

# HR Insights

## Top 10 HR Practices for Mitigating Risk

No matter what size company you are, chances are that at some point you will face a challenging HR compliance issue or employee situation that exposes your business to significant risk.

This issue of *HR Insights* focuses on the top 10 HR practices for compliance that go a long way to protecting your business so that you can stay focused on running and growing your business.

### #1: Use Employment Applications

Employment applications help safeguard your business from discrimination charges as well as to obtain consistent data from applicants to better compare and contrast them in the screening and selection process.

A job application is a great tool that enables:

- Obtaining an applicant's signature attesting that all information provided on the application is true
- Allowing your business to check all data provided on the application, including employment history, education, degrees, certifications, etc.
- Obtaining an applicant's signature attesting that the applicant has read and understands certain policies and procedures of your business that are stated on the application, for example, a statement saying that your business is an at-will-employer and an equal opportunity employer
- Obtaining an applicant's agreement to background checks, including CORI and for certain jobs, credit checks and driving records
- Obtaining voluntary self-identification data for EEOC and ensuring your own nondiscriminatory

and diversity promotion practices and policies are followed

Job applications should not be used to collect any of the following information:

- Criminal history
- Salary history
- Social Security number

Asking applicants for their criminal history is prohibited under Massachusetts law during the application process. Asking applicants for salary history is prohibited under the Massachusetts Pay Equity Act. Not asking for Social Security numbers during the early stages of the hiring process is a best practice in that a business avoids collecting protected information that should not be shared with some individuals participating in the hiring process.

Regarding CORI checks, it is important to note that a business must not run the check until after an offer of employment has been extended to the applicant.

Finally, do have your attorney review your employment application to ensure it complies with federal and Massachusetts state employment laws.

**Note:** If you are a member subscriber, see HR@Work's sample job application under Sample Forms and Checklists.

### #2: Do Written Job Offers

Written job offers are a great opportunity to start the employment relationship on a positive note. They also serve as legal documentation of the terms of the employment relationship – an important foundation to have in place should issues arise in the future. The following is a checklist of what to include in job offer letters.

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Some **tips** for creating job offer letters include:

- Use the letter to welcome a candidate and to say how excited you are to have the candidate join your team.
- Avoid words that could be perceived as an implied contract such as “guaranteed” and “annual” and make it clear that employment is at will. At will employment means the employee can resign at any time, for any reason, and the Company may end an employee’s employment any time, for any reason, with or without notice and with or without cause.
- Establish the timeframe for which the offer is valid and request the candidate to accept and sign the offer within that timeframe (e.g., three or five business days).
- Create a standard offer form letter and have your attorney review it to ensure the letter contains language that protects your business.

## Checklist for Creating Offer Letters

- Basic Job Information:** Job title, job responsibilities, reporting relationships, and start date
- Compensation:** Base pay, whether paid on an hourly or salaried basis and when, eligibility for overtime, and if applicable, a description of bonuses and incentive compensation
- Benefits:** Benefits (e.g., health, retirement, and time off) for which the employee will be eligible and when, and cost to employee
- At Will Language:** A statement that all employment is at will (unless this is an executive or other position that will be under an employment contract).

Also, consider including in the offer letter package a confidentiality and non-solicitation agreement to provide some protection against an employee

sharing your proprietary information outside the company and soliciting business away from the company. Under the agreement, employees agree:

- To keep all proprietary information confidential
- To return all company documents upon terminating employment
- That all work and documents generated on the employer’s premises or on company equipment belongs to the company
- To not solicit or influence clients, vendors, suppliers, and others to not do business or to not continue to do business with the company while an employee and for a stated time period following termination of employment (e.g., one year)

If you have existing employees who have not yet signed an agreement, you can state that it is now a policy of the company to require an agreement and ask them to sign one. This is especially effective if you are rolling out a new employee handbook at the same time. Sample agreements are available from multiple sources, but you should always have your attorney review a final draft of the agreement.

**Note:** If you are a member subscriber, see HR@Work’s sample Offer Letter under Sample Forms and Checklists.

## #3: Provide Employee Handbooks

While there are both pros and cons for providing employees an employee handbook, the pros far outweigh the cons. Among other things, an employee handbook:

- Protects your business from employee legal claims, including sexual harassment claims
- Sets expectations and rules for how you want employees to behave in the workplace
- Provides guidance to managers

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- Serves as a valuable orientation tool for new hires

Some *tips* for developing and maintaining employee handbooks are:

- A handbook should comply with federal, state and local employment laws AND reflect your company's mission, values and culture.
- Make sure the handbook is written in language that your managers and employees understand – not in legalese. However, do make sure your attorney reviews the handbook.
- Update the handbook regularly – at minimum every two years but always when laws change.
- Always date all versions of the handbook and retain old versions on file in case you need to later refer to them for issues that arose during that time.
- Do NOT download a handbook from the Internet and distribute it. The handbook may not have been updated for new laws or changes to existing laws or it may contain language on laws that are not applicable to your company.

## #4: Thoroughly Document Terminations for Performance

It is critical to thoroughly document terminations for performance. Here are a few important things you should know:

- Although Massachusetts is an at will employment state, you should be able to show that an employee was terminated for appropriate reasons. This is because there are exceptions to at will employment, for example, terminations that violate nondiscrimination laws, public policy, and employment contracts (whether actual or implied).
- Thoroughly document performance issues, including conversations with the employee and others regarding the issues and steps taken to

help the employee improve their performance. Terminating an employee without thorough documentation is potentially one of the costliest mistakes a business can make!

- If you decide to terminate an employee, consider offering severance pay in exchange for a waiver of discrimination and other claims. Note that when severance pay is contingent on a waiver of claims, the employee will be able to collect unemployment benefits while receiving severance pay. Make sure you have your attorney review the severance letter for compliance and protection purposes. Also, note that Massachusetts law requires that involuntarily terminated employees receive their final paycheck on date terminated, and that the final paycheck must include earned but not yet paid commissions and pay for accrued and unused time off.

Some *tips* for dealing with employee issues are:

- Don't ignore performance issues – try nipping them in the bud by talking with the employee.
- When talking with an employee, maintain your professionalism, provide specific examples of the issue, and what your expectations are for performance going forward. Treat the employee with dignity and respect.
- Consider implementing a progressive discipline policy if you have not already done so. If implemented, make sure the policy gives the company the right to skip progressive discipline for egregious behavior. In addition, follow the policy! If you don't, you further expose your business to potential liability.

## #5: Complete and Maintain I-9 Forms Correctly

Under federal law, companies may only hire individuals who can legally work in the U.S. – U.S. citizens, noncitizen nationals, lawful permanent residents, and aliens authorized to work in the U.S.

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To comply with the law, a company must verify the identity and employment authorization of each person they hire and complete and retain a Form I-9 that documents the verification. Failure to comply can result in civil fines, criminal penalties, and debarment from government contracts.

Form I-9 has three sections, the first of which is completed by the employee, and the second, by the employer. The third section is completed by the employer for certain rehires and others requiring recertification.

## Checklist for Completing Form I-9s

- Have the employee complete and sign Section 1 **no later than the employee's first day of employment for which the employee will be paid.**
- Review and make a copy of the documents provided by the employee for verification.
- Using the Form I-9 Instructions regarding documentation, complete and sign Section 2 of the Form. **Make sure you complete and sign the Form no later than three days from the employee's date of hire.**
- If based on documentation provided, recertification will be required, be sure to request new documentation from the employee and recertify timely.
- Staple copies of the documentation provided to the completed Form and file.
- Maintain all Forms for active employees in one single file – do not maintain the Forms in individual employee files.
- Retain all Forms for terminated employees in a separate file from active employees. A terminated employee's Form I-9 must be retained for three years after the employee's date of hire or for one year after the employee's date of termination, whichever is latest.

**Important Note:** The USCIS (U.S. Citizenship and Immigration Services) periodically publishes a revised Form I-9. To ensure your business is using the correct version of the form, regularly check USCIS's website.

## #6: Maintain Accurate Employee Files

Several federal and Massachusetts employment laws require employers to maintain certain information about active and terminated employees. Regardless of whether you maintain employee files electronically and/or in paper form, accurate employee files provide a solid foundation if issues should arise.

Some *tips* for maintaining employee files are:

- Make sure access to the files is limited, for example, to an employee's manager or an HR manager. Also, develop a policy and rules for who and when access to employee files will be given.
- Make sure employee files are kept in a secure area and in locked cabinets or in secure electronic form.
- Be sure to maintain information such as job changes, pay changes, performance reviews, and other similar information in employee files.
- Do **not** keep the following information in employee files. Instead, file the information in separately maintained files:
  - Protected information such as Social Security numbers, age, race, gender, national origin, disability, and marital status
  - Medical information
  - Information received from background checks and reference checks
  - Results of drug tests
  - Form I-9s (see #5 above)

Note that here in Massachusetts an employer must allow an employee to review his or her file within five business days of receiving a written request

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from the employee and that the review must take place at the place of employment during normal business hours. In addition, a copy of the file must be given to the employee if requested within five business days.

**Note:** If you are a member subscriber, see HR@Work's How to Guide on Setting Up and Maintaining Employee Files.

## #7: Classify Positions Correctly

Under the Fair Labor Standards Act (FLSA), an employee must be paid overtime at 1.5 times their regular pay rate for all hours worked over 40 in a workweek, unless the employee meets one of the FLSA exemptions. Failure to pay overtime can have serious consequences, including DOL bringing suit for back wages and an equal amount as liquidated damages. In addition, an employee may file suit for back pay and liquidated damages plus attorney's fees and court costs.

In addition, here in Massachusetts, most people providing services are considered to be employees rather than with rights to minimum wage, overtime, and other protections versus independent contractors. Employers who misclassify employees as independent contractors may face criminal enforcement or civil penalties. Massachusetts law requires independent contractors to satisfy a three-part test, a test that is more stringent than that under federal law.

law is more stringent than the federal law. In Massachusetts, an employer who wants to classify someone as an independent contractor has to show that the work meets all of the following factors:

1. The work is done without the direction and control of the employer.
2. The work is performed outside the usual course of the employer's business.

3. The work is done by someone who has their own, independent business or trade doing that kind of work.

Classifying positions correctly requires in-depth knowledge and expertise and for this reason, we recommend having an HR/compensation specialist or consultant or employment attorney review them.

## #8: Hire and Promote the Best

Businesses succeed through their people. Hiring and promoting the right individuals for your company drives the quality of your services and products, customer satisfaction, efficiency of your operations, and financial results. Yet, many companies have made bad hires and promoted individuals who fail, which are very costly to a business in terms of time and money spent on training, the impact these failures have on other employees, and the time and money involved in replacing bad hires or failed promotions.

Some *tips* on hiring and promoting the best are:

- Take the time to screen candidates and employees thoroughly, including conducting appropriate background checks.
- Before recruitment begins, review the job description and determine if it needs updating. In addition, think through the job requirements, including the competencies that make an individual successful in the job.
- When interviewing, ask about the individual's skills, education, and experience as well as questions that help you understand how an employee would handle different situations on the job. For example, if you were recruiting for an administrative assistant, you might ask "tell me how you organize your work" rather than "do you consider yourself organized." Also, ask questions that help you determine whether the individual is a good fit for your company's

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culture. For example, if your culture is team-oriented, ask behavioral type questions to learn more about whether the candidate is team-oriented.

- For individuals promoted, consider the job requirements, what strengths the individual will bring to the job, and any gaps for which the individual will need training to succeed. For example, if an individual is being promoted to a supervisory position and has no experience supervising staff, that individual will need training and support to be successful.

## #9: Develop an Onboarding Program for New Hires

Research has shown that onboarding programs significantly impact a new hire's success. Given the time and dollars spent on recruiting candidates, onboarding is a great way to protect your investment.

An onboarding program does not have to be expensive. The important thing is that there is a plan for orienting and training the new hire as quickly as possible so that he or she will be successful in the job. Examples of elements an onboarding program might include are a general contact person or "buddy" to whom the employee can ask general questions, meetings with employees with whom the new hire will be working most closely, taking the new hire out to lunch the first day, and follow-up/check-ins with the new hire after completing one week, one month, two months, three months, and six months of service with the company.

## #10: Know What Employment Laws Your Company Is Subject to and Post Required Posters

There are many federal and state employment laws, and many apply based on the number of

employees your business employs. It's important to comply with these laws and to post required posters in areas where they will be seen by your employees.

**IMPORTANT NOTE:** *HR Insights* is for informational purposes only. While we hope that our readers find this issue of *HR Insights* of great value, it does not constitute legal advice or opinion and is not a substitute for legal advice.

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