

## **EMPLOYMENT LAW AUDIT CHECKLIST**

### Employment Application

- Does the Company require all applicants to complete an employment application?
- Does the employment application contain a statement that the employee's employment will be at-will?
- Does the application notify the applicant that false or incomplete information will preclude hiring or result in termination?
- Does the application avoid any impermissible inquiries that would reveal the applicant's medical history, national origin, age, or other protected characteristics?
- Does the employment application include an authorization by the employee to contact the employee's references?
- If the application asks for information about criminal history, is the inquiry limited only to convictions/guilty pleas/nolo contendere, and does it include a disclaimer that a conviction will not automatically preclude employment?
- If the application asks for information about criminal history, does it request sufficient information to apply to EEOC/Green v. Missouri Railroad factors (date of conviction, identification of crime, etc.)?
- Does the application request and have space for the applicant to provide additional information allowing for an individualized assessment as to any criminal history (applicant's age at conviction, rehabilitation efforts, etc.)?
- If the employment application is utilized in multiple states, has it been reviewed for compliance with applicable state law (e.g. ban the box, salary history)?
- Please provide a copy of employment application for review.

### Background Checks/Drug Testing

- Does the Company perform any background checks on applicants/new employees (criminal, credit, driving, etc.)?
- Does the Company have a background check procedure/checklist identifying the process to be followed (return of authorization, personnel involved, background checks obtained, delivery of pre and post adverse notices, etc.)?
- Does the Company have policies in place governing the use of criminal history information in making employment decisions (i.e. no blanket bans)?
- Does the Company obtain any background checks from a consumer reporting agency (third party vendor as opposed to obtaining directly from government source)? If so, does the Company provide applicants/employees with required disclosure and authorization forms under the Fair Credit Reporting Act ("FCRA")?
- Is the FCRA Disclosure and Authorization its own separate document?
- Does the FCRA Disclosure and Authorization exclude impermissible provisions (state law FCRA requirements, release of employer, drug testing information, etc.)?
- If obtaining investigative consumer reports, does the FCRA Disclosure and Authorization include notice of applicant's ability to request the scope of inquiry?

- If using investigative consumer reports, are you providing the applicant with the FTC's Summary of Rights along with the Disclosure?
- To the extent there is adverse information on a consumer report, does the employer provide the FCRA required pre and post adverse notices to the applicants/employees?
- If the Company has operations in multiple states, has applicable state law been reviewed as to notice and authorization requirements under state FCRA laws?
- Please provide a copy of all notices, authorizations and pre and post adverse notices utilized by the Company for review.
- Does the Company require that new employees pass a drug test as a condition of hiring?
- Does the Company comply with the Florida Drug Free Workplace Act and/or receive a discount on its workers' compensation premium based upon its drug testing program (provide contact information of drug treatment programs in the policy, post notice of drug testing on premises, have policy available for applicants to review)?
- Please provide a copy of all drug testing policies for review.
- In light of Florida's Amendment 2, has the employer determined how it will respond to positive tests for marijuana with a medical marijuana card and/or request for reasonable accommodation?

#### Offer Letters

- Does the Company utilize written offer letters upon hire?
- Does the offer letter specifically identify that the employee's employment by the Company is "at-will"?
- Does the offer letter specifically identify that the employee's employment is conditional upon verification of their right to work in the United States?
- To the extent that the Company utilizes background checks or drug tests, does the offer letter indicate that employment is conditional upon successful satisfaction of such requirements?
- If the Company utilizes restrictive covenant agreements (confidentiality, non-solicit, non-competition, etc.), does the offer letter indicate that employment is contingent upon execution of such agreements?
- Please provide a copy of the Company's offer letter for review.

#### Employment Contracts

- Does the Company utilize written employment contracts?
- Does the written employment contract specifically identify that the employee's employment is at-will?
- If the employment is for a term rather than at-will, does the employment contract contain a definition of the "for cause" basis under which employment may be terminated?
- Does "cause" include violation of the Company's Equal Employment or Anti-Harassment policies?
- Does the employment agreement provide that the employer has discretion to modify the compensation and benefits provided to employee?
- To the extent that the employment agreement provides for severance to the employee upon separation, does it make it conditional upon the employee's execution of a full general

release as to the employer along with continued compliance with any applicable restrictive covenants?

- Does the employment agreement identify the applicable governing state law, include a jury waiver provision and identify exclusive venue for any related litigation?
- Does the employment agreement include a severability provision?
- Please provide a copy of the Company's form employment agreement for review.

### Orientation

- Does the Company have a standard orientation process?
- Does the Company utilize an orientation checklist to ensure all steps are completed?
- Does the Company have its employees complete W-4 forms?
- Does the Company have employees sign an acknowledgment of receipt and their obligation to read the employee handbook?
- Does the Company provide written notice (employee handbook) of the employer's 90 day initial probationary period?
- Does the Company have a record of all equipment and company property issued to the employee upon hire?
- To the extent the Company allows employees to use their own personal property (personal computers, ipads, cell phones, personal email accounts) to access/receive the Company's confidential information, are employees required to sign a Bring Your Own Device or Technology Use Agreement?
- Please provide a copy of the orientation checklist for review.

### Employee Handbook

- Does the Company have an employee handbook?
- Does the handbook:
  - include a provision notifying employees they are employed on an at-will basis;
  - confirm the employer's right to modify the handbook;
  - include an Equal Employment provision referencing federal and Florida protected classes (marital status, genetic information);
  - include an Anti-Harassment policy that includes at least two avenues to report harassment;
  - include an anti-retaliation policy;
  - include a reasonable accommodation policy for disabilities, pregnancy and religious beliefs; and
  - include a policy regarding the proper use of the employer's computers, internet and phones (waives right to privacy)?
- Does the handbook include a comprehensive timekeeping policy?
  - specifically prohibit all off the clock work;
  - identify the Company's workweek;
  - provide that employee's submittal of time records affirms their accuracy; and
  - provide a procedure for reporting timekeeping/payroll issues?
- Does the Company obtain written acknowledgment from each new hire of receipt of the employee handbook?
- When was the employee handbook last reviewed?

- Please provide a copy of the employee handbook for review.
- If the Company operates in other states, have you determined what policies are required under local state law?

#### I-9/Immigration

- Does the employer obtain a completed I-9 form on each employee within three days of hire?
- Are the I-9 forms kept separate from the employee's personnel file?
- Does the employer have a document retention policy as to the purging of I-9 forms of separated employees?
- Does the employee representative signing the I-9 form actually physically review the employee's eligibility documents?
- How is this handled as to remote or work at home employees?
- Please provide copies of the ten most recently completed I-9 forms for review.

#### Job Descriptions

- Does the Company have written job descriptions for each position?
- When was the last time the written job descriptions were reviewed?
- Do the job descriptions identify the essential functions of the position?
- Have the job descriptions been reviewed by the applicable employee to confirm accuracy as to day-to-day functions?
- Does the job description identify the position as exempt/non-exempt?

#### Compensation Agreements

- Does the Company pay employees bonuses or commissions?
- If these payments are "discretionary," is there a clear written agreement or notice establishing their discretionary nature?
- To the extent that the bonus and/or commission payments are non-discretionary, does the Company utilize written compensation agreements?
- Do these agreements:
  - adequately define the terms of eligibility for receipt of a bonus and/or commission;
  - adequately define how the bonus and/or commission will be calculated and when they will be paid;
  - provide the authority for the Company to modify the commission/bonus terms on a prospective basis;
  - provide that sales made in violation of the Company's policies are not eligible for commission bonus;
  - provide that the Company has the sole discretion to make any determination under the plan;
  - Include an integration clause;
  - define when the bonus/commission is earned by the employee;
  - include an integration clause; and
  - define when the bonus/commission is earned by the employee?
- Do the compensation agreements detail what happens with bonus/commission payments which are earned and/or due to be paid after employee separates from the Company?

- If the employee receiving a commission or bonus is non-exempt, are these payments factored into the calculation of the employee's regular rate for overtime?
- If the Company has operations in multiple states, has applicable state law been reviewed as to limitations on such agreements?
- Please provide a copy of the Company's form commission/bonus agreement for review.

#### Wage And Hour/FLSA

- Has the Company conducted an audit as to each employee's exempt/non-exempt status under the FLSA?
- Does the Company pay non-exempt employees commissions or non-discretionary bonuses?
- If so, are these payments factored into the calculation of the employee's regular rate for overtime?
- What method does the Company use to keep track of an employee's hours worked?
- Does the Company have the employee affirm the accuracy of the time records upon submittal?
- Does the Company have a policy/procedure as to the capture of after-hours or offsite hours worked?
- Does the Company avoid making any automatic deductions from an employee's hours worked (e.g. lunch break, breaks, etc.)?
- Does the Company have a process for employee's to acknowledge the reason for any adjustment to time records?
- Does the Company have any salaried, non-exempt employees? If so, does the Company have written agreements in place specifying the hours the salary is intended to cover and providing for the payment of overtime?
- If the Company operates in other states, does it have policies in place addressing state law overtime requirements?

#### Employee Benefits

- What employee benefits does the Company offer its employees?
- Are summary plan descriptions of all ERISA plans provided to employees?
- Please provide a copy of all summary plan descriptions for review.
- Are employees informed (offer letter/handbook) that the Company has the discretion to add, delete or modify the employee benefits provided?
- Is the Company in compliance with the ACA's requirements for offers of coverage and/or payment of a tax penalty?
- Does the Company include temporary employees? How are the benefits addressed with temporary employees?

#### Paid Time Off

- Does the Company provide employees paid time off (sick, vacation, PTO, jury duty, bereavement)?
- Does the Company have written policies defining these benefits?
- Do these policies provide a minimum and maximum amount of leave that can be taken?

- Do these policies define whether employees' paid leave benefits can be carried over to the next year if not used or if it is a use it or lose it benefit?
- Do the leave policies address what happens with accrued but unused leave upon the employee's separation?
- Do the policies provide a clear procedure for requesting and obtaining approval of paid leave?
- If you have a general PTO policy (rather than separate vacation and sick leave) does it specifically reference that the PTO can be used for "sickness or disability?"
- If the Company operates in other states, have these policies been reviewed for compliance with state laws (e.g. laws which do not allow "use it or lose it" policies)?
- If the Company operates in other states, has it researched what paid or unpaid leave may be required under applicable state law (e.g. paid sick leave, domestic violence leave)?

### FMLA

- Does the Company have a written FMLA leave policy?
- Is it contained in the Company's employee handbook or alternatively provided upon hire and to all employees on an annual basis?
- Does the employers' FMLA policy provide a clear procedure for requesting FMLA leave?
- Does the FMLA policy provide that employees will be required to utilize all paid leave concurrently with FMLA leave?
- Does the written policy define the 12 month period in which an employee is entitled to take 12 weeks of FMLA leave?
- Does the Company's FMLA policy include the contact information of the Department of Labor?
- Does the FMLA policy provide that false information or fraudulent use of FMLA leave will result in termination?
- Is the employer familiar with its notice deadlines upon an FMLA request or notice (eligibility notice, notice of requirement for certification, designation notice, etc.)?
- Does the employer have a copy of the Department of Labor's approved FMLA forms (Notice of Eligibility, Certifications, Notice of Designation)?
- Has the employer downloaded a copy of the Department of Labor's Employer Guide to the FMLA?
- Are supervisors and managers trained to report potential FMLA issues to human resources?
- Does the employer have a procedure for the documentation of FMLA absences?

### Americans With Disabilities Act/Reasonable Accommodations

- Does the Company have a written policy as to an employee's request for a reasonable accommodation on the basis of disability, religion or pregnancy related issues?
- Does the Company have a standard form for obtaining certification and/or medical information related to such request for an accommodation?
- Please provide a copy of the Company's accommodation certification form for review?

### Restrictive Covenant Agreements

- Does the Company utilize restrictive covenant agreements (confidentiality, non-solicitation, non-competition, etc.)?

- Do the restrictive covenant agreements include a provision in which the employee agrees that the duration of such restrictive covenants shall be tolled during any breach by the employee?
- Do the restrictive covenants include a provision establishing that the restrictions are independent of any other agreement with the employer and that a prior breach by employer will not preclude enforcement of the restrictive covenants?
- As to any agreements including confidentiality provisions, do the agreements include the disclosure mandated by the Federal Defense of Trade Secrets Act?
- As to any agreements including confidentiality provisions, do the agreements include the language required by the EEOC and the SEC's BlueLinx Holdings settlement?
- Are referral sources important to the Company's business? Do the restrictive covenant agreements establish that referral source information is confidential and prohibit the use of Company referral sources after separation?
- Does the agreement specifically provide that the restrictive covenants are enforceable by the company's successors and assigns?
- Does the agreement include a severability provision?
- Does the employer keep backup copies of signed employment agreements (restrictive covenants, arbitration, confidentiality, etc.) in a location besides the personnel file?
- To the extent that the Company has operations in multiple states, has applicable state law been reviewed as to restrictive covenant requirements and limitations, necessary consideration for such agreements and ability to utilize restrictive covenant agreements governed by Florida law?
- Please provide a copy of any restrictive covenant agreements for review.

#### Intellectual Property

- Does the Company have all employees sign an agreement recognizing the Company's ownership of intellectual property created by the employee in the course and scope of their employment?
- Does the Company have a written agreement with any independent contractors utilized by it to assign all intellectual property created by the independent contractor in the course of its relationship to the Company?
- To the extent that the Company has operations in multiple states, has state law been researched as to limitations on such agreements?
- Please provide a copy of any intellectual property agreements for review.

#### Personnel Files/Recordkeeping

- Are the employees' medical records, I-9 forms and domestic violence leave documents kept separate from the employees' general personnel file?
- Are these documents kept in a separate, locked location?
- Does the employer have a document retention/purge schedule for employee personnel files?
- Does the employer keep backup copies of the signed employment agreements (restrictive covenants, arbitration, confidentiality, etc.) in a location besides the personnel file?
- Does the Company have an established policy as to employee access to personnel files?

- If the Company has operations in multiple states, has applicable state law been reviewed as to an employee's right to access their personnel file?

#### EEO-1

- Is the employee required to file an EEO-1 form (more than 100 employees, federal contractor)?
- Is the Company aware of the changes to the EEO-1 form effective in 2018 (required reporting on pay data by gender, race and ethnicity by job category)?

#### Employment Law Postings/Notices

- Has the Company determined which employment law posters are required under federal and state law?
- To the extent that the Company has work at home or remote employees, have these employees been provided copies of all mandatory employment posters?
- If the Company operates in other states, has applicable state law been reviewed as to mandatory postings?

#### OSHA/Safety/Workers' Compensation

- Does the employer have a written policy as to the reporting of accidents, illnesses and injuries?
- Does the Company have written safety policies?
- Do these policies require the reporting of malfunctioning equipment and/or safety issues?
- Are MSDS sheets available for any chemicals on the Company's premises?
- Does the Company maintain its annual OSHA log to record all employee work-related illnesses and injuries?
- Does the Company have an anti-retaliation policy as to the reporting of accidents, injuries and workers' compensation claims?
- Has the Company considered establishing a safety program to obtain a discount on Florida workers' compensation premiums?

#### Performance Reviews/Discipline Forms

- Does the Company have standard discipline documentation forms?
- Does the Company have a procedure for secondary review of serious discipline (suspensions, terminations)?
- Please provide a copy of the discipline form for review.
- Does the Company perform regularly-scheduled performance reviews?
- Does the Company have a standard form used for performance reviews?
- Does the Company have a policy regarding secondary review of performance review before presentment to the employee?
- Please provide a copy of the performance review form for review.



## Terminations

- Does the Company require resigning employees to provide a resignation letter/written notice?
- Does the Company utilize a standard termination letter?
- If so, please provide a copy for review.
- Does the Company utilize a termination checklist as to actions to be taken upon termination (reminder/copy of restrictive covenants, employee loans, return of Company property)?
- If so, please provide a copy of the termination checklist for review.
- If the Company has operations in multiple states, have applicable state laws been researched as to deadlines for final payments, requirement to pay employee for accrued but unused paid leave and unemployment notifications?
- Does the Company offer severance in exchange for a release of claims to exiting employees whom the Company perceives as potentially likely to sue the Company?
- Does the Company's separation agreement for use with employees 40 or older comply with the Older Workers' Benefit Protection Act (21 days to consider, 7 days to revoke, advisement to consult an attorney before signing, etc.)?
- Does the Company's separation agreement condition the payment of severance upon the employee's return of all Company property and passwords?
- Does the Company's separation agreement explicitly provide that the employee's restrictive covenants (confidentiality, non-competition, etc.) remain in effect?
- Please provide a copy of the Company's form separation agreement(s) for review.

## Independent Contractors

- Does the Company utilize independent contractors?
- Are the independent contractors required to sign written independent contractor agreements?
- Have the independent contractors' status been reviewed in light of the Department of Labor's updated guidance in 2015 on independent contractor misclassification?
- To the extent that the Company utilizes multiple independent contractors, has the Company considered having the independent contractors sign an arbitration agreement which prohibits collective actions under the FLSA?
- Are independent contractors involved in the creation of intellectual property? Are the independent contractors required to execute assignments of such intellectual property to the Company?
- Does the agreement require the independent contractor to indemnify the Company for unpaid taxes, claims alleging the contractor is an employee and the acts of the contractor?
- Please provide a copy of the Company's form independent contractor agreement for review.

## Management Training

- Have all managers been trained in handling employee complaints of discrimination, harassment and retaliation?
- Have all managers been trained in the policies contained in the Company's employee handbook (FMLA, ADA, ethics/whistleblowing complaints, etc.)?

- When is the last time the Company updated/reviewed its sexual harassment policies and procedures?

Miscellaneous

- Does the Company have an ethics/whistleblowing policy and procedure?
- Are all employees required to sign some agreement including a jury waiver provision?
- Are all employees required to sign some agreement involving a class/collective action waiver?
- Does the Company have an evacuation plan that is explained to all new employees and practiced?

If you have any questions, please do not hesitate to contact me at:

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