

Internal Matters: Making Sure That You're Protected Legally Behind The Scenes

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PROTECTING YOUR “BRAND”: TRADEMARKS

- What are trademarks?
 - A trademark or service mark is any word, slogan, logo, symbol, sound, color, smell, or other item that serves as a means of commercial source identification of a product or service.
 - E.g., Nike, Coke, GEICO Gecko, Color Blue.
- Trademark rights arise through use, not registration. First in time is first in right. Consider how the Internet changes usage paradigms.

BEST PRACTICES FOR PROTECTING THAT TRADEMARK: BE PROACTIVE

- Pick “Clean” Trademarks:
 - Capable of functioning as a trademark or service mark.
 - It should be one you can use without getting sued—and losing.
 - Can be registered with USPTO.
 - Key domains and social media identifiers are available.
- Register Complementary Domains
- Obtain Social Media Handles and Pages and Channels First
- File ITU Trademark Registration Applications
- Monitor and Enforce

INSURING YOUR ORGANIZATION

- Liability insurance vs. property insurance
 - Property-based insurance coverage pays for damaged items of property specifically covered by the policy.
 - Liability-type insurance coverage broadly protects the organization if it should get sued. Coverage includes legal defense and settlement of claims.
- Types of liability coverage:
 - Commercial (General)
 - Directors/Officers
 - Covers directors and officers of the organization against claims made against them personally for management decisions.
 - Employment Practices Liability
 - Covers various employment-related claims, such as wrongful termination, harassment, discrimination, and retaliation claims.
 - Most employment claims are excluded in a CGL policy.

GENERAL EMPLOYMENT LAW ISSUES

At-will employment relationship - employer may discharge the employee without cause and without notice. Likewise, the employee may resign without cause and without notice.

- Limitations imposed by anti-discrimination statutes
- Limitations imposed by contract (express and implied)
- Limitations imposed by public policy

DISCRIMINATION CLAIMS

- May be filed with a state agency or the Equal Employment Opportunity Commission (EEOC)
- Claim can be based on alleged discrimination in hiring, firing, promotions, wages (etc) on the basis of race, color, religion, sex, national origin, age (40+), or disability.
- Most employers with at least 15 employees are covered by federal EEOC laws (20 in age discrimination claims). State laws vary greatly.

DISCRIMINATION STATISTICS

- Total EEOC charges filed were down in FY 2015 when compared with totals from 5 years ago.
- Most common charges filed with the EEOC in FY 2015:
 - Retaliation (44.5%) - 7% increase in the past 5 years!
 - Race (34.7%)
 - Disability (30.2%)
 - Sex (29.5%)
 - Age (22.5%)

AVOIDING DISCRIMINATION CLAIMS

- Any adverse employment action should be based on legitimate business reasons
- Avoid stereotypes
- Strive for consistency
- Avoid favoritism
- Use respectful terminology in all communications
- Use objective criteria for employment decisions
- Respond promptly to complaints of discrimination

RETALIATION CLAIMS

- Employee engaged in a “protected activity”; employer took adverse action; adverse action was because of the employee’s “protected activity.”
- Examples of “protected activity”:
 - Internal complaint regarding alleged sexual harassment
 - Request for reasonable accommodation of a disability
 - Cooperating in an internal investigation of alleged discrimination
- Caution- there can be actionable retaliation even if underlying claim of harassment/discrimination has no merit. “Reasonable belief” standard.

AVOIDING RETALIATION CLAIMS

- Never advisable to take any adverse action against an employee who reports harassment or discrimination, even if you think the report is false.
- Written anti-retaliation policy with examples of actionable retaliation, guidance for managers, a reporting mechanism for employees, and sanctions for retaliation.
- Training for managers and supervisors with practical advice for handling complaints in the workplace.

HIRING BEST PRACTICES

- Train supervisors and other persons involved in the hiring process.
- Develop guidelines for employment interviews.
- Interviewers should use standard questions, perhaps written before the interview, for applicants for a particular job.
- Limit questions about criminal records to convictions (not arrests w/o conviction) that affect job qualifications.
- Job applications should be reviewed to ensure that they do not include improper inquiries.
- Inquiries should be related to job requirements and employment policies.
- Conduct background and reference checks.

TIPS FOR ADDRESSING EMPLOYEE PERFORMANCE AND CONDUCT PROBLEMS

- Documentation
 - Document important personnel actions while memories are fresh.
 - Don't postpone documentation to create a "perfect" memo.
 - Ignore minor issues, focus on important incidents that reflect on job performance and conduct.
 - Focus on job-related behaviors and stick with facts.
 - Document the employee's side of the story too. This demonstrates fairness and reduces the risk that the employee's story will change later.
 - Avoid the impression of retaliation by documenting your attempts to "turn around" problems with an employee. "Building a case" is rarely helpful.
- Progressive Discipline
 - Fairness
 - Consistency

TEN STEPS TO DISCHARGE

1. Can you state the employee's problem?
2. Is the problem reflected in the employee's evaluations or other documentation?
3. Have the organization's own procedural steps been followed?
4. Is the discharge decision free of bias?
5. Is the decision consistent with decisions in similar cases?
6. Are there any possible signs of retaliatory motive?
7. Is the decision likely to cause non-legal damage?
8. Has the decision been reviewed by management, HR, and/or counsel?
9. Can the decision be communicated in an appropriate fashion?
10. Will the employee have the opportunity to tell his/her side of story?

EMPLOYEE HANDBOOKS

- If done well, employee handbooks are an excellent tool for conveying the mission and values of the organization and potentially insulating the organization from various types of liability.
- However, consider the size of your organization. Do you really need a handbook or will concise written policies on key topics be sufficient?
 - Some handbook provisions, if not drafted carefully, can be construed to create contractual obligations.
 - If your organization doesn't have the need or the resources to properly develop an employee handbook, individual policies may be a better option.

POSSIBLE HANDBOOK OR POLICY TOPICS

- At-will employment relationship
- Non-discrimination
- Employee conduct
- Retaliation
- Harassment
- Drug-free workplace
- Overtime and hours of work
- Employee benefits
- Leave (including FMLA)
- Performance evaluations
- Discipline
- Grievance procedure

QUESTIONS?

THANK YOU!

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