TOP 10 EMPLOYMENT LAW MISTAKES MADE BY BUSINESSES

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Court congestion is getting worse – and employment, contract and business disputes are on the rise.

- Approximately 3,000,000 new civil cases filed last year in L.A. County Superior Court.
- That's almost 5,000 new cases per judge in L.A. County.
- Most major categories of civil case types were down, including probate, small claims and family law matters.
- "Unlimited civil cases" - which are largely business, contract and employment disputes – were up about 25%.

1. Not researching local laws.

- Not all cities have been created equal in their business-friendliness. It is a good idea to check with local and regional chambers to assess local laws and regulations that affect business.
- E.g., City of LA's Business Tax Ordinance (imposing a gross receipts tax on businesses located in LA), and the Living Wage Ordinance, the Equal Benefits Ordinance, the Contractor Responsibility Ordinance, and the Slavery Disclosure Ordinance.

2. Underestimating the importance of the Employee Handbook.

- Employee handbooks help protect the company from legal liability by demonstrating the company's compliance with a variety of labor laws, including state and federal laws that require the presence of written employment policies.
- An employee handbook formally delineates company expectations regarding performance and conduct, summarizes the relationship between the employer and employee and provides general information about the organization as well as the benefits and services the company offers.
- One of the most vital components of the employee handbook process is that of employee acknowledgment and verification. The acknowledgment is important in order to ensure that all employees have read, understand, and are prepared to comply with company policies.

3. Misclassifying an Employee as an Independent Contractor.

- "Booking" someone as an independent contractor instead of as an employee with benefits must only be done with great care as federal and state fines for misclassification can be exorbitant.
- Employer bears the burden of proof when it comes to classifying independent contractors.
- The IRS and the State of California use different tests to determine whether a business has misclassified an employee (indeed, not all California agencies use the same test).
- Generally, the test is how much control the employer has over the "manner and means" by which the work is performed.

4. Not paying Overtime.

- Don’t assume everyone can be paid a salary.
- Overtime must be paid for hours over 8 in one day or 40 in one week.
- For a company to not pay overtime, it has the burden of proof to establish that the employee meets an exemption to California’s overtime laws.
- The exemptions are based on the amount of pay the employee receives and the duties the employee performs.

5. Not having a Meal and Rest Break Policy

- Meal and rest break lawsuits are one of the fastest-growing areas of business litigation in California.
- Every company in California is required to have a meal and rest break policy – and evidence that this policy is *regularly communicated* to employees.
- Employers are required to not only provide meal breaks, but also keep records of when the employee started and stopped the meal break.

6. Not providing and recording meal breaks.

- For most occupations, employees are entitled to a meal break after 5 hours of work, if her total days work is more than 6 hours.
- Employees must be completely relieved of all work related duties and be free to leave the work environment. If they have to answer the phone, watch the store, listen to a presentation, or perform any other work related items, its not a proper meal break and additional pay is required.
- The law requires that "If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided." Cal. Code of Regulations, Title 8, §11040.

7. Not paying accrued vacation when employment is severed.

- Accrued and unused vacation is considered wages under California law - and it needs to be paid out at the end of employment regardless of whether the employee is fired or quits.
- A policy requiring employee to take all her vacation within the year or lose it is illegal.
- A policy in which employee loses her vacation if she quits or otherwise leaves employment is illegal.
- A policy that uses "floating holidays" that can not carry over to the next year is illegal.

8. Not reimbursing employees for business related expenses, such as travel.

- Under Labor Code section 2802, employers are required to repay employees who pay for business related items out of their own pocket.

9. Overestimating the enforceability of covenants not to compete.

- Nine times out of ten, covenants not to compete are unenforceable in California.
- There are limited situations where a reasonable non-compete agreement may be valid in California:
  - If an owner is selling the goodwill in their business. (Business & Professions Code Section 16601).
  - When there is a dissolution or disassociation of a partnership. (Business & Professions Code Section 16602).
  - Where there is a dissolution of a limited liability company. (Business & Professions Code Section 16602.5).

10. Not hiring or retaining HR management who know California law.

- Employment liability is one of the top risks facing most companies. Claims and liability occur in the workplace with increasing frequency – and not only to those who are careless. An average of 450 employment lawsuits are filed in the U.S. every day, and 57% of companies have been named as defendants in at least one employment-related lawsuit in the past five years.
- More companies are outsourcing both their HR and General Counsel functions as cost-effective ways to stay protected.

SPECIAL NOTE:
The Employee Misclassification Prevention Act

- A bill has been introduced in Congress (H.R. 5107, Employee Misclassification Prevention Act, that if passed would amend the FLSA to required employers who employ "non-employees" to keep records of classification of the non-employees. The bill refers to non-employees, which is targeting employers' classification of independent contractors.
- Should the employer fail to maintain the records required under the proposed bill, a presumption would be created that the worker is an employee – not an independent contractor. The employer could only then overturn this presumption by presenting "clear and convincing evidence" that the worker is properly classified.
- The bill would also require employers to provide written notice to any non-employees about their classification. Among other items, the notice would need to state: "Your rights to wage, hour, and other labor protections depend upon your proper classification as an employee or non-employee. If you have any questions or concerns about how you have been classified or suspect that you may have been misclassified, contact the U.S. Department of Labor."
- The notice would also need to include additional information that Department of Labor deems necessary by regulation at a later date.
- Violation of the proposed bill's requirements carries a civil fine of $1,100 per worker, which could increase to $5,000 for willful repeat violations.

THANK YOU!
SOUTH PASADENA CHAMBER OF COMMERCE

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