Five Employment Law Traps for CFOs

with HR Oversight

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Hiring and firing employees comes with legal repercussions.

If you're tasked with overseeing HR, pay attention.

Overseeing human resources, a hat that many CFOs wear, may mean having to make crucial decisions about hiring and policy, performance management and discipline, and employee terminations. Such decisions may affect HR expenses and employee morale alike, and also may expose the company to the risk of expensive litigation. To avoid potentially costly missteps, the following five employment law issues should be on the radar of CFOs who oversee HR.

State and Local Wage and Hour Laws

The laws governing hours of work and payment of wages have become a leading source of employee claims. CFOs tend to be familiar with federal compensation laws and the laws of the state where the company's main office is located. But the company may have satellite offices or individual employees in different states and cities that have stricter laws. For example, an employee who would be exempt from the requirement to pay overtime in the state where the company is based may be entitled to overtime pay under the laws of the state where he or she works.

Some states also require payment of final wages on the date of involuntary terminations, and the definition of "wages" may include sales commissions and accrued but unused vacation time. Failure to timely pay wages under state law may result in awards of multiple damages, attorneys' fees and costs, and even personal liability for certain corporate officers. Mandatory meal breaks, days of rest, compensable travel time, and city-mandated minimum wages are other examples where state and local laws may differ.

Federal, State, and Local Leave Laws

Similarly, different states and cities may have medical leave and paid sick-time laws that differ significantly from what CFOs are familiar with under federal law or the law in the company's headquarters state. An employee's manager or the company's HR representative may ask the CFO to make decisions about whether to approve an employee's request for time off for medical reasons or to address an employee's absenteeism.

A good approach to these situations is to first evaluate whether the employee's leave should be approved under the company's medical leave or sick-time policy. Then, local, state, and federal medical and sick-leave laws must be reviewed to determine if the employee is legally entitled to job-protected leave, and whether some portion of that leave must be paid. Once all medical leave is exhausted, the company needs to evaluate whether it must provide some additional time off as a reasonable accommodation to a disability under federal or state disability discrimination laws.

Using Independent Contractors

Claims by individual contractors alleging that they were misclassified and should have been treated as employees are now very common. This also is an area of strong government enforcement at both the federal and state levels. To determine if the contractor is properly classified, most states evaluate whether the contractor is subject to direction and control in the performance of the work; whether the services are performed outside the usual course of the company's business (or away from the company's facilities); and whether the contractor has an independently established business.

Misclassification can result in liability and penalties for failure to provide employee benefits and pay overtime, FICA, and FUTA contributions, unemployment insurance payments, and workers compensation insurance premiums. In addition, potential buyers and investors are alert to the risks posed by misclassification, and the company's use of contractors will be scrutinized as part of due diligence in any corporate transaction.

Using Separation Agreements

At the end of employment, companies regularly use separation agreements that offer severance pay in exchange for an employee's release of legal claims. But using a one-size-fits-all separation agreement may result in paying an employee severance pay and not getting an enforceable release of all legal claims in return. Many small companies have form or template separation agreements that are not current or were drafted for different sized companies or for very specific types of separations.

Companies also sometimes use generic releases for group reductions in force, or RIFs, that are not compliant with the very specific requirements for enforceable releases under federal age-discrimination laws. The consequence of doing so may be that separating employees could accept the offered severance pay and still sue the company for age discrimination.

Similarly, some states have very specific requirements for employee-release agreements. In Massachusetts, for example, the release must specifically refer to the Massachusetts Payment of Wages Act in order for claims under that law to be released. If the required language is not included, then no enforceable release is obtained.

Using Contracts to Protect Business Info and Customer Relationships

Most CFOs are familiar with using restrictive agreements, such as non-competition, non-disclosure/confidentiality, and non-solicitation agreements, to protect business interests from misappropriation by departing employees. But CFOs of growth companies may need to be responsible for evaluating whether the company is taking the steps to ensure that, if necessary, restrictive employee contracts will be enforced by courts to the greatest possible extent.

This may include evaluating whether the agreements are reasonably tailored to the business and employees, whether the employees actually sign the agreements (and whether the company retains signed versions), and whether employees are reminded of their obligations upon departure.

In addition, particular state legal doctrines may render such agreements unenforceable if the company is not careful. One example is the "material change" doctrine, which generally may require that a new agreement be entered into when there is a substantial change to an employee's role, such as a major promotion. The material change doctrine may render the prior restrictive agreement unenforceable and the company's key business interests exposed.

CFOs who pay close attention to these five employment issues will minimize the risk of unnecessary and costly legal consequences.