General Company Questions

Question: Are you a federal or state government contractor?

Your Answer: skip

Answer

It is important to understand the impacts that any government contracts may have, as this may change certain reporting and compliance requirements for your business. There are numerous compliance requirements for companies that provide products and services to government agencies. The requirements will vary based upon several factors, including, but not limited to the following:

- Size of a company's workforce.
- Nature of work or industry.
- Type of government agency federal, state, or local.
- Whether or not the company is covered by a specific contract with its own unique requirements.

It is important to carefully review contracts and understand the obligations the company has committed to as part of the contract or memorandum of understanding. Some examples of requirements include:

- Annual EEO-1 reporting.
- Developing and maintaining an Affirmative Action Plan.
- Paying benefits and wages based on prevailing wages under various service contract acts.

Reference Resources

- Office of Federal Contract Compliance Programs - http://www.dol.gov/ofccp/
- McNamara-O'Hara Service Contract Act (SCA) - http://www.dol.gov/compliance/guide/sca.htm

Question: Do you know the employment laws and regulations impacting an organization of your size (by number of employees)?

Your Answer: skip

Answer

The smaller the company, the less likely it will have to comply with certain employment laws. As a company grows, the obligations increase. The Department of Labor (DOL) administers and enforces more than 180 federal laws. These mandates and the regulations that implement them cover many workplace activities for about 10 million employers and 125 million workers. **Note:** There may be state and local laws that will apply in addition to federal rules. Some of the more commonly applicable federal laws based on employer size include the following:

- One or more employees:
  - Fair Labor Standards Act (FLSA)
  - Immigration Reform and Control Act (IRCA)
  - Workplace Postings Requirements
  - Occupational Health and Safety Administration
  - The Uniformed Services Employment and Reemployment Rights Act (USERRA)
- 15 or more employees:
  - Americans with Disabilities Act (ADA)
  - Pregnancy Discrimination Act (PDA)
  - Title VII of the Civil Rights Act (Title VII)
- 20 or more employees:
  - Age Discrimination in Employment Act (ADEA)
  - Consolidated Omnibus Reconciliation Act (COBRA)
- 50 or more employees:
  - Family and Medical Leave Act (FMLA)
  - Employer Shared Responsibility Under the Affordable Care Act (ACA)
  - Workforce Adjustment and Retraining Notification Act (WARN)

Reference Resources

- Federal Department of Labor Employment Law Guide - http://www.dol.gov/compliance/guide/index.htm
- State Labor Offices - http://www.dol.gov/oasam/boc/osdbu/sbrefa/poster/matrix.htm
- Guidance from the Small Business Administration - http://www.sba.gov/content/employment-labor-law

Question: Do you intend to either hire more people or shrink your workforce this year?

Your Answer: skip

Answer

An employer's staffing strategy should be aligned with the strategic goals of the company. An employer should assess current needs,

future needs, and be aware of the need for succession planning for key jobs in the organization. Preparing ahead of time for changes in the workforce will have many benefits like reduced stress for managers and departments, ensuring continued service.

Hiring the right people for the job and your company is critical to the long-term success of your business. Ideally, the hiring process should begin long before you have an actual opening. By considering and incorporating the steps below, your hiring and employee retention will be much easier and limit any legal risk associated with unlawful discrimination or other unfair hiring practice claims (even if not intentional or malicious). A great hiring process also acts as good advertising for your business and helps promote your brand and products.

Staffing includes, but is not limited to the following:

- Creating a job description based upon current and anticipated business needs.
- Determining when there is an actual job opening internally.
- Creating and following the internal requisition process.
- Developing a recruiting strategy to include internal and external candidates.
- Creating a job ad and determining placement of your message to attract the right candidates.
- Reviewing and managing applications and resumes.
- Pre-screening for qualified applicants.
- Interviewing.
- Documenting interview notes.
- Management review and decision making.
- Making a conditional offer to final candidate.
- Conducting background checks (which may include Social Security, criminal, educational, work history, and credit reporting).
- Extending or rejecting formal offer based upon background results.
- Beginning the onboarding process to include pre-hire steps including IT and workstation set up.
- First day new hire orientation including required forms at federal and state level, in addition to internal forms and initial basic employment policy norms.
- Assigning a mentor or buddy for initial job-specific training.
- Following up with applicants interviewed but not hired.
- Following up with applicants not qualified, nor contacted during the recruiting process.
- Closing the requisition and documenting recruiting process for specific positions.
- Managing hiring record retention requirements.

Question: Do you have unions subject to a collective-bargaining agreement?

Your Answer: skip

Answer

Collective bargaining is specifically an industrial relations mechanism or tool and is an aspect of negotiation applicable to the employment relationship. In collective bargaining, the union always has a collective interest since the negotiations are for the benefit of several employees. Where collective bargaining is not for one employer but for several, collective interests become a feature for both parties to the bargaining process.

The International Labor Organization Report on Collective Bargaining Negotiations addresses the differences between negotiation and collective bargaining, the nature of collective bargaining, the conditions necessary for successful collective bargaining, some of the advantages of collective bargaining, issues of concern for employers, and guidelines for employers on the process of bargaining itself from the pre-negotiation stage to the agreement.

With all the recent changes to the National Labor Relations Act (NLRA), it is important for employers to stay abreast of requirements, employee rights, and employer limitations. The NLRA guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity. Employees covered by the NLRA are protected from certain types of employer and union misconduct.

Reference Resources

- http://www.dol.gov/dol/topic/labor-relations/collbargaining.htm
- International Labor Organization Report on Collective Bargaining Negotiations
- http://www.dol.gov/olms/regs/compliance/EmployeeRightsPoster11x17_Final.pdf

Question: Do you have a regular system for monitoring and auditing your human resources to ensure compliance with applicable state and federal regulations?

Your Answer: skip

Answer

Often employers go about their business without being aware that some policies, practices, and procedures could be in place that ultimately will keep a company out of legal trouble. It is a good idea to do an initial assessment of current HR practices, make any corrections, create a procedure, and regularly review practices in order to ensure continued compliance. Main areas of focus for an HR audit will include the following:

- Review federal/state labor laws that pertain to your size and type organization.
- Review employee handbook
- Audit postings
- Spot audit employee files
- Spot review job classifications
- Review hiring process
- Review benefits administration
- Review HR administration/record keeping
- Review disciplinary policies
- Review termination process

Question: Have you had any employment practice claims in the last three years (including, but not limited to, NLRB, DOL, EEOC, FLSA, state agencies, mediations, arbitrations, administrative hearings, internal grievances, and attorney demands)?

Your Answer: skip

Answer

Past practices are good indications of present ones. Many times a company, after facing a claim, will not make the effort to find out what failure in the management system generated the claim in the first place. Unless we examine our losses, and address the variances in our system, we will continue to be faced with similar failures.

Question: Do you have employment practices liability insurance coverage?

Your Answer: skip

Answer

Employment practices liability insurance (EPLI) is special insurance that covers the company in the case of litigation related to employment practices that are unlawful and have an actual cost in many cases. EPLI covers things like discrimination, breach of contract, wrongful termination, etc. These kinds of claims are not covered under general liability insurance, nor directors and officers (D&O) coverage.

EPLI is more common due to the increase in claims as a result of today's current business climate. Many employers simply cannot afford the risk associated with these types of claims, so EPLI is a good option to protect the company. If your organization does not have EPLI coverage, you risk exposure to considerable expenses for defending and indemnifying any claim. EPLI should not be used as a substitute for building an effective compliance program in the business, nor for building a corporate culture which grows powerful relationships. It is best used as a way to protect yourself against "special variations" which arise no matter how hard you try to do things right.

Question: Is your management personnel trained in human resources practices and compliance with company policies and the law?

Your Answer: skip

Answer

Ultimately it is the employer as a whole who is responsible for ensuring compliance and creating a safe and healthy work environment. Managers act on behalf of the company, and even if executive management is not involved in or aware of wrongdoings of management, the company is still responsible and could be held liable for the actions of its managers. Ensuring managers are trained, helps minimize any incidents, and having a formal training program can demonstrate the employer's good faith effort to ensure a healthy and safe working environment.

Hiring, Staffing, And Onboarding

Question: Do you have a recruitment process that includes defining the job prior to advertising openings and training hiring managers on the process?

Your Answer: skip

Answer

When a company has a clearly developed recruiting process, any manager should be able to step in and participate in the process. Being consistent with the process will eliminate gray areas for the company and for candidates, reducing or eliminating claims of unlawful or discriminatory recruiting and hiring practices.

Having a clearly defined job will help keep hiring managers focused on the relevant knowledge, skills, and abilities of applicants, resulting in hiring the best qualified person. Understanding the specific requirements of the position and logistics of the current opening gives managers clear boundaries in assessing candidates and asking appropriate interview questions. Keeping focused on the business need reduces risks associated with discrimination in hiring that may occur inadvertently if managers engage in small talk and do not focus on the requirements of the job or the qualifications of the applicant.

Question: Are your job advertisements compliant with nondiscrimination, equal employment opportunity, and disability regulations?

Your Answer: skip

Answer

It is acceptable to be creative in advertisements in order to attract more candidates; however, it is extremely important to stick with the specific details that relate to the job and the company without using language that appears to indicate a preference towards a certain "type" of person. Specifically, employers should stay away from statements or words that imply you are targeting a specific group based on a class that is protected under federal, state, and local anti-discrimination laws.

At the federal level, Title VII of the Civil Rights Act specifically prohibits discrimination on the basis of age, disability, genetic information, national origin, pregnancy, race/color, religion and sex. State and local law may also consider the following protected classes: gender/gender-identity, sexual orientation, HIV/AIDS status, political affiliation, etc.

Under the Americans with Disabilities Act (ADA), employment discrimination is prohibited against "qualified individuals with disabilities." This includes applicants for employment and employees. An individual is considered to have a "disability" if he or she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. Persons discriminated against because they have a known association or relationship with an individual with a disability also are protected. For further information on this topic, visit http://www.ada.gov/employmt.htm.

EEO is the law. Applicants and employees of most private employers, state and local governments, educational institutions, employment agencies and labor organizations are protected under federal law from discrimination. Employers are required to have workplace postings and often include an EEO statement in recruiting and hiring documents. Federal contractors and subcontractors must follow Executive Order 11246, ensuring hiring practices are non-discriminatory and compliant with the Executive Order.

Equal employment opportunity (EEO) laws enforced by the Office of Federal Contract Compliance Programs (OFCCP) mandate that federal contractors and subcontractors follow nondiscrimination in their hiring practices, as outlined in Executive Order 11246.

Reference Resources

- EEOC - http://www.eeoc.gov/eeoc/
- ADA - http://www.eeoc.gov/laws/statutes/ada.cfm and http://www.ada.gov/employmt.htm
- EO 11246 - http://www.dol.gov/compliance/laws/comp-eeo.htm
- OFCCP - http://www.dol.gov/ofccp/

Question: Do your job descriptions help you comply with the Americans with Disabilities Act (ADA) by setting forth essential job functions and duties?

Your Answer: skip

Answer

The ADA does not require employers to develop or maintain job descriptions. However, a written job description that is prepared before advertising or interviewing applicants for a job will be considered as evidence along with other relevant factors. If an employer uses job descriptions, they should be reviewed to make sure they accurately reflect the actual functions of a job. A job description will be most helpful if it focuses on the results or outcome of a job function, not solely on the way it customarily is performed. A reasonable accommodation may enable a person with a disability to accomplish a job function in a manner that is different from the way an employee who is not disabled may accomplish the same function.

Reference Resources

http://www.ada.gov/q&aeng02.htm

Question: Do you use a structured interview checklist with legally-compliant interview questions?

Your Answer: skip

Answer

The purpose of the job interview is to elicit as much information about a person to determine if he or she is the right person for the job. Hiring the right person for the job will directly relate to the success of the business. The employer must prepare ahead of time to have a successful interview. Clearly defining the job, and the skills, abilities and knowledge a person must have in order to be successful before the interview will ensure a smooth process.

Consider the following preparation tips:

- Determine the type of interview and who will participate in the process, such as:
  - One on one
  - Panel interview
  - Round robin
  - Group interview
  - Demonstration or skills testing
- Review job requirements with the interview team prior to meeting any candidates.
- Prepare a list of questions that will be asked of all candidates, which will ensure candidates are being evaluated on the same criteria. In addition

    - This will ensure candidates are being evaluated on the same criteria
    - It is okay to ask unique questions based on the candidate's experience
    - All questions must be job-related
    - Vary the types of questions asked, including behavioral questions, situational questions, open-ended questions, and closed-ended questions.
- Use a checklist to ensure standard company process is followed.
- Document notes in a professional manner.

Every question you ask in a job interview should be related to a bona fide occupational qualification. This means the questions must be related to the specific tasks or skills necessary to perform the job and cannot be designed to elicit information that might be discriminatory.

The following topics should be avoided:

- Race
- Religion
- Gender
- Sexual preference
- Height or weight
- Age
- Arrests
- National origin
- Disability

Question: Do you have candidates complete an employment application? If so, does it specify your state requirements for background checks, employment and educational verification, criminal records, driving records, credit checks, and job-related testing?

Your Answer: skip

Answer

The employment application should be designed in a way to elicit required job-related information only. An employer may not base hiring decisions on stereotypes and assumptions about a person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. As a general rule, the information obtained and requested through the pre-employment process should be limited to those essential for determining if a person is qualified for the job; whereas, information regarding race, sex, national origin, age, and religion are irrelevant in such determinations.

If a job applicant with a disability needs an accommodation (such as a sign language interpreter) to apply for a job, the employer is required to provide the accommodation, so long as the accommodation does not cause the employer significant difficulty or expense.

Inquiry into an applicant's current or past assets, liabilities, or credit rating, including bankruptcy or garnishment, refusal or cancellation of bonding, car ownership, rental or ownership of a house, length of residence at an address, charge accounts, furniture ownership, or bank accounts generally should be avoided because it tends to impact more adversely on minorities and females. Exceptions exist if the employer can show that such information is essential to the particular job in question.

Except for certain restrictions related to medical and genetic information, it is not illegal for an employer to ask questions about an applicant's or employee's background, or to require a background check. But the employer cannot conduct background checks or use the information obtained in a manner that denies equal employment opportunity to anyone on a protected basis, by intent or by unlawful disparate impact.

Reference Resources

- http://www.eeoc.gov/laws/practices/
- http://www.eeoc.gov/laws/practices/inquiries_arrest_conviction.cfm

Question: Do you conduct background checks or drug testing prior to making an offer of employment?

Your Answer: skip

Answer

Background and drug testing screens are typically reserved until a conditional offer of employment has been made. Many states require this. Several state laws limit employers' use of arrest and conviction records to make employment decisions. These laws may prohibit employers from asking about arrest records or require employers to wait until late in the hiring process to ask about conviction records. If you have questions about these kinds of laws, you should contact your state fair employment agency or consult legal counsel for more information.

Using criminal history information to make employment decisions may violate Title VII of the Civil Rights Act of 1964, as amended (Title VII). Title VII prohibits employers from treating people with similar criminal records differently because of race, national origin, or another Title VII-protected reason. Title VII prohibits employers from using policies or practices that screen individuals based on criminal history information if:

- They significantly disadvantage Title VII-protected individuals such as African-Americans and Hispanics; and

- They do not help the employer accurately decide if the person is likely to be a responsible, reliable, or safe employee.

Employers that obtain an applicant's or employee's criminal history information from consumer reporting agencies (CRAs) also must follow the Fair Credit Reporting Act (FCRA). For example, the FCRA requires employers to:

- Get permission before asking a CRA for a criminal history report;
- Give a copy of the report and a summary of rights under the FCRA before taking a negative employment action based on information in the report; and
- Send certain notices if the employer decides not to hire or promote based on the information in the CRA report.

Drug testing is one action an employer can take to determine if employees or job applicants are using drugs. It can identify evidence of recent use of alcohol, prescription drugs and illicit drugs. Drug testing works best when implemented based on a clear, written policy that is shared with all employees, along with employee education about the dangers of alcohol and drug abuse, supervisor training on the signs and symptoms of alcohol and drug abuse, and an Employee Assistance Program (EAP) to provide help for employees who may have an alcohol or drug problem. Employers should work with legal counsel to develop drug testing policies including pre-employment drug testing in order to ensure compliance with state and federal law.

Reference Resources

- http://www.eeoc.gov/laws/practices/
- http://www.eeoc.gov/laws/practices/inquiries_arrest_conviction.cfm
- http://www.dol.gov/elaws/asp/drugfree/drugs/dt.asp

Question: Are the tests and assessments you conduct job-related and validated based on actual job performance?

Your Answer: skip

Answer

The Uniform Guidelines on Employee Selection Procedures are a set of standards developed for employers in the use of selection procedures and to address adverse impact, validation, and recordkeeping requirements. If an employer requires job applicants to take a test, the test must be necessary and related to the job and the employer may not exclude people of a particular race, color, religion, sex (including pregnancy), national origin, or individuals with disabilities. In addition, the employer may not use a test that excludes applicants age 40 or older if the test is not based on a reasonable factor other than age.

If a job applicant with a disability needs an accommodation (such as a sign language interpreter) to apply for a job, the employer is required to provide the accommodation, so long as the accommodation does not cause the employer significant difficulty or expense.

Reference Resources

- http://www.eeoc.gov/laws/practices/
- http://www.eeoc.gov/policy/docs/factemployment_procedures.html

Question: Do you have a procedure to inform applicants of their acceptance or rejection?

Your Answer: skip

Answer

Having a formal process to close the application process is a good practice for several reasons. Not only is it a nice business courtesy, informing applicants of their status creates less additional work in the long run and allows applicants to move forward as opposed to continuing to follow up with an employer following an interview.

Having good documentation of recruiting and hiring actions will help an employer defend itself against claims of discrimination in the recruiting or hiring process as well.

EEOC regulations require that employers keep all personnel or employment records for one year. If an employee is involuntarily terminated, his or her personnel records must be retained for one year from the date of termination or until the disposition of any wrongful termination action is completed.

Question: Do you use independent contractors/contingent workers? If so, do you have them sign a contract confirming that their independent business is compliant with all labor, immigration, and tax laws and that the business has liability insurance?

Your Answer: skip

Answer

Not having the right documentation in place and not requiring certain independent business documentation from independent contractors can result in various consequences, including but not limited to, penalties and back taxes, as well as liability for issues that could occur while the contractor is working at the employing company's work site.

According to the Small Business Administration (SBA), independent contractors and employees are not the same, and it is important to understand the difference. Classification of an individual as a contractor or employee must be based on certain criteria, and this classification affects the taxes and other regulations that will apply. Misclassification of an individual as an independent contractor may have a number of costly legal consequences. If your independent contractor is discovered to meet the legal definition of an employee,

you may be required to:

- Reimburse the worker for wages you should have paid him/her under the Fair Labor Standards Act, including overtime and minimum wage.
- Pay back taxes and penalties for federal and state income taxes, Social Security, Medicare, and unemployment.
- Pay any misclassified injured employees workers' compensation benefits.
- Provide employee benefits, including health insurance, retirement, etc.

An independent contractor:

- Operates under a business name.
- May have his or her own employees.
- Maintains a separate business checking account.
- Advertises his or her business' services.
- Invoices for work completed.
- Has more than one client.
- Has own tools and sets own hours.
- Keeps business records.
- Maintains business and liability insurance.

The IRS guidelines state that once the determination is made that the person is an independent contractor, the first step is to have the contractor complete Form W-9, Request for Taxpayer Identification Number and Certification. This form can be used to request the correct name and Taxpayer Identification Number, or TIN, of the worker. A TIN may be either a Social Security number (SSN), or an Employer Identification Number (EIN). The W-9 should be kept in company files for four years for future reference in case of any questions from the worker or the IRS.

Form 1099-MISC is most commonly used by payers to report payments made in the course of a trade or business to others for services.

Also note that independent contractors may have their own employees or may hire other independent contractors (subcontractors). In either case, they should be aware of their tax responsibilities, including filing and reporting requirements, for these workers.

Reference Resources

- http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-Self-Employed-or-Employee
- http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Forms-and-Associated-Taxes-for-Independent-Contractors
- http://www.sba.gov/content/hire-contractor-or-employee

Question: Do you make sure that you are fully prepared for onboarding new employees by preparing paperwork, people, policies and procedures, performance expectations, getting the workstation ready, assigning a work "buddy" and a 60-90 day work plan?

Your Answer: skip

Answer

Having a formally documented process and checklist for onboarding new employees will benefit both the employee and the employer. Planning ahead will reduce stress and wasted time, particularly for the manager, IT and facilities staff tasked with preparing the workplace for a new hire.

The checklist will ensure that all compliance-related documentation is in place, as well as information needed to get the employee file set up and added to payroll and HRIS systems.
A formal orientation will get the new hire more quickly acquainted with the organization allowing a person to contribute to the operations of the business sooner. Having a well-organized and planned onboarding program shows the new employee that he or she is being welcomed into the organization and that the company has plans for him or her. The first 90 days are critical to remind the employee that he or she plays a key role in the company and that the company wants that new employee to be successful.

Check-ins at regular intervals during the first part of employment will help address any questions or concerns the employee may have and allows the new employee to offer feedback and suggestions for improving the company and the work. This is also an opportunity for the employer to formally measure and discuss the new hire's progress. Doing this for all employees from the start will likely result in better retention of employees, and allow for early course correction before there is a larger issue that may require more serious action such as resolving any misperceptions that may cause employees to leave the company or correcting performance or behavioral problems that may result in formal discipline and termination of employment.

Employee Relations And General Employment Policies

Question: Do you have an updated employee handbook compliant with federal and state rules for the areas where your company operates?

Your Answer: skip

Answer

Companies are required to comply with both state and federal labor laws. An employee handbook is the best means by which an

employer can communicate its compliance with the required laws but also its company-specific policies and practices. How are employees able to comply with the rules unless the rules are clearly communicated? Employees should be provided a handbook when hired and each time the handbook is revised, including an acknowledgement that confirms receipt and understanding of their responsibilities to know and adhere to the policies.

Employee handbooks should include the following information:

- Federal and state labor laws related to employee leave, equal employment opportunity, sexual harassment, worker safety and other requirements.
- Company policies and procedures related to standards of conduct, nondiscrimination, benefits, security and other terms and conditions of employment.
- Summary of procedures for training, performance evaluation and progressive discipline.
- General applicable statements such as a welcome statement by the owner or CEO, confirmation that policies and procedures apply equally to all employees and are applied fairly and consistently, and who to contact with questions.

Question: Does your employee handbook contain provisions for "employment at will" and acknowledgement of handbook receipt?

Your Answer: skip

Answer

In the United States, all states except for Montana* assume that the agreement by an individual to provide services to a company and be paid for those services without a written contract constitutes at-will employment. At-will employment is essentially the right on behalf of the employer or the employee to terminate the employment relationship at any time with or without notice and with or without cause. Courts have found that statements made verbally or in writing, such as in offer letters or employee handbooks, may at times create an implied contract that could potentially alter the at-will relationship. The best defense is to include an at-will statement in your employee handbook stating that no verbal or written statement can invalidate the at-will nature of employment without a signature from the owner or CEO of the company. As a best practice, this statement should be included in your handbook acknowledgement that is signed by every employee upon receipt certifying their understanding.

** Employers in Montana must comply with the Wrongful Discharge from Employment Act (MT Code 39-2-901 et seq.)*

Question: Do you have an arbitration or mediation agreement for resolving employee claims signed by employees and maintained separately from your employee handbook?

Your Answer: skip

Answer

Lawsuits can be very costly, which is why HR professionals are constantly searching for alternative means of dispute resolution when employee relations issues arise. Mediation of employment disputes allows employees and employers to talk about their concerns with an impartial mediator and work together to find a cooperative resolution that allows all parties to return to work promptly. Arbitration is a more formal process of resolution with the arbitrator's decision being final and binding.

When considering an arbitration of mediation program to resolve employee claims, both the Federal Arbitration Act (FAA) and state arbitration laws must be considered. In addition, the Supreme Court ruled that arbitration is only permitted when both parties expressly agree to it (*Stolt-Nielsen S.A. v. Animalfeeds International Corp.,* 130 S.Ct. 1758 (2010)). Therefore, a separate arbitration or mediation agreement must be signed by both parties, and in most cases a general handbook acknowledgement will not be considered as a sufficient agreement.

Reference Resources

Stolt-Nielsen S.A. v. Animalfeeds International Corp.

Question: Do you have a standard process for measuring and reviewing performance with employees?

Your Answer: skip

Answer

Periodic performance review is the best means of promoting two-way communications between an employee and the supervisor or manager. Although open communication is always encouraged, a formal means by which a supervisor can measure and document an employee's day-to-day work performance is important for ensuring consistent treatment of employees and providing everyone with an opportunity to succeed. Your performance review program should be designed to meet specific objectives such as a basis for assigning compensation increases, clarifying expectations, discussing training needs and opportunities, planning deficiency corrections and setting periodic goals. The organization can also use this information for planning purposes, such as organizational design, culture building and succession planning.

There are many types of performance reviews, such as self-evaluation, peer review, 360-degree reviews, etc. Whichever you choose, plan design and training of supervisors and managers on using the process are critical to ensuring a positive and successful evaluation process.

Question: Does your employee handbook contain language that states that the company will not tolerate any form of harassment, discrimination, or other illegal and unethical conduct?

Your Answer: skip

Answer

Not only is this a best practice, but communicating your unlawful harassment and discrimination policy to employees is required by law in many states. On a federal level, Title VII of the Civil Rights Act of 1964 applies to employer with 15 or more employees and disallows employment discrimination including sexual harassment. In addition, the U.S. Supreme Court has established that employers may be subject to vicarious liability for the actions of their supervisors. The good news is that employers may be able to limit their liability by establishing an affirmative defense composed of the following two elements:

- The employer exercised reasonable care to prevent and correct promptly any harassing behavior; and
- The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

Including unlawful harassment and discrimination policies in your handbook and training all employees regularly, including training on the procedure for reporting an offense, will ensure that your company is meeting the first step of an affirmative defense.

Question: Does your employee handbook contain an Equal Employment Opportunity policy statement, and is that also included in your employment application and posted in prominent employee areas of your company?

Your Answer: skip

Answer

The U.S. Equal Employment Opportunity Commission (EEOC), as well as many state agencies, enforce multiple laws that make it illegal for employers to discriminate against employees and/or candidates for employment. Equal employment opportunities must be extended to qualified individuals without regard to race, religion, color, sex (including pregnancy), national origin, disability, age, genetic information, or any other status protected under applicable federal, state or local law. Employers are required to have a policy in place that reflects and affirms the company's commitment to the principles of fair employment and the elimination of all discriminatory practices.
The following are examples of the nondiscrimination laws that are enforced by the EEOC:

- Title VII of the Civil Rights Act
- Americans with Disabilities Act
- Age Discrimination in Employment Act
- Pregnancy Discrimination Act

Reference Resources

More information on the discrimination laws enforced by the EEOC is available at http://www.eeoc.gov/employers/.

Question: Do you have a company ethics policy that includes the process for reporting illegal or unethical activity?

Your Answer: skip

Answer

Ethical employee conduct is essential for a business to succeed and prosper. Although your company expects employees to adhere to high ethical standards, it is often not apparent what those behaviors look like and when the line is crossed. For this reason, employers should include a policy in the employee handbook that clearly defines both the desired and unacceptable behaviors, as well as the process for reporting ethics violations.

For example, employers should use language that is appropriate to the company culture to describe required behaviors such as respect, honesty, proper communications, and a professional demeanor in the way they conduct themselves when on duty or representing the company. It is important to include behaviors to be avoided as well such as those listed below in addition to a statement that employees engaging in unethical conduct may be subject to corrective/disciplinary action.

Samples of unethical conduct are:

- Engaging in business conduct which is damaging to the company's reputation.
- Disclosing or misusing confidential or proprietary information belonging to the company or customers.
- Promising or giving something of value to anyone doing or seeking to do business with the company in order to influence them in matters relating to the company.
- Selecting vendors based on non-business reasons, such as personal or former non-business relationships.
- Undermining business decisions.

Question: Do you have a standard process for employees to communicate issues of concern (open door policy)?

Your Answer: skip

Answer

Successful businesses thrive when communications flow across all levels of employees. Creating open, honest communication between workers and their supervisors and managers is a process that must begin upon hire with a clearly stated "open door" policy and be

proven by example throughout the organization. When employees feel that their voice is being heard, trust and mutual respect develops and issues are raised and resolved promptly building a solid foundation for collaboration. Employees should be informed that they may seek counsel, provide or solicit feedback, or raise concerns without fear of retaliation when information is shared in good faith.

Question: Do you have a documented process, designated investigators, and management training for conducting an investigation of sexual harassment, discrimination, or other complaints?

Your Answer: skip

Answer

If an employee files a complaint of harassment with the EEOC or equivalent state governing agency, the first information they will request from the employer is documentation of the company's unlawful harassment policy, their investigation process, and proof of training for managers and all other employees. The response to this inquiry can be instrumental in the determination of whether the case moves forward. For this reason, employers must have their processes and procedures in place, even if there has never been a complaint.

An employer must conduct a timely investigation when they become aware (or should be aware) of any harassment that may have been or may be taking place, as they are legally responsible for taking appropriate remedial action if necessary. In order to meet these requirements, employees and supervisors must know how to report possible harassment, and HR and the senior manager that oversees the process must have in place a designated investigator (internal or external) and the forms to use and process to follow to document the investigation.

Question: Does your employee handbook outline standards of conduct and progressive disciplinary measures?

Your Answer: skip

Answer

As a manner of documenting performance and conduct issues consistently and to provide proof that employees were notified of the deficiencies or violations of company policies prior to termination, employers must have clearly defined progressive discipline procedures. As a best practice, when the disciplinary action is based upon poor conduct, is it most effective to refer to the incident as a violation of the company standards of conduct. The standards of conduct can list general topics that will include many of the common violation and include a statement that the list is not inclusive of all prohibited behaviors but rather is an example of conduct that is not allowed and will subject offenders to disciplinary action.

Many samples of standards of conduct can be found but it is important to include those that are most pertinent to your business and company culture. A few examples have been provided below, although this list is not all-inclusive.

- Falsifying employment applications, timesheets, personnel documents, or other company documents/records.
- Unauthorized possession of Company or employee property.
- Gambling, carrying weapons or explosives, or violating criminal laws on company premises or on company business.
- Fighting, throwing things, horseplay, practical jokes or other disorderly conduct which may endanger the well-being of any employee.
- Engaging in acts of dishonesty, fraud, theft or sabotage.
- Threatening, intimidating, coercing, using abusive or vulgar language, or interfering with the performance of other employee.
- Insubordination or refusal to comply with instructions or failure to perform reasonable duties which are assigned.

Question: Do you have an established process and managers trained to ensure that company standards are being followed prior to disciplining or terminating an employee?

Your Answer: skip

Answer

When managers are not properly trained on termination procedures, an employment termination may happen abruptly and create the potential for late payment of final wages and/or liability for a wrongful termination suit. As a best practice, many companies do not allow managers to terminate an employee without approval from HR or the company owner or CEO. In addition, it is important to train managers on the progressive disciplinary process that must be performed and documented prior to the consideration of a termination to prevent unemployment benefit awards in the case of a termination for gross misconduct. It is also a good practice to train managers on nondiscrimination factors that can lead to wrongful termination claims.

Question: Does your process include a second level of review prior to taking significant disciplinary action?

Your Answer: skip

Answer

Even the best trained manager or HR professional cannot be aware of all legalities pertaining to all situations that may come into play when terminating an employee. It is a best practice to have a relationship with a labor attorney or other trusted legal professional with whom you can confidentially review the details leading up to an employment termination prior to taking action. This added step can help limit liability by bringing to light potential risk areas that should be addressed.

Question: In the case of employment terminations, do you have a process in place to manage compliance with final paycheck regulations, required notifications for termination reasons, unemployment and benefits continuation rights, or any other notification, collection of company equipment, and exit interview process?

Your Answer: skip

Answer

As a best practice, employers should create a termination checklist that includes all of the steps to be taken prior to the employee leaving the place of employment. In addition to labor law requirements for final pay and required pamphlets such as state unemployment, employers must ensure they act consistently with requests to employees for returning materials, filing final expense reports, and termination of benefits.

Items to be included in a termination process checklist are:

- Resignation letter received or termination letter prepared.
- Final paycheck, acknowledgement and address change form for tax reporting.
- Benefit and benefit continuation (COBRA) information.
- Unemployment information.
- Return of company property and final expense report.
- Exit interview.
- Internal processing for IT, benefit termination, and payroll.

Total Compensation (wages And Benefits) And Hours Requirements

Question: Do you have clearly defined employee classifications (i.e., full-time, part-time, temporary, short-term, exempt, non-exempt, regular employee, independent contractor)?

Your Answer: skip

Answer

The Fair Labor Standards Act (FLSA) has not defined these types of employment classifications (e.g. full-time, part-time, and temporary) with the exception of exemption status and independent contractor. Therefore, employers are free to devise their own definitions in accordance with their business operations.

Most employers choose to define full-time as an employee who is regularly scheduled to work 30 – 40 hours each week. This takes into account interaction with benefit offerings and overtime provisions.

Reference Resources

- Full-time Employment
- Part-time Employment
- Exempt
- Determining Independent Contractor Status

Question: Have you ensured that you are paying your exempt and nonexempt employees in compliance with federal and state wage and hour laws?

Your Answer: skip

Answer

While most states have adopted the Fair Labor Standards Act (FLSA) in determining minimum wage, exemption status, permissible deductions from a salary basis and calculation of overtime, some state laws provide greater employee protections; employers must comply with both.

Reference Resources

Fair Labor Standards Act (FLSA) Overtime Security Advisor — Helps employees and employers determine whether a particular employee is exempt from the FLSA's minimum wage and overtime pay requirements.

Employment Law Guide - Minimum Wage and Overtime Pay - Describes the minimum wage and overtime pay requirements.

Overtime Laws in the States — provides a clickable map that informs what the overtime laws are in each state.

Minimum Wage Laws in the States

Question: Do you have systems and communications in place to accurately track time worked, including meal and rest periods, as required under federal and state laws, for purposes of overtime and regulatory compliance?

Your Answer: skip

Answer

Every employer covered by the Fair Labor Standards Act (FLSA) must keep certain records for each covered, nonexempt worker. There is no required form for the records, but the records must include accurate information about the employee and data about the hours

worked and the wages earned. Some state laws provide greater employee protections; employers must comply with both.

The following is a listing of the basic records that an employer must maintain:

- Employee's full name and Social Security number.
- Address, including Zip code.
- Birth date, if younger than 19.
- Sex and occupation.
- Time and day of week when employee's workweek begins. Hours worked each day and total hours worked each workweek.
- Basis on which employee's wages are paid.
- Regular hourly pay rate.
- Total daily or weekly straight-time earnings.
- Total overtime earnings for the workweek.
- All additions to or deductions from the employee's wages.
- Total wages paid each pay period.
- Date of payment and the pay period covered by the payment.

Reference Resources

Fact Sheet on Recordkeeping Requirements Under The Fair Labor Standards Act: Provides a summary of the FLSA's recordkeeping regulations.

"Are Pay Stubs Required?": Information from the elaws FLSA Advisor.

Question: Do you have a process in place to approve time worked or to make scheduled work time changes (such as requests for time off, make-up time requests or schedule changes)?

Your Answer: skip

Answer

While most employers place recordkeeping responsibilities on employees through the use of time cards or time tracking systems the ultimate responsibility falls on the employer to ensure that accurate records are kept and employees are paid properly. Having an internal process and procedure in place for review of time cards can facilitate proper payment of hours worked, and eliminate potential wage claims.

The Fact Sheet on Recordkeeping Requirements Under The Fair Labor Standards Act provides a summary of the FLSA's recordkeeping regulations.

Question: Do you have a written policy for absenteeism and punctuality?

Your Answer: skip

Answer

Employers are free to set schedules for employees, even those exempt from overtime. The employer can require adherence of work days, start times and end times.

Most employers adopt attendance policies to ensure that all employees know what is expected of them, including expectations to adhere to an established schedule, arrival in a timely manner for work, how to report an absence to the employer and a definitions of "absenteeism" should a disciplinary process need to be used.

Question: Do you have clearly defined paid time off policies (vacation, sick, holiday, other)?

Your Answer: skip

Answer

The Fair Labor Standards Act (FLSA) does not require payment for time not worked, such as vacations, sick leave or holidays. These benefits are matters of agreement between an employer and an employee in accordance with a written policy. The policies should be communicated to employees at the time they begin work (in a number of states this is a requirement).

It is important to note that some state and local ordinances do mandate employers to offer these types of fringe benefits and provide regulatory guidance as to how these benefits must be extended.

Employers offering vacation time must know the state laws where the business is located in order to develop a comprehensive policy covering eligibility, accrual, carryover, forfeiture, administration, pay upon termination, and integration of vacation policy with other state laws, and to ensure strict compliance and consistency of administration.

Employers establishing a sick leave policy should take into consideration how unused sick leave should be addressed, liability for sick leave, and general discrimination issues. When adopting a policy, employers must be sure that it complies with the interaction of federal or state family/medical leave laws, the Americans with Disabilities Act (ADA), and any other applicable federal and state laws.

Question: Does your sales compensation program clearly define when a commission is "earned" and what happens to uncollected commissions after an employee leaves the job?

Your Answer: skip

Answer

The best way to avoid disputes over commissions is to spell out everything clearly in a written agreement. Whether someone is owed a commission is a contractual matter. It is entirely a matter of state law and the compensation agreement between the employee and employer. Some states require written commission agreements. Ensure that your agreements between the parties answer the following questions:

- How is the commission calculated?
- When is it earned?
- When must it be paid out to the employee?

Commission payments are considered "wages" and therefore subject to state requirements in terms of wage payment timing and written agreements of when wages are earned. This also covers when wages are payable upon termination, whether voluntary or involuntary. Employers are generally free to devise a commission agreement that addresses how these "wages" are earned and payable within state regulations.

Question: Do you comply with regulatory rules for the employment of minors (work permits, hours of work)?

Your Answer: skip

Answer

Under the Fair Labor Standards Act (FLSA), youths 14 and 15 years old may work outside school hours in various non-manufacturing, non-mining, non-hazardous jobs under certain conditions.

Permissible work hours for 14- and 15-year-olds are:

- 3 hours on a school day.
- 18 hours in a school week.
- 8 hours on a non-school day.
- 40 hours in a non-school week./li>
- Between 7 a.m. and 7 p.m., except from June 1 through Labor Day, when nighttime work hours are extended to 9 p.m.

Child labor laws vary from state from state. Please consult your state department of labor for this information.

Reference Resources

What Hours Can Youth Work?
Specific information on permissible work hours for minor employees.

State Labor Offices/State Laws
Information on state minimum wage rates and other state child labor topics.

Question: If you offer group health benefits programs to your employees, do you have Summary Plan Descriptions for the required plans?

Your Answer: skip

Answer

The Summary Plan Description (SPD) is the primary vehicle for informing participants and beneficiaries about their rights and benefits under their employee benefit plans. Generally, an SPD must be furnished when a participant first becomes covered by a plan (within 90 days) and then at regular intervals thereafter.The plan administrator is legally obligated to provide the SPD to participants, free of charge.This obligation can fall on either the employer or plan carrier.

Reference Resources

Compliance Assistance
Provides information to assist employers and employee benefit plan practitioners in understanding and complying with the requirements of ERISA as it applies to the administration of employee pension and welfare benefit plans.

Fact Sheet: Workers' Right To Health Plan Information

Reporting and Disclosure Guide For Employee Benefit Plans (PDF) - A quick reference tool for certain basic reporting and disclosure requirements under ERISA.

Question: Are your benefit plans clearly communicated to eligible employees?

Your Answer: skip

Answer

The Employee Retirement Income Security Act (ERISA) requires plan administrators to provide plan participants with written information documenting the most important facts they need to know about their retirement and health benefit plans, including plan rules, financial information, and documents on the operation and management of the plan.

Reference Resources

Reporting and Disclosure Guide For Employee Benefit Plans (PDF) - A quick reference tool for certain basic reporting and disclosure requirements under ERISA.

Question: Do your plans that are subject to IRS Section 125 (Cafeteria Plans) or Employee Retirement Income Security Act (ERISA) meet the design, notification, nondiscrimination, and recordkeeping requirements of those plans?

Your Answer: skip

Answer

In offering an employer-sponsored health plan, it is important to understand your responsibly to plan participants in accordance with various regulations under ERISA. Additional considerations are given under the Internal Revenue Code when plans are extended under a Section 125 Cafeteria Plan. ERISA requirements pertain to retirement plan benefits that a company may offer as well.

Reference Resources

Employee Benefits—Cafeteria Plans

Cafeteria Plans

Employment Law Guide - Employee Benefit Plans - Provides information on the Employee Retirement Income Security Act (ERISA).

Employee Retirement Income Security Act of 1974 (ERISA) - Sets uniform minimum standards to ensure that employee benefit plans are established and maintained in a fair and financially sound manner. In addition, employers have an obligation to provide promised benefits and satisfy ERISA's requirements for managing and administering private pension and welfare plans.

Understanding Your Fiduciary Responsibilities Under A Group Health Plan

Question: Do your benefit and wellness plans comply with the portability and privacy requirements of the Health Insurance Portability and Accountability Act (HIPAA)?

Your Answer: skip

Answer

The primary goal of the HIPAA law is to make it easier for people to keep health insurance, protect the confidentiality and security of healthcare information and help the healthcare industry control administrative costs.

HIPAA regulations expand to non-discrimination requirements, which affect plan design for wellness programs.

Reference Resources

Nondiscrimination & Wellness Programs in Health Coverage in the Group Market – Final rules governing the HIPAA provisions regarding nondiscrimination based on a health factor and wellness program provisions for group health plans

HIPAA FAQs – The Health Insurance Portability and Accountability Act of 1996 (HIPAA), amended the Employee Retirement Income Security Act to provide new rights and protections for participants and beneficiaries in group health plans

HIPAA Nondiscrimination Requirements FAQs on final regulations issued on the nondiscrimination provisions under HIPAA

Final Regulations for HIPAA Health Coverage Portability

Question: Is your process and communications for participants eligible for health care continuation through the Consolidated Omnibus Budget Reconciliation Act (COBRA) defined?

Your Answer: skip

Answer

Under COBRA, group health plans must provide covered employees and their families with specific notices explaining their COBRA rights. They must also have rules for how COBRA continuation coverage is offered, how qualified beneficiaries may elect continuation coverage, and when it can be terminated.

Many states have enacted continuation coverage laws, known as "mini-COBRA" laws for those small employers not covered under the federal act. Each has its own notice and election procedures.

Reference Resources

An Employer's Guide to Group Health Continuation Coverage Under COBRA – The Consolidated Omnibus Budget Reconciliation Act of 1986

COBRA Continuation Health Coverage FAQs provide a general explanation of COBRA requirements, outline the rules that apply to health plans for employees in the private sector, and spotlight benefits under the law

Question: Are you working with your broker to ensure that your plans comply with the plan design, notification, and recordkeeping requirements under the Affordable Care Act?

Your Answer: skip

Answer

Under the Affordable Care Act, there are various provisions that apply to group health plans and health insurance issuers as well as protections and benefits for consumers that are beginning to take effect or that are already applicable.

Reference Resources

The Department of Labor's Employee Benefits Security Administration has prepared a self-compliance tool for group health plans: Self-Compliance Tool for Part 7 of ERISA: Affordable Care Act Provisions

Affordable Care Act

Question: Do your retirement plans (pension, 401(k), 403(b)) comply with all ERISA requirements?

Your Answer: skip

Answer

ERISA is a federal law that sets minimum standards for pension plans in private industry. For example, if an employer maintains a pension plan, ERISA specifies when an employee must be allowed to become a participant, how long the employee has to work before gaining a non-forfeitable interest in their pension, how long a participant can be away from the job before it might affect the benefit, and whether the spouse has a right to part of the pension in the event of the plan participant's death.

ERISA does not require any employer to establish a pension plan; it only requires that those who establish plans meet certain minimum standards. The law generally does not specify how much money a participant must be paid as a benefit.

Reference Resources

Frequently Asked Questions About Retirement Plans And ERISA

Types of Retirement Plans

Question: Are all of your discretionary bonus and benefits plans defined and communicated?

Your Answer: skip

Answer

Bonuses come in many different forms. They can be express, implied, based on the company's performance in a given period, or based upon an individual's performance. A well-functioning bonus program can yield increased productivity, improved morale, a safer workplace, and numerous other benefits.

Consider the following best practice tips:

- Put your bonus plan in writing.
- Make sure the plan contains stated and measurable goals and that the attainment of these goals will drive business results.
- Make sure the plan clearly identifies who is eligible and under what terms.
- Distribute the plan to all employees who qualify.
- Maintain discretion (and state unequivocally that you do maintain discretion) over the program.

Question: If you have a severance pay plan, does it comply with ERISA requirements?

Your Answer: skip

Answer

If a severance plan is a welfare benefit plan, then ERISA's reporting and disclosure requirements, fiduciary responsibility provisions, and administration and enforcement provisions apply. In general, employers are strongly advised to consult experienced employment counsel in developing these plans, including determining whether the arrangement is covered by ERISA.

Factors typically used in assessing whether a particular plan constitutes a welfare benefit plan under ERISA include whether the employer must exercise managerial discretion in its administration of the plan; whether a reasonable employee would conclude that the employer had an ongoing commitment to provide employee benefits; and whether the employer must analyze each employee individually in light of specific criteria. Cash bonus plans, cash profit-sharing plans, and severance pay of less than two years are considered compensation and are not regulated by ERISA.

Reference Resources

Severance Pay

Question: Does your severance pay plan require employees to sign a Release of Claims Agreement as a condition to receiving any severance package?

Your Answer: skip

Answer

Severance pay is often granted to employees upon termination of employment. Eligibility may be based on length of employment, job level or other factors when an employee leaves the company.

When an employer offers severance benefits, the employer should generally obtain a severance agreement which includes a release of claims by the departing employee of any and all claims against the employer that may arise from the employee's employment,

including claims of discrimination, wrongful discharge, etc. The agreement should be crafted by a knowledgeable employment attorney.

Considerations in drafting such a release should include compliance with the Older Workers Benefits Protection Act (OWBPA).

Reference Resources

Understanding Waivers Of Discrimination Claims In Employee - EEOC

Question: Do you have a policy about managing various leaves of absence, pregnancy disability, military leaves or other types of special time off needs?

Your Answer: skip

Answer

Various federal laws require that employers offer unpaid leave, depending on employer size. Similarly, some states have enacted laws which may be more protective for those individuals requiring time off due to pregnancy, the employee's own serious illness, illness of family members, military leave, as well as other types of leave for needs such as organ or blood donation, children's school activities, jury duty, witness leave, etc.

In administering laws, employers should be aware of interaction between the Fair Labor Standards Act, benefit maintenance or continuation coverage, and recordkeeping requirements.

Reference Resources

Federal vs. State Family and Medical Leave Laws

The Uniformed Services Employment and Reemployment Rights Act (USERRA)

Recordkeeping And Compliance Requirements

Question: Do you know what types of personnel records to maintain in your files?

Your Answer: skip

Answer

Records that are generally considered to be "personnel records" are those that are used or have been used to determine an employee's qualifications for hire/promotions, compensation, or disciplinary action, including termination of employment.

The following are some examples of "personnel records" (this list is not all-inclusive):

- Employment application.
- Payroll authorization form.
- Notices of commendation, warning, discipline, and/or termination.
- Notices of layoff, leave of absence, and vacation.
- Notices of wage attachment or garnishment.
- Education and training notices and records.
- Performance appraisals/reviews.
- Attendance records.

Please note that Form I-9, wage and hour records, and medical-related documents should be maintained separately in accordance to recordkeeping and privacy requirements.

Question: Do you know how long to maintain your personnel records?

Your Answer: skip

Answer

Federal and state regulations govern maintenance of personnel records, depending on the statues that govern such records. Best practice is to maintain up to date records on all current employees, and maintain those for terminated employees for a period of up to seven years to comply with the various statutes.

Employment laws such as the Occupational Safety and Health (OSH) Act, the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA), have certain recordkeeping and/or reporting requirements. The elaws FirstStep Recordkeeping, Reporting & Notices Advisor helps employers determine which recordkeeping requirements apply to them.

Question: Are your personnel files (cloud or paper) secure, with limited access to those on a "need-to-know" basis?

Your Answer: skip

Answer

None of the federal employment laws specify in what form you must retain records; however, there are a few things to keep in mind when going to a "paperless" record retention system:

- If any government agency conducts an audit, you will be required to have files readily accessible and readable.
- It is essential that disclosure of personnel files be made only to those with a "need to know." Ensure passwords or other security tools

are in place to protect the privacy of your employees' files.
- Retain records in accordance with federal and state retention periods.

Question: Do you separate any of your personnel records?

Your Answer: skip

Answer

Many laws require medical records to be maintained separately from general personal records. There is not a requirement that they be maintained in a separate cabinet, but should be maintained in such a manner so that they are kept confidential.

Here are some considerations:

- Employers who are covered by the Americans with Disabilities Act (ADA) must keep these medical records confidential and separate from other personnel records.
- The Health Insurance Portability and Accountability Act (HIPAA) also imposes privacy obligations on many employers who provide group health plans.
- The Family and Medical Leave Act (FMLA) requires records and documents created for the purposes of FMLA relating to medical certifications, recertifications, or medical histories of employees or employees' family members to be maintained as confidential medical records in separate files/records from the usual personnel files.
- The U.S. Citizenship and Immigration Services (USCIS) recommends that employers keep Forms I-9 separate from personnel records to facilitate an inspection request.

The elaws FirstStep Recordkeeping, Reporting & Notices Advisor helps employers determine which recordkeeping requirements apply to them.

Question: Do you know which postings you need to have on display in common areas for employees and if the posters need to be in another language besides English?

Your Answer: skip

Answer

As an employer, federal and state laws require you to clearly display official labor and employment posters detailing federal and applicable state labor laws. Federal agencies such as the U.S. Department of Labor and state agencies provide posters at no cost to employers.

Please note that posting requirements vary by statute; that is, not all employers are covered by each of the department's statutes and thus may not be required to post a specific notice. For information on state poster requirements please visit state Departments of Labor.

With a few exceptions (FMLA, MSPA, and Executive Order 13496), the U.S. Department of Labor's regulations do not require posting of notices in Spanish or other languages. However, there are some federal and state requirements to post important employment notices in the language of a certain percentage of the workforce to ensure understanding, so consider making those other language notices available when possible or required.

The elawsFirstStep Poster Advisor answers a series of questions to help determine workplace poster requirements for several of the laws administered by the U.S. Department of Labor.

Question: Do you know what required notices you need to provide to your employees and in what languages?

Your Answer: skip

Answer

Required notices vary by state. Some of the following notices are required under each state's statutes:

- Wage notice or notice of wages.
- Workers' compensation information, to include a medical provider network.
- Unemployment compensation pamphlets (at time of hire).
- Harassment policy.
- Benefits notices (e.g. COBRA, SPD, etc.).
- State mandated disability information.

For information on state specific requirements please visit state Departments of Labor.

While some statutes under state laws do mandate furnishing documents or notices in other languages, this is encouraged if employees in your workforce speak other languages.

Question: Do you know what notifications you need to file with the appropriate regulatory authorities?

Your Answer: skip

Answer

Under federal and state laws there may be reporting requirements placed upon employers. Such reporting includes new hire reporting, reporting to government agencies when offering benefits, or reporting to adhere to compliance with non-discrimination regulations.Company size, being a federal contractor, and/or offering benefit plans also trigger reporting requirements.

Reference Resources

The USDOL Office of Compliance Assistance Policy offers help navigating USDOL employment laws and regulations.

Hiring:

EEO Reporting Requirements - EEOC

(OFCCP) - FAQs for the Employer - US Department of Labor

New Hire Reporting - Answers to Employer Questions

Benefit Plans

Affordable Care Act Tax Provisions - Internal Revenue Service

Reporting and Disclosure Guide for Employee Benefit Plans (PDF)

Mandatory Insurer Reporting For Group Health Plans

Health And Safety

Question: Have you complied with all OSHA and notification requirements related to your industry?

Your Answer: Yes

Answer

Ensuring the safety and well-being of employees, customers, and others in your facilities is critical. Complying with the federal and state safety rules is important to your business. To comply with notice requirements under OSHA, all covered employers are required to display the OSHA Job Safety and Health: It's the Law poster in their workplace. Employers must display the poster in a conspicuous place where workers can see it.

The poster is available for free from OSHA and informs workers of their rights under the Occupational Safety and Health Act. It can be downloaded here:
https://www.osha.gov/Publications/osha3165.pdf

If you are in a state with an OSHA-approved state plan, there may be a state version of the OSHA poster.
https://www.osha.gov/dcsp/osp/index.html

To facilitate industry specific compliance, OSHA has created a Compliance Tool: OSHA: Compliance Assistance Quick Start

Additional guidance available from the U.S. Department of Labor's compliance page: Safety and Health Standards: Occupational Safety and Health

Question: Do you have an injury prevention program (IIP) that is compliant with the safety regulations in your company locations?

Your Answer: Yes

Answer

Under both federal and state regulations, there may be a requirement to adopt an injury and illness prevention program.Even when not required specifically under law, such a policy can assist employers in identifying potential safety issues, offer training to reduce workers' injury and exposure, and lower workers' compensation claims.

For additional information:

Injury and Illness Prevention Programs - OSHA

Injury and Illness Prevention Programs - Frequently Asked... OSHA

If you are in a state with an OSHA-approved state plan, there may additional requirements: https://www.osha.gov/dcsp/osp/index.html

Question: Do you have a designated safety officer that manages periodic safety inspections/audits and corrections?

Your Answer: Yes

Answer

While not necessarily a requirement under most state applicable laws or OSHA, most companies do implement a safety committee and/or a designated person to oversee this role. Often in smaller organizations this is the responsibility of the office manager, HR manager, or department manager.

Question: Do you have a safety training program?

Your Answer: No

Answer

Many industries, particularly those that are hazardous in nature, require training under federal or state OSHA-approved plans.

Federal OSHA requirements are outlined in the publication, Training Requirements in OSHA Standards and Training Guidelines and under the Compliance Assistance Quick Start: General Industry: Step 5: Train Your Employees.These are general industry requirements.

OSHA offers a wide selection of training courses and educational programs to help broaden worker and employer knowledge on the recognition, avoidance, and prevention of safety and health hazards in their workplaces at https://www.osha.gov/dte/index.html.

Question: Do you have an emergency response and communications plan?

Your Answer: Yes

Answer

The Occupational Safety and Health Act (OSH Act) requires employers to comply with hazard-specific safety and health standards. In addition, pursuant to Section 5(a)(1) of the OSH Act, employers must provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm. Emergency preparedness plans do not and cannot enlarge or diminish an employer's obligations under the OSH Act.

Having an emergency preparedness plan in place is as important to the survival of your business as your business plan. Consider now how a natural, human-caused or public health disaster such as a pandemic flu event could affect your employees, customers, and workplace. Would business operations continue?

Reference Resources

Emergency Preparedness and Response - OSHA

OSHA Publications - Emergency Preparedness and Response

Question: Do you have your process and communications in place for employees and managers to immediately report all occupational injuries to your human resources contact and/or workers' compensation carrier?

Your Answer: Yes

Answer

It is best practice to mirror the requirements for reporting incidents, near-misses, injuries and illness placed by your carrier. Most carriers require these to be reported within 24 hours to five days from the date of incident to ensure coverage.

You should train your managers on how to properly complete the notices required under state law and those to be furnished to the carrier. It is also encouraged that you ensure employees are informed of how to report an incident, how to seek care in the event that an incident is beyond a first-aid case, and limitations on reporting, as this can result in a loss of benefits.

Question: Do you maintain your annual OSHA log to record all employee work-related illnesses and injuries and comply with all OSHA recordkeeping and posting requirements?

Your Answer: Yes

Answer

Employers with more than 10 employees and whose establishments are not classified as a partially exempt industry must record work-related injuries and illnesses using OSHA Forms 300, 300A, and 301, available from https://www.osha.gov/recordkeeping/RKforms.html. Some states with state-approved plans may have different versions of these reports.

Employers who are required to keep Form 300, the Injury and Illness log, must post Form 300A, the Summary of Work-Related Injuries and Illnesses, in the workplace every year from February 1 to April 30. Current and former employees, or their representatives, have the right to access injury and illness records. Employers must give the requester a copy of the relevant record(s) by the end of the next business day.

Reference Resources

OSHA Injury and Illness Recordkeeping and Reporting Requirements

Question: Do you have a hazardous substance communication and disclosure policy that is communicated within your organization?

Your Answer: No

Answer

OSHA's Hazard Communication Standard [29 Code of Federal Regulations (CFR) 1910.1200, (also referred to as the "Right to Know" law)] requires manufacturers of chemicals, employers, and employees to take measures to prevent illness or injury that could occur when working with hazardous materials.

The Hazard Communication page, on OSHA.gov, includes downloadable versions of the revised Final Rule and appendices, updated to align with the GHS; a comparison of the Hazard Communication Standard, issued in 1994 (HazCom 1994), with the revised Hazard Communication Final Rule issued in 2012 (HazCom 2012); frequently asked questions on the revisions; and new guidance materials on the revisions.

Reference Resources

Hazard Communication Guidelines for Compliance - OSHA

Frequently Asked Questions: HAZCOM - OSHA

Question: Do you have a process for managing the employee communications and administration of workers' compensation leaves of absence, including your return-to-work protocols?

Your Answer: Yes

Answer

Medical files are to be maintained in a confidential manner; this extends to work-related medical information. While not specifically included under HIPAA, these files are subject to other provisions requiring employers to maintain them separately from personnel records.

While the workers' compensation statutes are not leave laws per se, employers covered by the Family and Medical Leave Act (FMLA) and Americans with Disabilities (ADA) do provide for leave taken for this purpose to run concurrently.While leave is granted, timely return of injured employees to productive roles in the workforce is one of the key components of many state's workers' compensation division's missions. Return to work is a responsibility shared by employers, employees, health care providers, insurance carriers, and state workers' compensation divisions.

Question: Do you have a process for reviewing your losses and experience ratings with your workers' compensation agent or carrier?

Your Answer: Yes

Answer

The key to calculating a workers' compensation premium is the experience modification factor (also known as an Experience Modification Rating, EMR, X-Mod, Experience Modifier, or just the Mod.) Understanding your company's mod and the data used to obtain it helps you identify ways to minimize your workers' compensation premium.

This information can be obtained by your carrier or the state insurance fund. Your broker can be an invaluable resource in helping you understand the factors going into your rating and suggesting methods to lower your risks.

Question: Have you evaluated your workplace for safety issues, including proper ergonomics, office equipment, VDT exposure, or other potential repetitive motion issues?

Your Answer: No

Answer

Occupational repetitive stress injuries (RSIs) comprise more than 100 different types of job-induced injuries and illnesses resulting from wear and tear on the body. RSIs are one of the fastest growing workplace injuries, and can result any time there is a mismatch between the physical requirements of the job and the physical capacity of the human body. Specific risk factors that can cause RSIs include repetitive motion, force, awkward posture, heavy lifting, or a combination of these factors.

Ergonomics, the science of adjusting the job to fit the body's needs, can prevent RSIs. Ergonomic solutions need not be expensive; in fact, the solutions are often simple. While in some cases redesigning the workplace is the best way to prevent RSIs, often many simple and inexpensive remedies will eliminate a significant portion of the problem.

Reference Resources

Safety and Health Topics | Ergonomics - OSHA

Ergonomics - Training and Assistance - OSHA

Question: Do you have a policy, procedures, and communications plan for managing potential violence in the workplace issues?

Your Answer: Yes

Answer

Workplace violence is violence or the threat of violence against workers. It can occur at or outside the workplace and can range from threats and verbal abuse to physical assaults and homicide, one of the leading causes of job-related deaths. However it manifests itself, workplace violence is a growing concern for employers and employees nationwide.

Most employers adopt a written policy, provide training to all employees and have a plan in place for the occurrences of such incidents. This can be a separate document, or maintained in a security policy. Your local law enforcement office may have additional resources for your business that are available in your area.

Reference Resources

Safety and Health Topics | Workplace Violence - OSHA

Question: Do you have employee wellness programs in place that are compliant with all applicable health care and privacy regulations and designed to improve health outcomes?

Your Answer: Yes

Answer

Wellness plans are adopted to incentivize healthy behavior, and designed to promote health awareness.Not only is this a cost-saving measure when offering a group-health plan, this is also now prevalent in preventing workplace injuries.

These plans are subject to HIPAA; records should be maintained in a confidential manner and place and should operate in accordance with nondiscrimination regulations.For more information, visit HIPAA's Nondiscrimination Requirements.

Employers that have or are interested in implementing a reward-based wellness program should consult the U.S. Department of Labor's Wellness Program Checklist for compliance assistance.