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Reporter

Employment Law

by Kelly O. Scott

THE TOP 20 EMPLOYER MYTHS

The celebration of the 20th anniversary of the Employment Law Reporter, one of the longest running employment law newsletters in the State of California, continues with our take on the top 20 employer myths. Join the celebration and read on!

20. "They are here from the government and they are here to help."

No, they are not really there to help; they are there to collect revenue in the form of interest, fines and taxes, revenue which is made all the more essential by growing state and federal government deficits. An example is the much-publicized IRS "safe harbor" for employment tax relief offered to employers who mistakenly classified workers as independent contractors, a safe harbor which has numerous loopholes and which is not recognized by state taxing authorities who are entitled to seek their own taxes and penalties under state law. While employers can and should make every effort to properly classify employees, employers should be extremely careful when dealing with state or federal agencies, period.

19. "But it's my company!" We have often heard the cry from employer-owners: "but it's my company and I will do what I want!" No, you won't. Or, more accurately, you will, but you will pay for it...through the nose.

18. Laughter is the Best Medicine. Many employers

attempt to diffuse an awkward situation with gallows humor. This only breeds resentment which can lead to litigation. "We don't know what we'll do without you, but we are going to try!" Not funny. Well, kind of funny, but not appropriate.

17. The Myth of the Perfect Employee. The employee is fantastic and should receive a "perfect" review, right? Wrong. Everyone has room for improvement; new areas they can learn, new responsibilities they can absorb, etc. Perfect reviews only serve to create a perfectly fine problem for the employer down the road when change is truly needed.

16. "They stole, so we deduct." Many employers believe that all forms of employee theft can be deducted from an employee's paycheck. However, theft is often a matter of opinion and deductions which are not authorized by employees in writing can lead to litigation.

15. "We are family." Many employers like to speak of the workplace as a "family." It is not family. In a family, cousin Hank, who never does anything and who is an absolute waste of space, is tolerated, even loved. In business, cousin Hank is fired. Don't set unrealistic expectations by using terms that don't apply.

Upcoming 2012 Seminars at ECJ**Tuesday, October 30, 2012 - 8:30 a.m.-9:30 a.m.**

Accommodating Employee Disability: Have You Done Enough? by Karina B. Sterman, Esq.

Tuesday, October 30, 2012 - 10:00 a.m.-12:00 p.m.

Sexual Harassment Prevention Training by Kelly O. Scott, Esq.

Please contact Brandi Franzman at bfranzman@ecjlaw.com for registration information.

- 14. The Mushroom Theory of Management is Best.** Some employers believe that keeping employees in the dark about future plans for the company is the best way to manage. While it may be appropriate in some cases, this management style when consistently applied leads to a workplace that is rife with rumor and speculation, resulting in low morale, increased complaints and frequent turnover.
- 13. The Myth of Confidentiality.** Employers promise confidentiality in all kinds of situations ranging from personal issues to routine business decisions to important employment matters. Some information should be maintained as confidential within a given group of persons who need to know. However, true confidentiality is difficult in any workplace. Be careful; making promises you cannot keep can lead to disastrous consequences.
- 12. The Myth of the On-Duty Meal Period Waiver.** On-duty meal period waivers can only be used under very limited circumstances. They should not be thrown around like confetti during a Thanksgiving Day parade.
- 11. The Myth that Younger is Cheaper.** Maybe it was when you were dating in college, but with employees, it is a myth that can lead to serious trouble in the form of an age discrimination claim.
- 10. The Legend of the Independent Contractor.** Labeling someone as an independent contractor to avoid taxes and other employer obligations is like passing off cubic zirconia as a diamond engagement ring. It will be fine until someone checks into it, and then look out.
- 9. The Myth that Meal and Rest Breaks Can be Combined and Taken at the End of a Shift.** Employees love leaving early, so let them take their breaks at the end of the day, right? Wrong. While the recent California Supreme Court case of *Brinker v. Superior Court* has made the lives of employers a little easier with respect to meal and rest breaks, there are still rules that apply to prevent, for example, the providing of breaks in this manner.
- 8. The Miracle of a Layoff/Restructuring.** Many employers seek to “get rid” of problem employees by labeling a termination as “layoff.” Can this work? Maybe, but only if it is truly a layoff and legitimate layoff criteria is used for selection.
- 7. The Myth of the Management Title.** Giving someone a title means absolutely nothing. Just ask people in England where titles can be bought and sold like used cars. On the contrary, the test for whether someone is actually exempt from overtime has everything to do with their daily job duties and very little to do with any title they may have.
- 6. “If it was good for them, it’s good for me.”** When it comes to handbooks and other employment forms, what is good for one employer may not be good for another. Employment forms can be industry specific, state law specific or simply out of date.
- 5. The Myth of the One Size Fits All Manager.** The “Swiss Army Knife” approach to management doesn’t really work. Generally speaking, one person cannot do it all, as we all have our strengths and weaknesses. Human resources work, for example, takes knowledge and a special set of skills to be done properly.
- 4. The Myth that Probation Terminations are “Bullet-Proof”.** An illegal termination is illegal, even if it takes place during a probationary period.
- 3. Out of Sight, Out of Mind, Out of Work.** There are many myths that can be associated with leaves of absence: that these people are easy to replace, easy to include in a layoff, easy to terminate at the end of the leave and easily forgotten. On the contrary, these employees must be handled with care, which typically involves legal consultation.
- 2. The Myth that Complaints Must be “Formal”.** Where do employers get this idea? It is reminiscent of the proverbial “see no evil, hear no evil, speak no evil” monkeys or the ostrich that sticks its head in the sand to avoid danger. If you knew or should have known of a problem and failed to deal with it properly, you are in danger. Ignoring the problem is, well, evil.
- 1. The Myth of At-Will Employment.** Okay, it isn’t the Loch Ness Monster or Big Foot, but at-will employment is not nearly the silver bullet that many employers think it is. Yes, employees are at-will in the State of California absent an agreement to the contrary. However, there are many types of terminations that are illegal regardless of an employee’s at-will status. Accordingly, when you have a good and valid reason for termination, use it.

If you have any questions regarding this bulletin, please contact Kelly O. Scott, Esq., Editor of this publication and Head of ECJ’s Employment Law Department, at (310) 281-6348 or kscott@ecjlaw.com. If one of your colleagues would like to be a part of the Employment Law Reporter mailing list, or if you would like to receive copies electronically, please contact Brandi Franzman at (310) 281-6328 or bfranzman@ecjlaw.com.