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Lessons Learned and How to Be Proactive in 2019

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In these beginning months of 2019, we wanted to reflect back on the past year and identify some lessons learned related to employment policies and procedures. This article highlights some commonly recurring issues that we hope our employers can learn from and take any necessary proactive steps to address in 2019.

1. Training – Supervisors and Anti-Harassment

The #metoo movement has raised awareness on harassment behaviors and unreported harassment in the workplace. In part due to this raised awareness, employers are getting more complaints from employees and claims of harassment, typically filed as claims of discrimination based on sex, retaliation, or hostile work environment. Sexual discrimination claims at our state level are the second most common type of discrimination claim after disability claims, and they are not going away. If a supervisor either observes or has harassment reported to them, the employer is deemed to know about the complaint, whether or not the supervisor notifies upper management or the business owners. In other words, if an employee reports harassment to his/her supervisor and nothing is done, the employee can bring a claim, and the employer is liable for not responding to a valid harassment complaint. In light of this, how can you reduce your risk of harassment claims or issues?

According to the Equal Employment Opportunity Commission task force studying harassment in the workplace, employers need buy in from top management. Harassment in the workplace will not stop on its own. Management needs to lead by example, reiterate anti-harassment policies, and train supervisors and employees. More often than not, harassment is **not** reported – supervisors and managers should be observant and aware of the workplace culture and how they can foster a culture that does not allow harassment. Workplace cultures that are successful in preventing harassment are those that have created a sense of collective responsibility among employees and management and a sense of empowerment for employees, and that have provided resources to employees.

Crowley Fleck employment attorneys conduct trainings with employers on harassment and discrimination issues, to educate supervisors and staff and to let employees know that their company's management is taking harassment and discrimination seriously. This is an important part of preventing and dealing with harassment issues, but employers can do more. Harassment behaviors and complaints should not be ignored or taken lightly, regardless of whether the harassment is legally actionable. All supervisors should be required to elevate harassment complaints to the human resources contact and upper management (or board, or owner, as applicable). If you find that your supervisors are not escalating harassment to upper management, consider disciplining your supervisors. Further, when harassment is observed or once a complaint is made (formally or informally), employers should not change terms or conditions of employment for employees complaining of harassment or discrimination. That almost certainly constitutes illegal retaliation. Most importantly, harassment cannot be ignored.

2. Personnel Files and Performance Evaluations – How they can help you or hurt you … depending on what is said or kept in them.

While private employers in Montana are not required to keep a personnel file, many do in order to comply with payroll laws and anti-discrimination laws. Most employers obligate themselves to keep a personnel file through their own written policies and procedures. If you have a written policy regarding a personnel file, be sure to consistently follow and apply the written policy, including what is kept in the personnel file, who has access to it, and whether an employee can see or copy it. We typically recommend that employers allow their employees to view their personnel files upon written request, but not to copy or remove anything from the personnel file.

State employees, on the other hand, have the right to access their personnel files, and may file a written response to information contained in their file. The employee responses must be kept in the personnel file.

If your company has personnel files, we recommend the following:

- Do **not** retain any medical information in personnel files. Instead, have a separate medical file for each employee that includes drug testing results, doctor notes, medical information related to workers' compensation claims, medical certifications, Family and Medical Leave Act requests, and requests for reasonable accommodations for those employees with a disability as defined by the Americans with Disabilities Act, as amended (ADA). The medical files should be kept in a secure location and access should be limited to only those individuals in your company who need to know that information.

- Do **not** retain I-9 Employment Eligibility Verification forms in personnel files. Instead, have a separate I-9 file to hold all employee I-9 forms, and any paper copies of documents your employees present (you are not required to make copies of the presented documents – driver's license, social security card, etc. – but be consistent and either do not copy any employee's documents or keep a copy for every employee). I-9 forms should be retained for three years after the date of hire, or one year after the date employment ends – whichever is later. Keeping I-9 forms in a separate file will make it easier to comply with these retention requirements, to follow up on any employees whose work authorization has an expiration date, and to be prepared for a potential audit. The I-9 file should be kept in a secure location (either on paper or electronically) and access should be limited to only those individuals in your company who need to know that information.

- Do **include** in a personnel file any work restriction or reasonable accommodation that is being provided to an employee. The medical reason(s) does not, and probably should not, need to be included. Many times, an employee's direct manager or supervisor is not privy to the medical file but does look to the personnel file for information related to the employee. This is particularly important when a new manager comes onboard.

- Do **include** a note summarizing any verbal reprimand the employee receives. The note can be simple: date, reason(s) for verbal reprimand, instructions on improvement and name of person giving the verbal

reprimand.

- Do **periodically review** an employee's personnel file, especially before a promotion, raise or negative action is taken against the employee. Does the employee's work history as outlined in the personnel file support or contradict the pending employment decision? For example, an employer is planning to demote an employee due to his performance. The employee's personnel file, however, indicates that the employee has received 3 raises in the last two years, has average to above-average performance evaluations, and has zero disciplinary actions. The demotion likely cannot be tied to poor performance under these circumstances.

- Do **ensure** that performance evaluations fairly and accurately represent the employee's performance. If an employee has made a significant error that cost your business an important client or a substantial amount of money, the performance evaluation should reflect the seriousness of the error. The error should not be discussed in a single line of a multiple-page evaluation that includes glowing, positive comments everywhere else. It should be prominent throughout the evaluation and may even warrant a performance improvement plan and/or a final warning (consistent with any performance and discipline policy that you may have).

- Do **ensure** that you have an effective employee evaluation process and that the person(s) completing the performance evaluation is appropriately trained on completing the evaluations. For example, if your company has a numeric ratings scale of 1-3, do you have managers or supervisors that never give a top "1" because they do not see anyone as having a perfect performance, but then other managers or supervisors give all or most of their employees a "1"? Consider requiring supervisors to add comments or notes to any evaluation that is not "meets expectations," or a 2 or less on a scale of 1-3.

- Do **ensure** that performance evaluations are not discriminatory. For example, an employee was granted intermittent FMLA leave last year. Under the intermittent leave, she went to doctor's appointments or stayed home for several hours, several days a week. In her performance evaluation by her direct supervisor, she is rated low for her attendance and is told that her attendance needs to improve. The supervisor did not distinguish between her FMLA absences and non-FMLA absences. In this situation, her direct supervisor should have looked at which of her absences were related to FMLA and which were not. The supervisor should only comment on the non-FMLA (or, if not subject to the FMLA, to non-medical) related absences.

3. Why Montana Employers should strongly consider having a written grievance policy.

Montana is **not** an at-will employment state. That means, once an employee completes her probationary period (typically six months), the employer has to have good cause to terminate the employment. If there is no good cause, the employee can bring a claim under Montana's Wrongful Discharge from Employment Act (WDEA). Mont. Code Ann. § 39-2-901 et seq. If the employee is successful, she can recover up to four years of lost wages and fringe benefits.

One simple way an employer can protect itself against a WDEA claim is to have a written grievance policy, which includes deadlines for the employee to submit a grievance and for the employer to respond. Under the law, if the employee fails to first exhaust the procedures set forth in the employer's written grievance policy before filing a WDEA claim, then the employee's failure to do so is an affirmative defense for the employer. This means that the employer likely can get the WDEA claim dismissed by the court. This defense does not apply to other potential claims the employee may have, such as discrimination or wage claims.

It is critical that the employer follow the requirements under the law **to a T**. First, the employer **must** provide a copy of the written grievance policy to the employee **within 7 days** of termination. Failure to provide the employee with the written grievance policy within 7 days destroys the defense. Providing the employee with the written grievance policy at the start of employment doesn't satisfy this requirement. Nor does providing the written grievance policy 8 days after termination or even 1 day before termination. Also,

the actual policy must be given to the employee. It is not enough to summarize the grievance policy or reference the policy in a letter to the employee. The actual grievance policy should be photocopied or printed and provided to the employee.

We recommend the employer have some documentation of providing the written grievance policy to the employee, whether it be a signed acknowledgement by the employee (or a witness) if the policy was provided in person, or to have the policy mailed to the employee by certified mail with the final paycheck. We also recommend that the written grievance policy be given to employees who voluntarily quit or are laid off, in addition to those terminated, as we have seen employees in the past quit and then declare later that the employer fired them.

Second, if the employee initiates the grievance policy, then the employer must complete the entire grievance procedure within 90 days from the date the employee initiates the procedure. Not only must the employee initiate the grievance procedure, but the employee must exhaust the employer's grievance policy. For example, if the written grievance policy requires the employee to submit a written grievance or to submit to an interview within a certain number of days (e.g. 5, 10, or 20) of severance from employment, and the employee fails to do so, the defense is raised.

4. Be Proactive – Know the law, know when to contact a Labor and Employment Attorney, and consider purchasing Employment Practices Liability Insurance.

We as labor and employment attorneys are here to protect your interests. Often we have employers call us after a threat to involve attorneys or claim for damages is made, but the employer had a feeling, based on either history with the employee, the unique situation, or laws they have not dealt with before, that the situation might escalate. In those situations, we often find that a phone call with one of our attorneys **on the front** end and following advice given would have either resolved the issue, kept the issue at bay, or saved the employer time, energy, and/or money by taking the course of action with the lowest amount of risk possible given the situation. When you contact us, we likely have dealt with the same or similar issue with another employer. For example, the laws surrounding workers' compensation, FMLA and the ADA are often intertwined and specific to each situation. Actions employers have taken with one employee may not work with another. The ADA may require an employer to make an exception to a policy in their written handbook. A workers' compensation claim could also require an employer to consider and apply FMLA and ADA laws. Our labor and employment attorneys can help with claims or litigation filed against our employers, but we can also provide advice and guidance before a claim or suit has been filed. As Benjamin Franklin said, "an ounce of prevention is worth a pound of cure."

In addition to contacting us when you have a labor or employment issue, keep yourself informed about applicable state and federal labor and employment laws through available online resources, including the United States Department of Labor, the Equal Employment Opportunity Commission, the National Labor Relations Board, the Montana Department of Labor and Industry, the North Dakota Department of Labor and Human Rights, and the Wyoming Department of Workforce Service.

Also consider whether employment practices liability insurance ("EPL insurance") is right for your company. EPL insurance provides coverage to employers against claims made by employees related to legal rights in the employment relationship. The most common claims include discrimination (age, gender/sex, disability, race, for example), wrongful termination, sexual harassment and retaliation. Defending these claims to an administrative agency like the Montana Human Rights Bureau and, potentially later, through the court system, can be expensive and the potential damages can be significant (at times, including attorney fees and emotional distress).

Not all EPL insurance policies are the same. In addition to discussing with your insurance agent or broker whether your business needs EPL insurance, your insurance agent should go over what claims and items the EPL insurance policy will cover and any claims or items the policy specifically excludes (e.g. whether attorney fees are covered). Your insurance agent should help determine a sufficient amount of coverage for your company-specific risk exposures, taking into account your employee wages and benefits, and attorney fees

and costs associated with defending an EPL claim (which may reduce the amount of liability coverage). It is important to review these items with an agent or broker to be sure you understand and cover your risk exposures.

Update in Law: As of January 1, 2019, Montana minimum wage is $8.50/hour. The federal minimum wage remains at $7.25/hour. Montana employers must abide by Montana minimum wage.

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