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FLORIDA
EMPLOYMENT LAW LETTER

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Vol. 26, No. 12
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What's Inside

What's Online

Video
Vaping: Are e-cigarettes safer for your employees?
http://ow.ly/HeHvW

Engagement
3 flaws of employee engagement initiatives
http://ow.ly/GRBOK

Accommodations
Accommodating service animals in the workplace
http://bit.ly/1BdjAgu

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BACKGROUND CHECKS

FCRA—a minefield for managers and employers

by Robert J. Sniffen and Jeff Slanker
Sniffen & Spellman, P.A.

A decision out of the U.S. District Court for the Middle District of Florida is a reminder to employers that the use of background checks in the hiring process is fraught with potential pitfalls that could easily lead to liability in a civil suit. In the case, the employer failed to provide adequate notice to an applicant that it was revoking a job offer based on information uncovered in a background report. The case is particularly noteworthy given the prevalent use of background checks in employment decisions and the increased focus on the issue by regulatory agencies such as the Equal Employment Opportunity Commission (EEOC) and the Federal Trade Commission (FTC).

The law at issue in the case, the Fair Credit Reporting Act (FCRA), doesn't typically receive the same type of attention as other federal laws such as Title VII of the Civil Rights Act of 1964 or the Fair Labor Standards Act (FLSA). Nevertheless, compliance with the provisions of the FCRA can be technical, and it imposes myriad requirements on the use of background checks in the employment context, including during the hiring process.

Facts of the case

In May 2011, Thomas Miller II inquired about an area business specialist job with Johnson and Johnson in Orlando. He then interviewed with the company's recruiter and district manager and submitted a formal application for the position on June 9, 2011. Later in June, he received a job offer contingent on his successful completion of a background check.

Miller signed a release allowing Yale Associates, Inc., to conduct the background check. Based on the results of the check, his application was flagged for review, and Johnson and Johnson rescinded the job offer. The company contended that it didn't formally rescind the offer at that time, but only made the internal decision to withdraw it.

Yale mailed a copy of the background report to Miller, along with a summary of his rights under federal law, and asked him to contact it if the report contained any inaccurate information. Miller contacted Johnson and Johnson to dispute information about criminal activity in the report. Johnson and Johnson told him to contact Yale about any inaccurate information. When Miller didn't contact Yale to provide clarifying information, Yale mailed him a letter indicating that the job offer was being withdrawn based, at least in part, on information in the background report.

Miller contacted Yale in August 2011 to dispute the criminal information listed in his background report. Yale performed another background check,

AGENCY ACTION

New NLRB member begins five-year term. Democrat Lauren McFerran took a seat on the National Labor Relations Board (NLRB) in December 2014, replacing Democrat Nancy J. Schiffer, whose term expired December 16. McFerran was sworn in on December 17 after being confirmed by the Senate on December 8. She joins Democrats Mark Gaston Pearce, Board chair, and Kent Y. Hirozawa and Republicans Philip A. Miscimarra and Harry I. Johnson, III. McFerran is to serve a five-year term ending December 16, 2019. Before her appointment to the NLRB, she served as chief labor counsel for the Senate Committee on Health, Education, Labor, and Pensions (HELP) and had served the committee as deputy staff director.

DOL grants to expand apprenticeship programs. The U.S. Department of Labor (DOL) is making $100 million in grants available to expand registered apprenticeship programs in high-skilled, high-growth industries like health care, biotechnology, information technology, and advanced manufacturing. "An apprenticeship is the 'other four-year degree,'" Labor Secretary Thomas E. Perez said while announcing the grants in December. "It is a tried and true job training strategy that offers a reliable path to the middle class, with no debt." Apprenticeship grants will be awarded to public and private partnerships consisting of employers, business associations, joint labor-management organizations, labor organizations, community colleges, local and state governments, and other nonprofit organizations. Approximately 25 grants from $2.5 million to $5 million each will be awarded using funds collected from employers that use H-1B visas to hire foreign workers.

Federal hiring of people with disabilities highest in 33 years. The U.S. Office of Personnel Management (OPM) reported in December that more than 18 percent of the federal government employees hired during fiscal year (FY) 2013 were people with disabilities, the highest rate of federal hiring of people with disabilities since 1981. In making the announcement, OPM Director Katherine Archuleta cited President Barack Obama's 2010 Executive Order stressing the importance of hiring people with disabilities to work in the federal government. The 2013 hiring rate represents a 1.9 percent increase over FY 2012. In the first three years after the Executive Order, the federal government has hired 57,491 permanent employees with disabilities, Archuleta said. "Our commitment to hiring, developing, and retaining more people with disabilities is not just about the numbers," she said in a blog post. "It's about making sure that we have a rich diversity of thought, of expertise, of experience, and of perspective throughout the government." ✤

which indicated that the information in its first report was incorrect. It then corrected the inaccurate information and forwarded another report to Johnson and Johnson. However, by the time it received a corrected background report, Johnson and Johnson had already filled the position for which Miller applied.

Miller sued Johnson and Johnson and Yale, alleging they failed to comply with the FCRA's disclosure requirements. He specifically claimed that Johnson and Johnson violated the Act by failing to provide him with a preadverse action disclosure and an opportunity to dispute the accuracy of the background report.

Court's decision

Johnson and Johnson asked the court to dismiss the lawsuit, contending that it complied with the FCRA. Miller, on the other hand, asked the court to find that the company violated the law based on the facts he alleged. The court ultimately found that Johnson and Johnson didn't comply with the FCRA when it failed to provide notice of its intent to take an adverse action based on information in the background check before it actually took the adverse action.

The court began its analysis by outlining some of the key provisions of the FCRA at issue in this case. Under the FCRA, a company that uses a consumer report for employment purposes must provide the consumer or job applicant a copy of the consumer report and a summary of his rights before it takes an adverse action based on information in the report. An adverse action can include the denial of a job or any other employment decision that adversely affects a current or prospective employee.

The summary of rights must include information about the employee's or applicant's right to obtain a copy of the report from the agency that generated it and to dispute inaccurate information in the report, as well as a method for contacting the consumer reporting agency to correct the inaccuracies. That gives individuals a chance to correct any errors before an adverse action is taken on the basis of what could be incorrect information. Employers that willfully or negligently fail to comply with the FCRA's requirements can be subject to civil liability, money damages, and statutory penalties, including attorneys' fees.

Consumer reporting agencies must investigate alleged inaccuracies in consumer reports within certain time frames. If inaccuracies are discovered, the agency then has a duty to modify the report to correct the inaccuracies and notify the source that the information has been deleted. The agency also has a duty to notify the consumer of the results of its investigation.

In this case, Miller alleged that Johnson and Johnson unlawfully took an adverse action against him based on information in a background check before he received notice that it intended to take the adverse action. As a result, he didn't have adequate time to correct the inaccuracies in the report. He maintained that when Johnson and Johnson notified him that it was rescinding its job offer, he hadn't yet received notice

from Yale about the negative information in his background report.

Johnson and Johnson argued that it didn't actually take an adverse action against Miller before he received the required notice. Rather, it had only made an internal decision to withdraw the job offer. The court rejected that argument, finding the evidence showed that the company had already decided to rescind the offer before it gave Miller the opportunity to rebut the information in the report.

The court distinguished case law under which courts have found that the intent to take an adverse employment action isn't an adverse action under the FCRA. As the court explained, the employers in those cases merely indicated that they intended to take certain employment actions but then provided the proper notice before actually taking the adverse actions.

Further, an adverse action occurs in the hiring context when a job offer is actually withdrawn or when the applicant has no opportunity to object to the contents of a background check. The court found that it was undisputed that Johnson and Johnson informed Miller that it was rescinding the job offer before he received the statutory notice. As a result, this case was unlike the cases in which the employer's intent to take an adverse action was at issue because the employees in those cases were afforded the opportunity to dispute the information in the background reports. *Miller v. Johnson and Johnson, et. al.,* Case No. 6:13-cv-1016-Orl-40KRS.

Employer takeaways

Although FCRA compliance may not make front-page news, it should command front-page attention. The law has many sticky wickets for employers that rely on background checks and credit reports when making employment decisions. You must satisfy certain obligations when you request such a report and when you take adverse actions based on information in the report.

The proliferation of credit reporting agencies that can provide access to background checks and federal agencies' increased focus on whether background screening policies are lawful make the issue even more important for employers. Indeed, the EEOC has made the elimination of barriers in recruitment and hiring, including improper exclusion of individuals based on background checks, part of its strategic enforcement initiatives. Further, the EEOC and the FTC have released joint guidance on the proper way to comply with the FCRA. That guidance can be found at www.eeoc.gov/eeoc/publications/background_checks_employers.cfm.

You would be well served to review and analyze your background check policies and practices as they relate to hiring and other employment decisions to make sure they comply with the many technical requirements of the law. Otherwise, you may find yourself tripped up by one of the FCRA's many pitfalls.

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WAGE AND HOUR LAW

11th Circuit rejects employer's 'blame the employee' defense to overtime claim

by Andy Rodman
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As overtime litigation continues to clog the courts, employers' frustration continues to rise. Many companies have adopted timekeeping policies intended to decrease the risk of litigation, and some employers have attempted to assert the existence of such policies as a complete defense to overtime claims. The U.S. 11th Circuit Court of Appeals (whose rulings apply to all Florida employers) recently rejected an employer's reliance on its policies as a defense to a former employee's overtime claim.

We maintain a 'no overtime' policy

Santonias Bailey resigned from his employment with TitleMax after approximately one year. After resigning, he filed a lawsuit under the Fair Labor Standards Act (FLSA) alleging he wasn't paid for overtime hours he had worked. According to him, he worked "off the clock" at the direction of his supervisor, who told him that TitleMax didn't pay overtime. He also alleged that his supervisor edited his time records to avoid paying him overtime.

Throughout his employment, Bailey was aware that TitleMax maintained the following policies:

- Employees were required to report their hours accurately.
- Employees were required to verify their reported hours.
- Employees were required to report work-related problems to a supervisor or, if a supervisor was part of the problem, to a higher-level manager or an anonymous employee hotline.

In defense against Bailey's overtime lawsuit, TitleMax argued that it couldn't be held liable for the unpaid overtime because he didn't comply with its policies. According to TitleMax, Bailey worked "off the clock" (and therefore didn't accurately report his hours) and didn't object to his supervisor's directives

to perform off-the-clock work or edits to his time records (and therefore didn't verify his hours or report a work-related problem to management or through the employee hotline).

Court adopts 'knew or should have known' standard

TitleMax asked the trial court for summary judgment on Bailey's claims (i.e., dismissal of the case without a trial)—and won. In essence, the trial court held that Bailey bore responsibility for the alleged overtime violations. Bailey appealed the trial court's decision to the 11th Circuit, which sided with him and sent the case back to the lower court for trial.

The 11th Circuit reasoned that the FLSA was created to counteract the inequality of bargaining power between employers and employees. According to the court, if employers were allowed to avoid overtime liability by placing the blame on employees, they would simply pressure or compel employees to underreport their hours worked. To prevent that from happening, an employer will be held liable if it knew or should have known about an employee's overtime hours.

The 11th Circuit also held that a supervisor's knowledge of overtime hours can be attributed to the employer. Once such knowledge is attributed to the employer, the employee's conduct in underreporting his hours becomes irrelevant. In Bailey's case, his supervisor knew about, and participated in, the underreporting of his overtime hours, and that knowledge and participation was imputed to TitleMax.

While the 11th Circuit rejected TitleMax's defense to Bailey's overtime claim, it suggested that the result might have been different if the supervisor hadn't participated in the underreporting of hours and if TitleMax had no reason to know about the underreporting. *Santonias Bailey v. TitleMax of Georgia, Inc.*, Case No. 14-11747, 215 WL 178346 (11th Cir., January 15, 2015).

Employer takeaway

Overtime claims are among the most frequently filed employment claims in Florida (and nationwide). It's critical to maintain accurate records of hours worked, train supervisors on timekeeping policies, and discipline any supervisors who fail to comply with your timekeeping policies. Keep in mind that many states have wage and hour laws that are more "employee-friendly" than the FLSA, so consult with your employment attorney before addressing wage and hour issues that arise at your workplace.

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EMPLOYEE CLASSIFICATION

Florida Department of Revenue and DOL announce joint investigative initiative

by Tom Harper
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On January 13, 2015, the Florida Department of Revenue signed an agreement with the U.S. Department of Labor (DOL) to share information and work together to locate improperly classified independent contractors and other types of nonemployees and prevent the proliferation of misclassified workers in Florida. The agreement, announced by the agencies as a "Memorandum of Understanding" (MOU), marks the beginning of new efforts to find and punish employers for misclassifying workers and failing to make proper payroll withholdings.

The announcement of the initiative on the DOL's website quoted Dr. David Weil, administrator of the agency's Wage and Hour Division (WHD), as stating, "Misclassification deprives workers of rightfully-earned wages and undercuts law-abiding businesses. This [MOU] sends a clear message that we are standing together with the state of Florida to protect workers and responsible employers and ensure everyone has the opportunity to succeed." The announcement went on to explain, "Business models that attempt to change or obscure the employment relationship through the use of independent contractors are not inherently illegal, but they may not be used to evade compliance with federal labor law. Although legitimate independent contractors are an important part of our economy, the misclassification of employees presents a serious problem."

Florida employers should make sure all jobs are classified correctly to avoid any appearance of impropriety if administrative agencies come calling at your workplace.

FLSA's economic realities test

Federal and state employment laws have their own factors for determining if a person is an employee or an independent contractor. However, the factors are quite similar. For example, the Fair Labor Standards Act (FLSA) uses the "economic realities test," under which an individual is determined to be an employee or an independent contractor based on the following factors:

(1) The nature and degree of the employer's control over the manner in which the work is to be performed;

(2) The individual's opportunity for profit or loss, depending on his managerial skill;

(3) The individual's investment in equipment or materials required for his tasks or his employment of workers;

(4) Whether the service rendered requires a special skill;

(5) The degree of permanency and duration of the working relationship; and

(6) The extent to which the service rendered is an integral part of the employer's business.

On-the-job injuries under workers' comp

The Florida Legislature specified the factors that must be used to determine employee or independent contractor status under Florida workers' compensation law. To satisfy the definition of "independent contractor" for workers' comp purposes, a worker must meet at least four of the following criteria:

(1) The independent contractor maintains a separate business with his own work facility, truck, equipment, materials, or similar accommodations.

(2) The independent contractor holds or has applied for a federal employer identification number (EIN), unless the independent contractor is a sole proprietor who is not required to obtain a federal EIN under state or federal regulations.

(3) The independent contractor receives compensation for services rendered or work performed, and the compensation is paid to a business rather than an individual.

(4) The independent contractor holds one or more bank accounts in the name of the business entity for purposes of paying business expenses or other expenses related to services rendered or work performed for compensation.

(5) The independent contractor performs work or is able to perform work for any entity in addition to or besides the employer at his own election without the necessity of completing an employment application or process.

(6) The independent contractor receives compensation for work or services rendered on a competitive-bid basis or completion of a task or a set of tasks as defined by a contractual agreement, unless such contractual agreement expressly states that an employment relationship exists.

The Florida workers' comp law also provides that even if four of the criteria are not met, an individual may still be presumed to be an independent contractor based on full consideration of whether the individual situation satisfies a set of similar conditions spelled out by the legislature in the workers' comp law.

Common-law agency test under NLRA

The National Labor Relations Act (NLRA) follows what is called the common-law agency test to determine workers' status. Under that test, the factors that are considered include:

- The extent of control that, by agreement, the employer exercises over the details of the work (this factor has been interpreted to mean whether the independent contractor has "significant entrepreneurial opportunity for gain or loss");
- The kind of occupation at issue;
- Whether the worker "supplies the instrumentalities, tools, and the place of work";

WORKPLACE TRENDS

Survey calls lower morale the costliest part of a bad hire. When an employer makes a poor hiring decision, the expense of recruiting, hiring, and training isn't the only cost, according to chief financial officers (CFOs) participating in a Robert Half survey on the subject. Thirty-nine percent named lower staff morale as the greatest impact of a bad hiring decision, 34% named lost productivity, 25% said monetary cost, and 2% named something else or didn't know. The survey was based on interviews with more than 2,100 CFOs from a stratified random sample of companies in more than 20 of the largest U.S. markets. "Interviews and reference checks are designed to ensure a successful hire, but these methods are not fail-safe, particularly if employers are not thorough in their efforts," Paul McDonald, senior executive director for Robert Half, said in announcing the survey.

Report examines recession's falling churn rate. A report from CareerBuilder and Economic Modeling Specialists shows the national labor market churn rate fell by 23% during the recession and remained below prerecession levels through 2013. An announcement on the report explains that in a given year, millions of people leave jobs—either voluntarily or because of layoff—and millions of people are hired to fill the newly vacant positions. That job-to-job movement is known as labor market churn. "Churn measures the pulse of hiring activity in an economy," Matt Ferguson, CEO of CareerBuilder and coauthor of "The Talent Equation" report, said. "Low churn rates mean fewer workers are moving to jobs that better utilize their skills, which in turn can lower productivity for companies and stall wage growth for individuals. Through 2013, churn rates in most occupations had not yet recovered significantly, but we expect that to change as workers gain confidence in a labor market that continues to improve and expand."

Survey reveals job interview gaffes. A survey from OfficeTeam highlights some awkward moments for job applicants. The survey asked managers to recount the most embarrassing job interview blunders they have heard of or been witness to. Here are some of the responses: An interviewee was so nervous she almost fainted; someone brought his dog; an applicant wore mismatched shoes; the candidate called the interviewer by the wrong name; a candidate didn't realize his zipper was down; someone started swearing during the interview; an applicant checked his phone and chewed gum during the interview; a jobseeker had lettuce in his teeth when he arrived; a candidate fell asleep; an applicant did a song and dance routine in hopes of getting the job. ✤

- The method of payment (whether it's by time or by the job);
- The length of time for which the person is employed;
- Whether "the work is a part of the regular business of the employer"; and
- The intent of the parties.

Yet a different test under antidiscrimination laws

The federal and Florida antidiscrimination laws follow a variation of the economic realities test, viewed in light of the principles of agency and the right of the employer to control the employee. This is the test applied by the courts when an employer is accused of some type of discrimination (e.g., race, age, disability). The factors evaluated under this test include:

(1) The kind of occupation at issue (specifically, whether the work is usually performed under the direction of a supervisor);

(2) The skill required to perform the particular occupation;

(3) Whether the "employer" or the individual furnishes the equipment used and the place of work;

(4) The length of time the individual has worked;

(5) The method of payment;

(6) Whether one or both parties have the right to terminate the relationship with or without notice;

(7) Whether leave or vacation is offered;

(8) Whether the work is an integral part of the employer's business;

(9) Whether the individual accumulates retirement benefits;

(10) Whether the employer pays Social Security taxes; and

(11) The intent of the parties.

Takeaway

As you can see, the test for determining whether a worker is an independent contractor or an employee is a little different depending on which law is involved. Having a written independent contractor agreement is usually helpful in establishing independent contractor status. Here are some other steps you can take:

- Ask your independent contractors to set up their own businesses and register them with the state.
- Make sure contractors have the opportunity to perform work elsewhere as well as the ability to make decisions that affect their profits.
- Investigate questionable jobs at your company, and decide whether they are properly classified.

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PERSONNEL POLICIES

What handbook changes will 2015 bring?

As 2015 gets into full swing, it's time to think about your company's employee handbook. We hope the following article will provide you with the guidance you need to have your policies up to date and ready to embrace any brand-new laws affecting your operations in 2015.

State and local leave laws

When it's time for the annual (we hope) handbook review, leave policies are consistently one of the most frequent areas in need of updating. This year is likely no exception.

Several new state leave laws—particularly those providing paid sick leave and leave to victims of domestic violence—have passed this year. There are new leave responsibilities in California, Massachusetts, and Washington, D.C., just to name a few, and those have all come about in just the past few months.

New antidiscrimination laws

Another common area of annual policy review is that of equal employment opportunity and antidiscrimination policies. As in previous years, states and cities adopted new laws protecting individuals from discrimination on the basis of gender identity, family or marital status, domestic violence leave status, and pregnancy and lactation. Additionally, Illinois and California have recently expanded all existing antidiscrimination protections to unpaid interns and volunteers.

Finally, don't forget to check the cities in which you operate for additional requirements. Municipal ordinances—especially in larger cities such as New York City, San Francisco, Portland, and Seattle—are becoming more common when comparable state laws aren't yet on the books.

New notice requirements for pregnancy accommodation

While you're reviewing your leave and antidiscrimination policies, don't forget this key area that encompasses them both. Because normal pregnancy isn't considered a disability under the Americans with Disabilities Act (ADA), employers are often uncertain of the need to provide accommodations such as leave, more frequent meal and rest breaks, and light-duty work to pregnant workers.

Therefore, several states—most recently Delaware and Illinois—have taken the extra step to enact new pregnancy accommodation laws in the past year. These laws specifically require reasonable accommodations for employees who are limited in their work by pregnancy, childbirth, lactation, or related conditions. Many of these state laws also require employers to provide notice of employees' rights to accommodations, and your handbook is a perfect place to do so.

Additionally, the Equal Employment Opportunity Commission (EEOC) recently issued guidance clarifying that the Pregnancy Discrimination Act (PDA) does require employers to provide accommodations to pregnant workers if those accommodations also would be provided to other workers who are similarly limited in their work abilities by something other than pregnancy. So even if your state hasn't passed a pregnancy accommodation law, you may wish to review related policies and practices to ensure they don't run afoul of federal law.

Leave policies are consistently one of the most frequent areas in need of updating.

Medical and recreational marijuana use laws

The wave of state medical marijuana laws has created quite a bit of policy confusion for employers. The confusion arises largely because marijuana is still illegal under federal law, yet some state medical marijuana laws prohibit employers from terminating employees based on a positive test for marijuana use or for being a medical marijuana cardholder.

Until more guidance and clarity are available, consider what *your* particular workplace needs from its drug policy. If you are a federally regulated motor carrier or are eligible for discounts on workers' compensation insurance premiums for maintaining a drug-free workplace, then these are exceptions that protect your zero-tolerance policy. On the other hand, if your main concern is that you don't want people coming to work impaired, whether from drugs or alcohol, then you may consider amending your drug and alcohol policies to focus on impairment and use on the work premises.

There is currently no medical or recreational marijuana law that restricts an employer's ability to discipline employees for use or impairment on the job, so you are completely safe to regulate this area. Another alternative is to consider amending drug policy language to discipline use "to the fullest extent permitted by law." This allows you to determine discipline on a case-by-case basis (accommodating medical marijuana cardholders, for example) and to adapt as more case law and guidance become available.

State social media privacy laws

Social media policies are another area of confusion for employers, partly because of the variety of forms they can take and the topics they can cover—for example, background checks using social sites, what employees are allowed to say about your company on social media, which employees are allowed to post on behalf of your company, and whether access to personal accounts is allowed during work hours.

As with drug policies, consider the needs of your company and address those specific issues—don't try to cover every aspect of social media use in a catchall policy if you don't need to. Limitations on social media use can have a big effect on morale, so try to stick to what's most important for your business operations first.

Also note that several states have passed laws forbidding employers from disciplining employees for refusing to provide access to their personal social media accounts. If you have a policy that requires employees to provide access to their accounts (through friend requests, for example), it should be reviewed for compliance with state law.

Finally, because the laws in this area—as well as social media resources themselves—are still evolving, consider reviewing and revising your social media policies more frequently than your handbook as a whole.

Emerging technology and related security concerns

Like social media policies, workplace technology policies and the popular "bring your own device" (BYOD) policies can be confusing simply because there is so much territory that they can cover. And like social media policies, these policies help employers balance the security and privacy needs of the company with

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2-27 I-9s for 2015: HR's Completion, Retention & Reverification Rules

3-4 Fundamentals of Market Pricing: How to Interpret Salary Data and Make Better Offers

3-4 Employees with Bipolar Disorder: HR's Legal and Practical Accommodation Roadmap

3-5 Exempt, Non-Exempt or Contractor: How to Classify Workers and Avoid Costly Mistakes

3-10 The DIY Compensation Makeover: How to Primp, Plump & Prioritize Your Compensation-Based Initiatives ✤

the changing tech landscape, in which employees are regularly equipped with such things as personal mobile devices, tablets, smartwatches, flash drives, and Google Glass.

Technology policies will vary from employer to employer perhaps more than any other type because they must cater not only to the security needs of your workplace but also to your tech-savvy employees. Many employers may not even need a BYOD policy.

This is a great time to recruit the assistance of others in developing your handbook—specifically your IT department. Your IT staff can help you determine the security needs of your company and whether certain problem areas should be addressed and regulated. If your company has very little sensitive data accessible to employees or your workers don't use mobile devices while working, then you probably don't need a policy to regulate these things. ✤

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