

Family Doctor

09.28.2000

A good employment lawyer is, in effect, a company's trusted family physician. Employment counsel develops a long-term relationship with a company, monitoring relevant laws and ensuring on-going compliance. An employment counselor's goal is to keep the client out of litigation, much like a physician's role is to keep a patient out of the hospital.

If that job is done well, it goes unnoticed. No one celebrates the fact that no sexual harassment suits were filed. No one gets a bonus when a consultant is properly designated as an employee rather than an independent contractor. Such accomplishments are taken for granted. Yet they are, indeed, accomplishments. Every company realizes that when they get their first legal bill in a sexual-harassment case. Any chief financial officer who has been through an Employment Development Department audit knows the importance of a properly drafted independent-contractor agreement.

Yet companies continue to ignore human resources in their overall business strategies. In fact, in a recent survey by Towers Perrin, 86 percent of executives agreed that human resources was critical to an organization's overall business strategy. Yet, fewer than 50 percent of those executives felt that the human-resources strategy in their organization was integrated effectively into the overall business strategy. It's at that point "when it's generally too late" that most companies finally start to appreciate the importance of their human-resources function. What was once considered an "overhead" corporate department is finally viewed, much more accurately, as a cost-savings department.

Think of a human-resources audit as a company's "physical exam." Just as people get regular check-ups, exercise and take a daily aspirin to lessen the risk of heart disease, a company can take steps to lessen the risk of a lawsuit or labor commissioner investigation. Perhaps the most effective step, if also the most overlooked, is the human-resources audit. In order to conduct an effective human-resources audit, counsel must do four things:

Understand the company. Consultation with management and human-resources personnel to understand the company's concerns, goals and "corporate culture" is important because it ensures that counsel understands what the client is trying to accomplish.

An Internet company, for example, may not care about its employment contracts or employee handbook because those formalities are seen as outdated. These companies might be more concerned about their confidentiality and nondisclosure agreements, whether their independent-contractor agreements adequately protect the company's trade secrets or whether their computer programmers are properly classified as "exempt" workers. On the other hand, a worldwide "brick and mortar" company likely has numerous employee policy manuals, employees in several states and a variety of offer letter and executive-contact templates.

Understanding the client's business is necessary to develop an adequate audit review and prepare for areas of particular weakness or concern.

Analyze existing policies and practices. The audit should include attorney analysis of the existing human-resources practices, agreements and other corporate documents. A thorough audit examines the areas of most concern to the client, which are generally those most likely to lead to litigation: corporate governance and administration, employee-handbook policies, recruiting methods, employee selection and hiring, exempt vs. nonexempt classifications, leave-of-absence policies, the use of offer letters and employment contracts, the use of independent contractors, employee leasing, employee discipline policies, performance-appraisal systems, civil-rights compliance, protection of proprietary information, fair employment practices, employee recordkeeping policies, wage-hour and compensation policies, employee benefits, stock-option policies and health-and-safety issues.

Prior to the audit, counsel should prepare an "audit questionnaire," which will raise hundreds of questions and issues for exploration. Each of these issues, if not addressed properly, exposes a company to potential liability. The converse is also true: A properly drafted sexual-harassment policy, for example, coupled with regular employee training, can provide a company with a complete defense in a sexual-harassment suit.

Prepare a summary of the findings. Traditional legal advice is intangible. Clients cannot see it. They cannot touch it. When they get the bill for legal advice, clients often are left wanting. There is nothing they can point to as evidence that they received something "of value" for their money.

In contrast, a human-resources audit results in something tangible, an "Audit Findings and Recommendations" binder that contains an analysis of the company's practices and potentially dozens of useful templates, forms and strategies. For example, the binder can include a sample independent-contractor agreement, a sample offer letter, Cal/OSHA posters, an employee Internet usage policy, guidelines for conducting performance appraisals, a sexual harassment policy and an exit-interview checklist. The binder should contain all of the state-of-the-art forms, postings and agreements the client needs to run its business, protect assets and avoid litigation. Managers can touch the binder, hold the sample agreements and hang the posters.

Implement necessary changes. It is not enough simply to know the company's weaknesses. The company, through its officers, directors and front-line managers, must be prepared to address them. When undertaking a human-resources audit, it is critical that the company be prepared to implement the necessary changes recommended by the auditor. Follow-through is key. In some cases, the company will merely need to update its forms or lunchroom postings. In other cases, a fundamental retraining of the staff might be appropriate.

The human-resources audit is designed to understand, evaluate and improve the infrastructure that drives an organization. This should be as important to a company as an evaluation of its products, its market share or its profits. But there is a lesser-known, but equally important, role for the human-resources audit in today's "new economy": assisting companies considering a merger or acquisition. One of the many reasons why a business combination fails is because of a clash between people and company values: People just didn't "fit."

Management must evaluate the human-resources infrastructure of the target company. Such an evaluation frequently illuminates much about the target, including its business sophistication, the value of its human capital, its intellectual property and other assets, and, in addition, its corporate culture. A human-resources audit before a potential merger or acquisition may help a company decide whether an acquisition should be

reconsidered, whether the terms should be re-evaluated or whether it should proceed at all. From startups to Fortune 500s, all clients benefit when they take such proactive steps and address issues before they turn into costly problems. There is relevance today in what Ben Franklin said almost two centuries ago: "An ounce of prevention is worth a pound of cure."

This article reprinted with permission from The San Francisco Daily Journal.

©2000 The San Francisco Daily Journal.

Practice Areas

Labor and Employment Counseling

Labor and Employment Litigation