduct was based on an unlawful motive, such as race, sex, or age. As an employer, you should carefully review the language of your employee handbook to ensure that it is consistent with how you intend to operate your business and that each statement represents a policy for which the Company is willing to forgo a certain level of flexibility.

Include a Disclaimer

To avoid a finding that an employee handbook is an enforceable contract (or implied contract) under some state laws, a handbook must include an express statement that it is not a contract, that it can be modified unilaterally by the employer, and that employment with the Company is "at will." This disclaimer should appear as a stand-alone provision, preferably on the first page of the handbook immediately following the table of contents.

Avoid Detailed Discussions of Benefit Plans

Certain types of employee benefits—including medical, disability, life insurance, retirement, and, in most cases, severance—are governed by the Employee Retirement Income Security Act (ERISA).[9] ERISA imposes a host of reporting and disclosure requirements on employers, including mandating that a written plan document describing the terms of a benefit plan be prepared and that a summary plan description (SPD) be distributed to all plan participants. Because the SPD and plan document (which can be one and the same) set forth the terms of the plan, any attempt to describe their terms in an employee handbook is unnecessary and, indeed, may be confusing or may result in inconsistencies that will be construed against the employer. Consequently, to the extent references to such benefits are included in a handbook, they should be limited and should simply direct employees to the SPD or plan document for details regarding the terms of the plan. This gives the employer the ability to amend its plans without also having to amend its handbook. Often, companies that provide plan details in their handbooks forget to amend the handbooks when they amend their plans, which can result in contradictory terms and possible arguments by employees that they relied on the terms as written in the handbooks.

Include Those Policies That Are Required or Recommended to Be in Writing

At a minimum, employers should maintain written policies:

- Prohibiting discrimination

9. *Id.* §§ 1001 *et seq.*

- Prohibiting sexual, racial, and other forms of unlawful harassment and establishing complaint procedures
- Specifying that employees without a written contract for employment for a specified period of time can be terminated at will
- Addressing email and Internet usage
- Explaining vacation and sick leave accrual and usage
- Describing non-ERISA-governed benefits
- Listing examples of prohibited conduct
- Prohibiting and attempting to prevent workplace violence
- Addressing trade secrets and confidential information

These policies should appear in the employee handbook if your Company issues one. Additionally, if the employer is subject to the FMLA, the DOL's regulations under that Act require that covered employers provide written descriptions to employees of their rights under the FMLA. Employers that distributes handbooks to their employee's that describe benefits and leave rights *must* include in the handbook a description of the employee's FMLA rights.[10] Employers covered by the FMLA also may be covered by other state leave of absence laws, some of which may overlap with the FMLA. Policies that comply with or reference these state laws also should be included in the employee handbook.

Require the Employee to Acknowledge in Writing Receipt of the Handbook

An acknowledgment form should be distributed to and signed by each employee at the time he or she receives the handbook, and a copy should be retained in the employee's personnel file. The acknowledgment should include

- A statement that the handbook supersedes all prior written or oral statements by the Company concerning its employment policies, guidelines, and benefits
- A statement confirming the employee's at-will status and affirming that the handbook is not a contract
- A statement reserving the Company's right to alter or amend the policies contained in the handbook at any time without notice
- Language requiring the return of all Company property at the time of termination, including documents, computers, money, credit cards, and so forth

10. 29 C.F.R. § 825.301(a)(1)–(2).

Tips for Maintaining an Effective Employee Handbook

- Ensure that all employment policies are written and communicated to all employees.
- Ensure that all policies and practices are followed and that they are consistently and equally applied to all employees.
- Periodically review, evaluate, and update policies and procedures and discontinue or change those that are no longer followed.

Sexual Harassment Prevention

No company is immune from the potentially devastating effects of a sexual harassment charge. An effective harassment-prevention policy and the implementation of that policy through harassment-prevention training programs will assist management in creating an appropriate work environment, as well as help defend the Company from liability and protect against punitive damages in the event a sexual harassment action is brought against the Company. The hallmarks of an effective sexual harassment policy are as follows:

- The inclusion of the following express statements:
  - Sexual harassment, or harassment of any type prohibited by applicable local, state, or federal laws, is strictly forbidden and will not be tolerated.
  - Any employee who has a good-faith belief that he or she has been subjected to or exposed to sexual harassment or ethnic, racial, discriminatory, or sexual comments, jokes, or epithets is encouraged to come forward with complaints about alleged violations of the policy.
  - Complaints need not be limited to someone who was the target of the offending conduct; anyone who has observed or has learned of any alleged violation of the policy also is encouraged to report it to the Company.
  - The Company will take appropriate measures in response to any such incidents that are reported or of which the Company becomes aware.
  - The policy applies equally to contractors and consultants, customers, agents, vendors, and visitors.
  - Retaliation against an employee for reporting prohibited conduct is a serious violation of the policy, and may be grounds for discipline, up to and including termination.
- The inclusion of a definition of the conduct that is prohibited by the policy.
- An explanation of the investigation procedures the Company will follow upon learning of possible prohibited conduct.
- The creation of convenient, secure, and reliable mechanisms for reporting alleged violations of the policy, including the following:

- The provision of multiple avenues to report harassing conduct (e.g., an employee's supervisor, the Company's chief compliance officer, the Company's chief executive officer, or human resources).
- Disclosure that all complaints shall be treated in a confidential manner to the extent possible without undermining the thoroughness of an investigation.

Some courts have observed that adequate training on an employer's harassment-prevention policy is an important part of the employer's harassment-prevention program. Training all employees ensures that everyone understands what conduct is prohibited and what to do if a complaint is made.

Performance Evaluations

In an effort to establish a relaxed, creative, and freely structured environment, emerging companies are often tempted to abandon traditional corporate practices such as performance evaluations. However, employee performance evaluations are a vital personnel tool. Evaluations often are central to the defense of a layoff or termination decision. If done poorly, evaluations are meaningless and can actually create liability. If done properly, they can help to improve employee performance, aid human resources and managers in managing unsatisfactory performance, and increase the chances of successfully defending a lawsuit arising from an employment decision. Care should be taken to train managers and supervisors to conduct performance evaluations that will place an employee on notice of performance deficiencies and the standard for acceptable performance; provide you, the employer, with a valid basis for comparison in personnel decisions such as merit pay increases, promotions, transfers, and reductions in force; and provide the Company with a defense against discrimination and wrongful dismissal claims.

Below is a list of tips to assist employers in completing effective performance evaluations:

- Avoid soft or inflated grading of employees.
- Be candid, honest, and specific in describing deficiencies and areas for improvement.
- Ensure that the overall grade or ranking of the employee is consistent with the substantive evaluation of the employee.
- Do not use any inappropriate content, stereotypes, or language that may be interpreted as discriminatory.
- Conduct employee evaluations as scheduled.
- Offer informal feedback and performance assessments to employees between formal evaluations so that there is no surprise to the employees upon receipt of the formal evaluations.

Hiring and Firing Practices

Appropriate hiring and firing practices are critical in avoiding potential litigation and defending against claims that cannot be avoided. Care should be taken to train all supervisors and other employees who will be involved in the hiring and firing process. Although it is impossible to discuss each and every issue that may arise during the hiring and/or firing of employees, the following sections discuss critical issues and strategies that should be kept in mind to help avoid litigation arising from the hiring and firing of employees.

Hiring Practices

- Recruiting materials should avoid language that implies fixed-duration or permanent employment and language that may be interpreted as discriminatory in any way.
- During an interview, the interviewer should not discuss permanent employment with the candidate and should not make any promises of any kind.
- Employment skill or knowledge testing should only be used if it has been validated as a predictor of job performance, and as not adversely affecting applicants based on a protected characteristic.
- Comply with all applicable federal, state, and local laws in connection with requiring and conducting satisfactory results of a preemployment drug and alcohol test or background check.
- Comply with mandatory employment eligibility verification requirements by properly executing and retaining a Form I-9 (U.S. Citizenship and Immigration Services) for every employee.
- An employer can only require a physical/medical examination if it is required of all candidates for the same type of job and is job related, and only after an offer of employment has been made and all other conditions of the offer have been met.
- Applications/interviews must contain only questions that are reasonably related to the requirements of the job in question.
    - Do not ask questions about an applicant's or candidate's date of birth or age, except whether the person is "over the age of 18" and whether he or she can provide proof of age if hired. Do not try to indirectly acquire this information (e.g., through questions such as "When did you graduate from high school?").
    - Do not ask questions about an applicant's or candidate's race or national origin. Do not require that an applicant submit a picture with the application because this may be used to support a claim for race discrimination.
    - Do not ask questions about what languages an applicant or candidate speaks, reads, or writes unless the questions are reasonably related to job performance.
    - Do not ask whether an applicant or candidate is a U.S. citizen.

- Do not ask questions about an applicant's or candidate's religion or whether the applicant's or candidate's religious beliefs would prohibit his or her working at certain times and on certain days. An employer can inform an applicant or candidate of the regular work hours for the position and ask whether the applicant or candidate will have difficulty with that schedule or any overtime. Do not discuss accommodations for religious beliefs until after a hiring decision has been made.
- Do not ask questions about an applicant's or candidate's marital and/or family status.
- Do not ask questions about an applicant's or candidate's health, mental condition, or specific disabilities, or about the health, medical condition, or disability of any person associated with the applicant or candidate (e.g., spouse, domestic partner, child). Limit questions to the applicant's or candidate's ability to perform the necessary functions of the position. For example, an employer can ask whether an applicant or candidate can perform the necessary functions of the position "with or without a reasonable accommodation." Do not ask if an accommodation would be needed or what kind of accommodation would be needed. Do not ask how many days of work the applicant or candidate missed last year due to a medical condition or a disability.
- In some states, status as a smoker may be a protected class under state antidiscrimination laws, in which case the employer may not be permitted to ask about smoking in an application or during an interview.
- Do not ask questions about arrests, and only ask questions about convictions if the inquiry is job-related and otherwise consistent with state law.

• When taking and/or preparing notes from an interview, care must be taken to ensure that these notes do not contain any statements that may be interpreted as discriminatory because these notes are discoverable in litigation.

• When offering employment, be sure to make the offer in writing, and require that the candidate accept the offer in writing so that there is no mistake about the terms of the employment being offered. The written offer should contain the material terms of employment, it should set forth any conditions that must be satisfied for the offer to be binding and employment to begin, and it should expressly state that the employment being offered is "at will," which should be defined as permitting either party to terminate the employment relationship at any time and for any lawful reason, with or without notice, and with or without cause. The offer letter also should state that it is the complete agreement for initial employment, it cancels and replaces all prior discussions and negotiations, and the candidate is not relying on any statement or promise that is not expressly stated in the offer letter.

• Use a hiring checklist. Such a checklist is a helpful tool to track company procedures that have been completed, conditions of the offer and employment that have satisfied, ap-

provals obtained, documents that have been provided to the candidate/new employee, documents that have been signed by and received from the candidate/new employee, and items of property provided to the new employee. In addition, some states require that new employees be provided with certain information and written notices. State-specific "hiring checklists" can help ensure that the employer has complied with unique requirements that vary by state law.

Disciplining Employees

Any policy relating to discipline should ensure that the employer is not limited in the options it may take to discipline or terminate an employee's employment based on the facts and circumstances of each situation.

Regardless of whether the employer has a specific policy on discipline, some disciplinary "best practices" are as follows:

- Employees should understand expectations for job performance and conduct.
- Employees should be notified in advance of potential consequences of poor performance or violation of Company policies and procedures.
- Disciplinary procedures must be consistently followed and equally applied.
- All discipline should be supported by sufficient documentation to identify the type of discipline and to support the reason for such discipline.

Termination

Legally, employers are free to discharge at-will employees at any time for any reason or for no reason at all, so long as the motives for the termination are not unlawful. In practice, however, employers should be careful to ensure that all termination decisions can be supported by legitimate business reasons to rebut any potential claim of unlawful motivation. In addition, before terminating an employee, an employer needs to understand when final wages must be paid and be able to timely pay final wages so the Company does not inadvertently violate state wage payment law. A "termination checklist" is a helpful tool to ensure that the employer is prepared to fulfill legal obligations triggered by the termination, and that all subjects and issues can be addressed at the time of termination or in a post-termination follow-up letter to the former employee.

It is recommended that all terminations have human resources and/or legal review. Notification of an employee termination, and the reasons therefore, should be kept to a need-to-know basis before and after the termination. The Company should be consistent in its articulation of the reasons for termination. If possible, the termination should occur in person and should be witnessed by one other managerial or human resources employee in addition to the person actually informing the employee of the termination. This session should be documented by a note to the file, and the exit procedures for return of company property and materials should be followed.

Waivers and Releases

The best way to avoid litigation after a termination is to have the terminated employee execute a release and waiver of claims. Any agreement to pay severance to an employee, whether contained in an employment agreement, severance plan, or other communication, should be expressly conditioned upon the employee's execution of a general release of the Company.

To be effective, a release must be knowing and voluntary and supported by adequate consideration that is in addition to an employee's existing entitlements. As an employer, you cannot require that an employee waive future claims and cannot interfere with an employee's right to file a charge with the Equal Employment Opportunity Commission (EEOC) or to participate in an EEOC investigation.

Note that there are special requirements if the person executing the waiver or release is age 40 or older. These requirements are mandated by the Older Workers Benefit Protection Act, and include, but are not limited to, specifically identifying the Age Discrimination in Employment Act (ADEA) in the release; advising the employee in writing to seek the advice of an attorney before signing the release; providing the employee with 21 days to consider the agreement (45 days if the release is part of a group termination); providing the employee with seven days to revoke the agreement after execution; and, if the agreement is related to a group termination, providing the employee with a list of the job titles and ages of those employees terminated and those employees retained in the decisional unit.

Leaves of Absence Under the FMLA

The FMLA entitles eligible employees to 12 weeks of leave during a 12-month period. As with the FLSA, under the FMLA states are not prohibited from enacting leave laws that are more beneficial to employees, and employers must also consider leave issues under any applicable state law.

Summary of Entitlements

The FMLA entitles an eligible employee to 12 weeks of leave during a 12-month period to care for his or her newborn child, for the placement of an adoptive or foster child with the employee, to care for his or her own serious health condition, or to care for a parent or child who has a serious health condition. The employer also must continue group health benefits on the same terms as would exist if the employee continued to work. Adverse treatment of employees based on their taking leave to which they are entitled is impermissible retaliation.

Eligibility

Employers that employ 50 or more employees are covered by the FMLA. The FMLA requires that employees must have worked 1,250 hours, including overtime, in the previous 12-month period to qualify for leave.

Notice

Employees may be required to provide 30 days' notice when the need for a leave is foreseeable. Otherwise, employees must provide as much notice as is practical. An employer must notify an employee that it is designating the employee's leave as FMLA leave. The employer's failure to designate the leave as FMLA leave is not necessarily grounds for an automatic extension of the leave period.[11] However, failure to provide notice of the designation might be grounds for extension of the leave period where the employee can demonstrate that he or she was prejudiced by the failure.[12]

Reduced Leave/Intermittent Leave

Under certain circumstances, employees are allowed to take leave on a reduced or intermittent basis. However, an employer may transfer an employee to a position that can better accommodate the intermittent absence (at the same salary).

Key Employees

The FMLA contains special rules for an employer's "key employees," which it defines as employees within the top 10% of salaried employees. The FMLA provides an employer with the right to deny reinstatement to key employees if the reinstatement will cause "substantial and grievous economic injury."

Recovery of Benefits

If an employee fails to return from leave, the employer may recover the premiums for group health benefits it paid during the leave period. However, an employer may not recover such premiums if the employee's failure to return from leave occurs because of unforeseen circumstances.

Leaves of Absence as a Reasonable Accommodation Under the ADA

Under the Americans with Disabilities Act (ADA), a leave of absence may constitute a reasonable accommodation for a disabled worker.[13] Employers should consider whether a leave of absence might be a reasonable accommodation under the ADA, even if the employee's FMLA leave has been exhausted.

Visa Issues for Foreign Nationals

Success for many emerging companies means going global in various aspects, among them recruiting and retaining the best talent for your business. Foreign nationals, for example graduate students, recent graduates, current or former employees of another company, all need visa status that allows them to work in the United States. U.S. immigration law is complex, and employment authorization can sometimes be difficult to obtain. Employers should plan accordingly, and make informed decisions after consulting with experienced immigration counsel about whether to recruit or hire a foreign national talent. Inclusion of the following questions in an employment application will help an employer flag these issues early in the process:

11. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 88–89 (2002).
12. *Conoshenti v. PSE&G*, 364 F.3d 135, 144 (3d Cir. 2004).
13. *Fogleman v. Greater Hazleton Health Alliance*, 2004 U.S. App. LEXIS 26861, at *8-9 (3d Cir. Dec. 23, 2004).

Do you currently possess lawful authorization to work in the U.S.?
(If you are offered a position, you will be required to provide proof of your identity and eligibility to work in the United States as a condition of employment.)

__Yes __ No

Will you now or in the future require company assistance or sponsorship in order to ensure your continued eligibility to work lawfully for the company?
(e.g., H-1B status, green card sponsorship, etc.)

__ Yes __ No

Conclusion

In many new companies, it is often an employee with no HR background or training—whether a high-level executive or an administrative assistant—who tries to wear the human resources hat to address employment issues (if they are being addressed at all). Although this allocation of duties can appear cost-effective, it can result in costly mistakes. If your Company is not ready to hire a trained HR professional or in-house counsel with employment law experience, it should establish a relationship with outside employment counsel experienced in advising emerging companies. For relatively little cost compared with the potential savings, your Company can greatly benefit from a periodic diagnostic checkup and an ongoing efficient and cost-effective relationship in which the Company feels comfortable seeking advice before an issue becomes a critical problem.