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Oden's 'Top 4' Issues for Employers for 2018 (So Far)

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What follows are the 'Top 4' issues or some variation/combination (in no particular order) that I have discussed with employers so far in 2018.

Some may seem like common sense for the more seasoned Human Resource Director, but I keep discussing these issues with clients, so they are definitely worth repeating, even if just as a refresher.

Number 4: At-will employment is NOT a get out of jail free card for employers in North Carolina.

Just because your employee does not have a written employment agreement, or her/his written employment agreement and/or your employee handbook states that she or he may be terminated at-will, with or without notice or cause, does NOT mean that you have a carte blanche permission slip to terminate or otherwise take adverse action against the employee if the reason provided (or the real reason behind the pre-textual reason provided) violates public policy (e.g. based on race religion, age, gender, disability, national origin or any other protected category). The more common issue I experience is that an employer HAS a legitimate reason to discipline or terminate an at-will employee in a protected category, but either fails to document that reason with the employee beforehand (e.g. written warnings) or fails to provide the reason for the discipline or termination to the employee at the time that it is taken, because they believe that they are protected by the at-will nature of the employee's employment. That scenario opens you up to a discrimination charge, and trying to bring up the legitimate reason after the fact can result in detrimental consequences.

Number 3: Do not misclassify employees as independent contractors to save money.

If it looks like a duck and quacks like a duck, it is a duck. How much control do you exercise over the worker's work and schedule of performance? Does the worker provide her or his own equipment or do you provide it to them? Do they advertise and actually provide similar independent contractor services to other companies? Does the type of work they are performing for you mirror the type of work you have some of your employees performing? There is no written independent contractor agreement that will save you from a misclassification issue if the worker should be classified as an employee. Misclassifying employees can be a costly mistake. First, it may mean you have skirted overtime obligations. Second, I have seen smaller employers mistakenly believe (or be advised by their insurance agent) that they do not need workers' compensation insurance

because they have less than three employees (but in fact have workers on their books that should be classified as employees). For some, this has resulted in the North Carolina Industrial Commission levying hefty fines ($50 per day) for not having workers' compensation insurance in place. For others, the Department of Labor has issued five figure back wage requests.

Number 2: Family Medical Leave is not always the end of the story .

I still see employees who have granted appropriate Family Medical Leave Act ("FMLA") leave, terminate the employee after their 12 weeks of FMLA leave is exhausted, without considering whether the employee should be afforded additional, unpaid time off from work under the Americans with Disabilities Act ("ADA"). Unpaid time off can be a reasonable accommodation of a disability under the ADA if you employ 15 or more employees (again, think about the misclassification issue above). Take the time to have an interactive discussion with the employee who has exhausted his or her FMLA leave who may need additional unpaid time off. The ADA's interactive process also is required in stand-alone disability scenarios, independent of the FMLA. Failure to provide reasonable accommodation under the ADA can result in an Equal Employment Opportunity Commission ("EEOC") Charge based on disability discrimination, among other things.

Drumroll...

Number 1: Do not turn a bogus EEOC Charge or workers' compensation claim into a valid retaliation complaint.

North Carolina's Retaliatory Employment Discrimination Act ("REDA") provides that an employer may not retaliate against an employee for doing something that she or he is allowed by law to do. Employers who take adverse action against an employee after she or he has filed an EEOC Charge or a workers' compensation claim, for example, should be 100% certain that the reason for the adverse action (whether it be a written warning, suspension, or termination) has nothing to do with the employee's earlier protected activity. Employers also should document the reason for the legitimate adverse action. Otherwise, you run the risk of a REDA complaint or EEOC retaliation charge, which if successful, could result in you paying significant damages and the employee's attorneys' fees.

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