



Prepare for the Worst: How Employment Audits Can Protect Your Organization

by Jillian Barron and Laura L. Edwards

In the past few years, federal and state agencies have increased enforcement efforts through investigations and inspections. Now, most businesses can expect to be visited by a government agency at some point during their existence. These visits often occur because the organization was selected for an audit, either at random or in response to a specific employee complaint. Agencies such as the Equal Employment Opportunity Commission (EEOC) may also ask for documentation of personnel policies and practices in the course of investigating a discrimination charge. Government audits can result in substantial backpay determinations, penalties, and even litigation. To prevent or minimize such costs, organizations would be well served by performing an employment audit to proactively identify and correct problems before a government compliance review occurs.

The scope of an internal employment audit depends on the specific objectives and needs of an organization. While employees of the organization can conduct the audit, in most cases it will be best to at least have an attorney provide guidance. An audit generally will involve review of the organization's personnel policies and practices, and may include interviews with executives, managers, and employees. Upon completion of the audit, a report may be prepared, which discusses the organization's compliance status and, if appropriate, identifies areas for corrective action. Involvement of counsel at this stage serves not only to provide the report attorney-client privilege from discovery if litigation ensues, but also to ensure critical issues are recognized and addressed. Following are some of the areas that may be included in an employment audit.

General Personnel Policies and Practices. Employers are subject to an array of state and federal laws prohibiting discrimination, requiring accommodation of disabilities, and providing various forms of protected leave. An auditor should review the organization's employment handbook, training materials, and practices—from hiring to termination—to ensure they are up to date and legally compliant in these and other areas. Among other things, an audit may determine whether employees have been (1) trained to comply with harassment and discrimination policies, and (2) provided and signed off on copies of the policies, including the procedures through which employees are to report perceived harassment or discrimination.

Federal Contractor Requirements. If your company is a federal contractor or subcontractor, the Office of Federal Contract Compliance Programs (OFCCP) may perform an audit. If you are required to have an affirmative action plan, an auditor should consider whether the plan is being properly utilized and updated annually. Equally important is determining whether the company has made progress in achieving goals set in prior years' affirmative action plans. Special attention should be paid to hiring, promotion, and compensation decisions to ensure there is no appearance of discriminatory practices and that requirements such as job posting are being satisfied. The auditor should further evaluate whether necessary forms and reports, such as the Standard Form 100 (EEO-1 Report), are being filed on time, with copies retained.

Wage and Hour Compliance. The Fair Labor Standards Act (FLSA) and the Washington Minimum Wage Act govern most Washington employers, which are accordingly subject to audit by both the federal Department of Labor, Wage and Hour Division, and the Washington Department of Labor & Industries (L & I). In advance of an official audit, organizations should periodically review wage and hour specifics, such as: (1) which job categories are being treated as exempt from overtime and the basis for those exemptions; (2) whether exempt employees are being paid on a salary basis, without any deductions that may destroy exempt status; (3) whether overtime is being properly paid to nonexempt employees—for example, whether nondiscretionary bonuses are being included in their "regular rate of pay" for purposes of computing overtime; and (4) how meal and rest breaks of non-exempt employees are tracked and paid. The auditor may also examine several years' worth of payroll records as part of the compliance review process.

Records and Posters. An auditor should review Human Resources' record retention practices to ensure documents are being maintained for at least the minimum time required by law, and placed in content-appropriate personnel files. For example, employee medical records and I-9 forms must be kept separate from the rest of an employee's personnel file. An audit should also include an examination of workplace posters to determine whether all required material is displayed in its most current version.

Safety and Health. The Occupational Safety and Health Administration (OSHA) and L & I, its state counterpart for safety issues, are among the agencies most likely to audit an organization. Thus an audit should include a review of OSHA/WISHA compliance, from a facility walk-through to determine the existence of any hazards likely to cause death or bodily injury, to an examination of OSHA logs. If hazardous chemicals are used in an organization's facilities, a hazard communication program and record retention are required. The auditor should also determine whether safety measures (such as first aid kits, water rinsing stations, and safety plans) are adequate. An audit may also include other health-and-safety-related policies and practices, such as those governing drugs, alcohol, and workplace violence.

These are some, but not all, of the areas that should be reviewed periodically through an employment audit. If you are interested in conducting an audit of your organization, we recommend you consult with counsel. We would be happy to provide guidance.

*This Employment Law Note is written to inform our clients and friends of developments in labor and employment relations law. It is not intended nor should it be used as a substitute for specific legal advice or opinions since legal counsel may be given only in response to inquiries regarding particular factual situations. For more information on this subject, please call Sebris Busto James at (425) 454-4233.

© 2012 SEBRIS BUSTO JAMES