Mistake No. 1: Not Paying for Compensable Travel
Portal-to-Portal Travel

• Normal home to work travel

• But . . . stopping along the way

• Carpooling
Overnight Travel

• When it applies

• Overnight travel as a passenger is compensable working time when . . .

• The driver is always working
Mistake No. 2: Not Understanding How to Deal with the Injured Employee or the Employee with a Medical Condition
Addressing Medical Issues at Work

- Generally, talk about medical conditions is off limits
- Performance issues?
- Information becomes known?
- A medical issue is observed
Applicable Laws to Consider

- Consider the Law: FMLA, ADA, and Worker’s Compensation Laws

- FMLA allows covered employees up to 12 weeks unpaid leave

- ADA requires reasonable accommodations
Mistake No. 3: Failing to Publish Accurate Job Descriptions
Job Descriptions

- The ADA necessitates the use of job descriptions
- Assists with defenses to Title VII claims
- May help to defeat claims for overtime
Job Descriptions

• Be sure to include:
  – Attendance standards
  – Lifting requirements
  – Availability to work overtime or weekends
  – Travel requirements
  – Supervisory duties
  – Exempt duties

• Make sure job descriptions are accurate and up to date
Mistake No. 4: Failing to Document Disciplinary Actions and Performance
Avoiding Mistake No. 4

• Publish a disciplinary policy, then follow it!

• Verbal warnings should be in writing

• Identify any prior counseling and failure to correct issues

• State the facts, be objective and avoid opinions

• Allow the employee an opportunity to sign the document, or note the refusal to sign
Documenting Performance

• Conduct (at least) annual reviews

• Document both good and bad performance
Mistake No. 5: Failing to Obtain a Release or Severance Agreement from a Terminated Employee
Mistake No. 5

• Consider whether the agreement is worth the risk
  – Is the employee in a protected category?
  – Will there be a replacement? Is the replacement in a difference protected category?
  – Has the employee recently engaged in protected activity?
  – The agreement may leave the employee considering whether they have a legal claim
Avoiding Mistake No. 5

• An enforceable agreement must provide “consideration”
  – The employee must be given something other than what they are already entitled to
• Consult with an attorney to obtain an enforceable release from ADEA claims
Mistake No. 6: Thinking You Have A Strong Misconduct Defense
The Unforeseeable Employee Misconduct Defense

- Work rules
- Training
- Self-Inspections
- Discipline
Avoiding Mistake No. 6

• Maintain safety manuals in all necessary languages
• Keep training documents organized
• Focus training on most common hazards
• Conduct self-inspections and document same
• Administer effective discipline
Mistake No. 7: Failing to publish a harassment or discrimination policy
Harassment under Title VII

• Employer’s liability for harassment under Title VII
  – Is the harasser a co-worker or supervisor?

• Harassment by a supervisor
  – Supervisor harassment with tangible employment action invites strict liability
  – Constructive discharge is not a tangible employment action, with one exception
Avoiding Mistake No. 7

• Publish a policy

• Address complaint procedure and retaliation

• Follow the policy . . . And document it!
Mistake No. 8: Treating Employees as Independent Contractors
Common Law Test

• Seven Factors:
  – the degree of control exercised by the principal over the details of the work
  – which party invests in the facilities used by the worker
  – the opportunity of the worker for profit or loss
  – whether the principal can discharge the worker
  – whether the work is part of the principal’s regular business
  – the permanency of the relationship
  – the relationship the parties believed they were creating
Avoiding Mistake No. 8

- Conduct a relationship audit
- Use formal contracts with independent contractors
- Ensure independent contractors maintain their own corporate documents
- Do not repeatedly and continuously engage the same independent contractors
Mistake No. 9: Not Properly Completing or Maintaining Form I-9s
Form I-9

• There is a new Form I-9 that becomes effective on September 18, 2017

• Beginning September 18, 2017, employers must use the 07/17/2017 N version

• Conduct an annual audit of your Form I-9s

• Know the Form I-9 record retention rules
Mistake No. 10: Not Having A Non-Compete and/or Non-Solicitation Agreement
Mistake No. 10

• Without a Restrictive Covenants Agreement, former employees are free to compete
• Non-Competition Agreements
• Non-Solicitation Agreements
• Non-Solicitation of Employees
• Trade secrets and confidential information
QUESTIONS?
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