



The FindLaw Guide to Counseling the Human Resources Department

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Whether you are a new in-house corporate counsel, or a seasoned legal advisor for your company, counseling the Human Resources (HR) function of your organization is probably a key part of your role. Understanding the legal needs of HR is a challenge because: (1) the related federal and state laws and regulations are in constant flux; and (2) the nature of HR function is evolving.

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Understanding the HR Functions

Even if you are not an Employment Law specialist, you will likely be involved with personnel issues that arise with employees, as well as interact with HR professionals. Thus, it is important to understand some basic issues associated with counseling HR.

The HR function is at the heart of a company's efforts with respect to two basic aspects of organizational design: people and structure. In order for companies to achieve strategic

goals and objectives, they must attract, motivate, and retain those workers who are best qualified to carry out the necessary activities of the company and make sure that they are placed into the right spots in the most effective organizational structure.

Traditionally, the HR department was largely administrative -- recruiting and interviewing prospective employees, administering benefit plans and writing policies. Forward thinking companies now realize that HR should be part of the organization's strategic planning activities. HR leaders now proactively suggest policies and initiatives to ensure the company has access to adequate knowledge and talent. Also, HR professionals are now involved in training and development, job analysis, oversight of workplace conditions and mediation of disputes between employees and the company.

HR issues are around every corner of the workplace. Here is a practical framework of the main categories of "HR activities:"

Employment and Placement

One key activity of the HR function is employee recruitment, hiring and termination. Recruiters are responsible for screening and interviewing applicants, managing reference checks, and transmitting employment offers and notices of the company's decision not to extend an offer. As major players in the hiring process, recruiters must be fully aware of relevant laws to ensure that the company does not run afoul of rules relating to non-discrimination and the handling of applicant information.

Compensation and Benefits

These activities include establishing and maintaining the organization's pay structure and administering employee benefits programs, such as PTO, health insurance and retirement plans. Compensation managers may also be involved with how the company measures employee performance.

Job Analysis

Job analysis activities include studying the duties of vari-



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ous positions within the company and the creation of job descriptions and position classifications within the organizational structure.

Training and Development

These activities involve employee training and development programs that not only benefit workers but also enhance the organization by developing skills, enhancing productivity and quality of work, and improving employee morale and loyalty. HR training personnel are responsible for developing programs and contracting with outside providers for training activities.

Employee Relations

Employee relations, also called industrial relations, is concerned with the formal relationship with unions. Depending on the industry of your company, unions may be relevant.

HR Laws and Regulations

As in-house counsel, you must be aware of the federal and state laws and regulations that apply to corporate employment practices, including employee recruitment, hiring, discipline and termination. Employment law is made up of a complex body of statutes, regulations and cases. Here is a basic outline of how employment law impacts basic HR activities:

Recruiting and Hiring

Companies must comply with federal and state discrimination laws which cover, among other things, recruiting and advertising, applications and interviews, collecting and using applicant records and pre-employment tests. Federal immigration laws must also be satisfied. In general, if companies avoid illegal hiring practices, they are free to establish qualification and hiring standards. There are, however, limits on a company's discretion. For instance, if your organization promises to follow a hiring procedure included in a collective bargaining agreement, then the company will be bound by that agreement.

Employee Information

Employees have privacy rights, although they are not absolute. Companies have the right to retain and use information about applicants and employees to operate their businesses and protect their property, customers, employees and the public. It is necessary for organizations to institute procedures to insure that this information is collected and used in a lawful manner. Also, companies should create consent forms to obtain desired information, including consents to do a background check, credit check, and drug screening.

Investigating Wrongful Conduct

Companies must be aware that they may be held liable for their employees' misconduct. Such misconduct can include harassment, acts of violence, and other criminal conduct. HR organizations should establish standard investigation procedures to respond to internal and external complaints regarding the wrongful conduct of employees.

Discipline Programs

When employees violate company rules, are dishonest or disloyal, or fail to perform satisfactorily, companies may wish to impose some type of punishment. Generally, companies are free to discipline employees for any reason companies consider legitimate, and are not required to prove that they had "good cause" to justify the discipline. However, companies may be liable for wrongful discipline if disciplinary action is contrary to state or federal laws, the terms of their employment contracts or company policies and practices. Therefore, companies should proceed with caution in disciplining employees and make sure that certain steps are followed.

Termination of Employment Relationship

Most employment relationships in the US are said to be "at will", which means that employees and companies are free to end the relationship without notice and without a showing of cause. However, courts have been known to protect employees against termination of the employment relationship under a variety of theories, sometimes referred to as "abusive, retaliatory, or wrongful discharge." Therefore,



companies should establish and follow formal procedures for terminating employees, including a review and investigation of the circumstances surrounding the proposed termination and documenting the reasons for the decision and how it was communicated to the employee.

Harassment and Discrimination

Under federal and state law, companies are subject to liability for sexual harassment and other acts of discrimination of their employees by supervisory personnel. Actionable sexual harassment can take a variety of forms, including creation of a hostile work environment, and is not limited to adverse employment actions against the affected employee such as demotion or termination. In order to avoid or reduce the possibility of liability, prudent companies should adopt a compliance program which includes: 1) a written sexual harassment policy; 2) a process to ensure that the policy is effectively communicated to all supervisors and employees; and 3) a complaint procedure to encourage reporting and full and discrete investigation of discrimination or harassment claims. Many states now require that companies offer both supervisors and employees training and educational programs focusing on prevention of sexual harassment and other forms of discrimination.

Creation and Maintenance of Employment Records

Every business, regardless of its size, must keep accurate and complete records regarding its employees from the date of the employee's application for employment through the employee's termination and thereafter for at least the applicable statute of limitations period.

Documents, Systems and Compliance Programs

Having a solid set of HR tools is incredibly helpful for the in-house counselor. Here is a list of the basic tools to help you successfully advise HR:

Documents and Systems

While carrying out its various activities, HR must prepare and implement a wide spectrum of documents, practices and systems. A list of such practices and systems might include an HR information management system, company-wide e-mail, an employee feedback system, employment involvement programs, background checks of prospective employees, employee orientation programs, job rotation programs, in-house training programs, regular company-wide meetings, and regular company-sponsored social events.

Compliance Programs

Compliance with employment laws and regulations is a demanding task and requires a real commitment from senior executives within the company's organization. An effective compliance program will have several components, including written policies and procedures, a regular auditing process and, of course, specific investigations which address particular problems that may arise among the company's workers.

Companies should consider putting together an interdisciplinary team to deal with employment law compliance issues. In larger companies, a committee consisting of the chief operation officer, general counsel, and the head of the HR department should be formed to guide the employment law compliance activities. In turn, specialists within the legal and HR departments should focus on particular compliance areas, including recruitment and hiring, testing, compensation, evaluation, promotion and demotion and termination.

Compliance Audits - An important part of any compliance program is a system of regular comprehensive audits of employment practices and procedures. The purpose of these audits should be to find out what policies and procedures the company is following and to identify any existing employment practices that might expose the company to liability.

As with any compliance audit, an effective employment law review depends on the development of a comprehensive investigation plan and solid information collection proce-



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dures. During the audit, a careful review should be made of all written policies and materials relating to employment practices. Specifically, the audit team should read procedural guidelines, manuals, and benefits booklets, and should review any standardized forms that might be used by the human resources department or line managers in dealing with employees.

Document review should be supplemented by interviews with supervisory personnel to determine their level of knowledge regarding the company's policies and the possible effects of employment laws and regulations on their dealings with workers. Interviews might cover recruitment procedures; applicant interview procedures; performance review procedures; steps taken to handle key life events impacting employees, such as pregnancy, illness, deaths in the family and religious holidays; and promotions, demotion, and termination procedures.

Employee Handbooks and Policies

Elements of the report generated during the compliance audit can be used to assist the company in developing personnel-related procedures that can be distributed to employees and supervisors. Distribution may take the form of a formal personnel handbook. The company may simply collect the most important procedures and put them in the form of a memorandum or hand-out that is delivered to employees at the time that they join the company and then periodically thereafter.

A short-form document might also be posted on the company's internal intranet for easy viewing and revision. Policy statements and procedures can cover a wide range of issues and compliance areas and special requirements with respect to public companies must also be taken into account, although such policies might also be adapted for privately held businesses.

For example, under the Sarbanes-Oxley Act of 2002, public companies must adopt "whistleblower" policies that set out detailed policies and procedures regarding receipt, retention and evaluation of reports received by employees regarding

instances of financial fraud within the company. Finally, companies are required to post, in a conspicuous location, a number of notices regarding employees' rights.

Independent Contractors

Companies often contract with third parties, rather than employees, to perform various services or complete specified tasks or projects. For legal and tax purposes, these non-employee service providers are generically referred to as "independent contractors."

There are certain potential disadvantages connected with independent contractors, notably the need to surrender control over how the contractor performs the services in order to satisfy legal requirements, which should be considered before using an independent contractor. Companies must carefully analyze the possibility that the relationship with the worker will ultimately be characterized as "employer-employee" by regulatory authorities, thereby resulting in substantial fines and penalties. In the course of this analysis, reference must be made to common law rules, court decisions, statutory definitions and industry-specific rules and guidelines.

FindLaw thanks Alan Gutterman for his support in the creation of this material. Alan S. Gutterman is the founder and principal of [Gutterman Law & Business](#), a provider of legal and business books, online content, newsletters, programs, training and consulting services. Mr. Gutterman's publications are available on the West Web site or at Westlaw Next at Business Counselor.

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Disclaimer: This summary is not intended to be exhaustive, as the commentary and case law on these issues are far reaching. You should conduct your own research or consult an attorney for advice regarding your specific individual situation. Additionally, cases and statutes in this area of law can change, so it is important to conduct updated research for your case.

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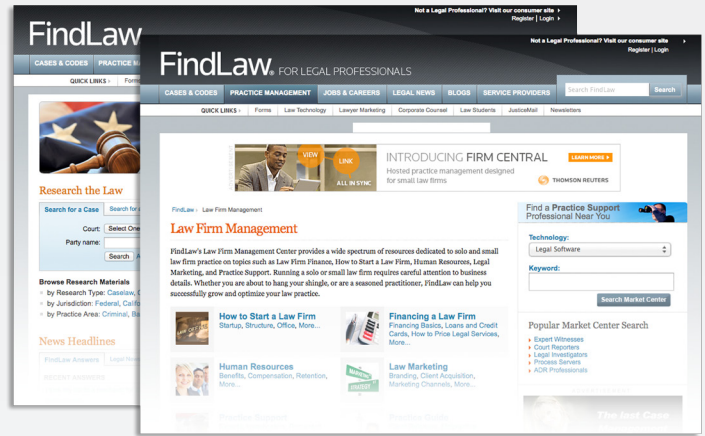
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