

# CONDUCTING A LABOR RELATIONS SELF-AUDIT: AN OUTLINE FOR EXAMINING PERSONNEL POLICIES & PROCEDURES

## § 1 I. RECENT TRENDS & DEVELOPMENTS

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Now more than ever, employers are facing an escalation in potential liabilities and obligations created by the continuing trend of enormous growth and expansion in employment litigation.<sup>1</sup> Recent events have led to significant developments in potential employer liability. Significant developments in legal doctrine and the creation of new areas of risk, including the possibility of joint employer liability for franchisors and franchisees, have fueled the growth of employer liability. For example, the continued expansion of social networking media has created new danger zones of potential risk for employers by complicating the intersection between employee privacy and the workplace. This outline provides an overview of the preventive measures franchise businesses may take to minimize the potential for litigation and employment-related claims.

A labor relations self-audit raises a series of important questions regarding labor and employment relations to guide employers to identify problem areas. The self-audit is designed to aid employers in evaluating the strengths and weaknesses of their personnel policies and procedures. Although some of these issues may already be apparent, the audit focuses attention on deficiencies and potential problems that employers may have overlooked but need to address and resolve. This overview provides an outline of the areas a self-audit would cover.

### § 1.1 A. PRIVACY

#### A. PRIVACY

From employee blogs, Twitter and Facebook pages to background checks and cross-border transfers of information within multinational corporations, more and more aspects of the employer-employee relationship are raising privacy concerns. Properly resolving those concerns presents an enormous challenge for employers as the web of federal, state, local and international privacy laws becomes increasingly complex.

With the latest and greatest technological advancement comes the risk for potential security breaches. Such security breaches can result in damaging publicity, significant out-of-pocket expenses and undercut employee and customer loyalty. We outline the steps employers should take to prepare for a security breach and obligations to maintain employee privacy.

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<sup>1</sup> The Equal Employment Opportunity Commission (EEOC) publishes statistics on the number of discrimination and retaliation charges filed each year. The numbers reflect a sobering reality for employers. See U.S. Equal Emp't Opportunity Comm'n, *Enforcement and Litigation Statistics*, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm>.

## § 1.2 B. CORPORATE LEGAL COMPLIANCE

### **B. CORPORATE LEGAL COMPLIANCE**

The demand for corporate legal compliance continues to grow, especially in light of disclosures that rocked corporate America after the turn of the century. The keys to implementing a successful compliance program lie within the human resources and corporate counsel departments

## § 1.3 C. CLASS ACTION AVOIDANCE

### **C. CLASS ACTION AVOIDANCE**

In conjunction with corporate compliance, self-audits of labor and employment policies identify potential problems before claims are filed and thereby limit the risk of future litigation. In particular, self-audits can eliminate the possibility of future wage and hour class action lawsuits. We provide “eleven first steps” to prevent employment class actions.

## § 1.4 D. WORKPLACE CRISIS MANAGEMENT

### **D. WORKPLACE CRISIS MANAGEMENT**

A self-audit can assist employers with implementing a system of workplace crisis management. We identify ten key preparedness areas.

## § 2 II. OVERVIEW: THE LAW OF SELF-AUDITS

There is no law that generally requires an employer to conduct a comprehensive self-audit. However, the increasing number of laws and regulations that regulate the employment relationship and the workplace make the use of periodic audits important to avoid legal landmines. The potential benefits of conducting a comprehensive self-audit are significant. For instance, accurate recordkeeping is essential to ensuring compliance with the FMLA.<sup>2</sup> As a further example, employee background checks are becoming more regular, and employers must be certain to comply with the required but complicated consent and notice provisions under the Fair Credit Reporting Act (FCRA).<sup>3</sup>

Evaluating and updating job descriptions to determine whether an individual or group of employees are accurately considered exempt or nonexempt under the FLSA<sup>4</sup> and corresponding state laws and regulations is crucial to avoid the current tidal wave of class-action lawsuits

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<sup>2</sup> 29 U.S.C. §§ 260 *et seq.*

<sup>3</sup> 15 U.S.C. §§ 1681 *et seq.*

<sup>4</sup> 29 U.S.C. §§ 201 *et seq.*

seeking back wages and statutory penalties for misclassified employees. By the same token, determining whether workers are properly designated as independent contractors can avoid significant potential liability under the FLSA as well as federal tax laws.

Ensuring personnel files are complete and include all essential components such as copies of offer letters, applications, drug testing/background check consent forms, personnel manual acknowledgements, at-will employment acknowledgements and any other forms used by the employer is crucial to defending potential claims for wrongful termination, breach of contract or other causes of action frequently asserted in an employment lawsuit under state law. Often, poorly maintained personnel files create unnecessary hurdles exploited by plaintiffs' counsel in employment litigation.

Although numerous laws make a self-audit increasingly complicated, the potential benefits cannot be understated. On the other hand, failing to conduct periodic evaluations of an employer's policies, procedures, practices and other issues outlined below can result in a multitude of legal liabilities. Consequently, the self-audit remains an important tool for all employers.

In the franchise setting, franchisors should remain cognizant of being considered a joint employer with the franchisee if the franchisor exerts too much control. Currently, only legally separate entities that exert a significant and direct degree of control over employees, and their essential terms and conditions of employment, are considered joint employers. Essential terms and conditions of employment are those involving hiring, firing, discipline, supervision and direction of employment.

The NLRB has not issued a formal decision stating a new rule to find a joint employer, but has shown a willingness to consider a new rule.<sup>5</sup> On December 19, 2014, the NLRB's General Counsel issued complaints against McDonald's USA and numerous McDonald's franchisees as joint employers, which may change decades' old franchise law. The NLRB General Counsel advocates looking for "indirect control" and determining whether "industrial realities" make a company a necessary party to collective bargaining.<sup>6</sup> This would shift the inquiry from whether there is day to day control to whether there is operational control.

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<sup>5</sup> The NLRB invited *amicus* briefs as to whether it should adopt a new joint employer standard in *Browning-Ferris Industries of California, Inc., d/b/a Newby Island Recyclery & FRP-II, LLC. d/b/a/ Leadpoint Business Services*, NLRB Case. No. 32-RC-109684 (filed April 30, 2014).

<sup>6</sup> The General Counsel filed an *amicus* brief advocating a new standard as discussed above. See *Amicus Brief of the General Counsel, Browning-Ferris Industries of California, Inc., d/b/a Newby Island Recyclery & FRP-II, LLC. d/b/a/ Leadpoint Business Services*, NLRB Case. No. 32-RC-109684. (filed June 26, 2014) ("*Amicus Brief*").

### § 3 III. PRACTICAL RECOMMENDATIONS

#### § 3.1 A. OUTLINE OF ISSUES & CONCERNS TO BE ADDRESSED IN A SELF-AUDIT

##### **A. OUTLINE OF ISSUES TO BE ADDRESSED IN A SELF-AUDIT**

A comprehensive outline of the issues, policies and practices that all employers should consider is set forth in the labor relations self- audit. This outline provides an overview of the areas covered.

##### § 3.1(a) *Company Organization (Including Franchise Structure)*

##### § 3.1(b) *Administration of Human Resources & Industrial Relations*

##### § 3.1(c) *Workforce Planning*

##### § 3.1(d) *Recruitment & Hiring*

##### § 3.1(e) *Orientation, Training & Development*

##### § 3.1(f) *Promotions & Transfers*

##### § 3.1(g) *Fair Employment Practices*

##### § 3.1(h) *Hours of Work*

##### § 3.1(i) *Compensation*

##### § 3.1(j) *Fringe Benefits*

##### § 3.1(k) *Safety & Health*

##### § 3.1(l) *Communication*

### § 3.1(m) *Discipline, Termination & Leaves of Absence*

### § 3.1(n) *Union Relations*

## § 3.2 B. CONCLUSION

### **B. CONCLUSION**

Even a brief glance at the preceding outline of issues and concerns makes it evident that conducting a self-audit is a significant task. Nonetheless, the short-term effort of conducting such an audit yields important long-term gains by identifying problems the employer may need to address.

Such an audit is merely the first step in preventing and confronting potential employment problems. Once problems are identified, employers must act to correct those policies, procedures, and practices that are inconsistent with the employer's goals or legal requirements. Employment audits should not be regarded as one-time events, but rather as an ongoing process that must be engaged in with regularity as circumstances and legal requirements change.