



# **In-House Employment Law Compliance Audit for Employers of All Sizes**

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“Nothing is particularly hard if you divide it into small jobs.”

**Henry Ford**

“The secret of getting ahead is getting started. The secret of getting started is breaking your complex overwhelming tasks into small manageable tasks, and starting on the first one.”

**Mark Twain**

# Employment Application

- EEOC does not “ban the box” but has issued guidance with many restrictions on the use of criminal history.
- Employer should limit the use of background checks to inquiries that are “job related and consistent with business necessity.”
- Consider: (1) nature and gravity of the offense; (2) time passed since offense and/or completion of sentence; and (3) nature of the job sought.
- Should be able to demonstrate that exclusion bears a demonstrable relationship to successful performance of the jobs for which it is used.

# Employment Application

- 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 the 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.)?

# Employment Application

- Does the application notify the applicant that false or incomplete information will preclude hiring or result in termination?

# Background Checks/Drug Testing

- 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.)?

# Background Checks/Drug Testing

- Fair Credit Reporting Act lawsuits becoming more prevalent:
  - 2014 - 2,469 lawsuits
  - 2015 - 3,656 lawsuits
  - 2016 - 3,826 lawsuits
  - 2017 - 4,343 lawsuits
  - 2018 - 4,351 lawsuits
- The number of FCRA suits rose each year through 2018, more than doubling since 2009.

# Background Checks/Drug Testing

- FCRA lawsuits are happening in our backyard.
- Local plaintiff's law firm has filed dozens of FCRA cases in the past few years.
- Appear to be actively looking for FCRA class action lawsuits.

# Background Checks/Drug Testing

- Significant potential liability if violate FCRA.
- Negligent employer liable for applicant/employee's actual damages and attorneys' fees and costs.
- Willful employer liable for statutory damages, punitive damages and attorneys' fees and costs.
- Statutory damages are \$100.00 to \$1,000.00 per employee.

# Background Checks/Drug Testing

- FCRA allows for class action claims.
- Single employee can sue on behalf of all other applicants/employees receiving deficient form.
- Statute of limitations between 2 and 5 years.

# Background Checks/Drug Testing

- 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.)?

# Background Checks/Drug Testing

- 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)?

# Offer Letters

- Does the offer letter specifically identify that the employee's employment by the Company is "at-will?"
- 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?

# 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?

# Employment Contracts

- Does the employment agreement provide that the employer has discretion to modify the compensation and benefits provided to employee?
- Does the employment agreement include a severability provision?

# Severability Provision

- However, if a provision of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, that provision will be deemed severable from the remaining provisions of this Agreement and will not affect the validity, interpretation, or effect of the other provisions of this Agreement or the application of that provision to other circumstances in which it is valid and enforceable.

# Orientation

- Does the Company utilize an orientation checklist to ensure all steps are completed?

# Orientation

- 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?

# Employee Handbook

- Does 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; and
  - include a policy regarding the proper use of the employer's computers, internet and phones (waives right to privacy)?

# Employee Handbook

- If the Company operates in multiple states, have you determined what policies are required under local state law?

# Compensation Agreements

- If payments are “discretionary,” is there a clear written agreement or notice establishing their discretionary nature?

# 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 or bonus;
  - provide that the Company has the sole discretion to make any determination under the plan;
  - define when the bonus/commission is earned by the employee; and
  - include an integration clause?

# Integration Clause

- This Agreement contains the entire agreement of Employer and Employee regarding \_\_\_\_\_ and supersedes any prior understanding or agreement, whether written or oral, between Employer and Employee with respect to the subject matter contained herein.

# Compensation Agreements

- Do the compensation agreements detail what happens with bonus/commission payments which are earned and/or due to be paid after the employee separates from the Company?

# Compensation Agreements

- 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?

# Wage and Hour/FLSA

- 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?

# Wage and Hour/FLSA

- 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 employees to acknowledge the reason for any adjustment to time records?

# Wage and Hour/FLSA

- 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?

# Paid Time Off

- 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?
- 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?"

# Paid Time Off

- If the Company operates in other states, have these policies been reviewed for compliance with state laws (e.g., laws that 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 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?

# FMLA

- Does the FMLA policy provide that false information or fraudulent use of FMLA leave will result in termination?
- Does the Company's FMLA policy include the contact information of the Department of Labor?

# FMLA

- 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 FMLA?

# FMLA

- Are supervisors and managers trained to report potential FMLA issues to human resources?

# Restrictive Covenant Agreements

- 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?

# Restrictive Covenant Agreements

- 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?

# Restrictive Covenant Agreements

- Does the agreement specifically provide that the restrictive covenants are enforceable by the Company's successors and assigns?

# Restrictive Covenant Agreements

- 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?

# Terminations

- 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?

# Terminations

- 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?

# Independent Contractors

Multiple avenues of liability.

- FLSA.
  - Intellectual property.
  - Unemployment/workers' compensation.
  - IRS.
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- Economic independence test.
  - Written agreement a necessity.

# Management Training

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

# Miscellaneous

- 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?

# Thank you for attending!

## Questions?

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