

PERSONNEL NOTEBOOK

For Your Most Important Resource—The Human Resource

Prepared By:

HUMAN RESOURCE ASSOCIATES

Personnel Consultants

EMPLOYMENT POTPOURRI

A VISIT TO THAT JUNGLE OF ACCUMULATED EMPLOYMENT ISSUES

Everyone who manages Human Resources (HR) Departments or is responsible for dealing with employees and their concerns, faces questions and issues that by themselves do not warrant reading or writing a manual (or a *Personnel Notebook*). However, these issues still want to be examined. This issue of *Personnel Notebook* will concentrate on items that might otherwise go unexplored.

Let's take on a list of employment issues that have emerged and can be covered in brief responses or reports.

MEALS AND REST PERIODS

1) Connecticut and Illinois, now have laws requiring all employers (in Illinois it's employers with at least 5 employees) to provide a private location near the work area for breast feeding mothers to pump (for delivery) or to breast feed babies on site.

2) In Maine the breast feeding mother may use any location public or private wherever she is authorized to be.

MILITARY LEAVE

1) Delaware. Veterans or National Guard Reservists must be allowed to serve on the funeral detail of any veteran at least once each year. They must be paid for the time off by the employer.

2) U.S. Under the Vietnam Veterans Rehabilitation Act, an employee may work for you for a few months, then leave, take another job for a month or two then quit and then failing to find work after a few weeks, join the military. After serving his/her full duty, they take a month off and then find a job. After a month they decide that they no longer want this job. They then quit and return to your

company and re-claim the original job they held with you 4 or 5 years ago.

You must return them to that job with all general increases in pay and benefits that occurred during their vacancy, even though you now have someone else in that job. The Act states that any employee who leaves your employ and within 90 days joins the military and within 90 days of his or her discharge returns to you must be reinstated and restored as if they had never left. That includes seniority and vacation eligibility. However no unearned cumulative advantages such as unused vacation, sick leave, etc., are required.

MINIMUM WAGE

Hawaii's minimum wage (currently \$5.25 per hour) will increase to \$5.75 per hour on January 1, 2002 and to \$6.25 per hour on January 1, 2003.

RELIGIOUS DISCRIMINATION

Effective January 1, 2002, the state of Oregon will add to their list of protected classes (minorities, females, etc.) who are protected by anti-discrimination laws, "those individuals who hold degrees in Theology or religious occupations."

WAGE AND HOUR

1) Pay increases for this year (2001) will average 4% compared to last years 4.2%.

2) More employers are choosing to grant one-time bonuses instead of pay increases by percentage.

3) The Federal Labor Standards Act of 1938 will be facing several potential updates this year. Although covering many employment issues, the following are the most prominent to be considered for change.

A) It appears likely that employees may be soon be able to "bankroll" extra hours of work in preparation for a "comp-time" leave later. Generally outlawed in private employment, this would allow employees to work overtime and/or extra days and take off the equivalent hours later for a pregnancy, extended vacation or other reasons.

B) There may be a change in the requirements for "exempt" status for employees. This would allow mostly hi-tech workers to be reclassified as "exempt." Employers nationwide tend to classify too many employees as exempt based on their office work or their "clean clothes" functions. As exempts, of course, they do not receive overtime pay. Employers often believe that claiming confusion or ignorance of the law or assuming that the Feds will make allowances for a small company can work at least once. This hardly ever works.

Farmers' Insurance Exchange in Los Angeles was recently hit with a judgment of **\$90 Million** when it was determined that they wrongly classified Insurance Adjusters as exempt. That figure may exceed \$130 million after interest and attorney fees. Since January 2001, Rite-Aid, U-Haul and Taco Bell settled cases on mis-classifying exempts ranging from \$7.5 million to \$25 million.

AN ENORMOUS INCREASE IN U.S. POPULATION

We have all heard about it. We will all be affected by it. Most of that increase will be due to immigration. Over one million entries each year will increase to almost 2 million per year by 2020. Primarily Hispanics, this number will increase the number of minorities to exceed the number of Caucasians. Caucasians will become the minority population. This coupled with:

THE AGING OF AMERICA

...are the 2 major messages to employers on the changes in the U.S. labor force. By 2020, 70% more workers will enter the retirement age bracket of age 60 to 65. Employers need to be aware that hiring immigrants, often with limited English, must become a part of every HR strategic plan. But even more so the hiring of older workers who need different methods of recruiting, training and a whole new thinking about the type of benefits they will require.

BENEFITS COSTS ARE GOING TO INCREASE

Average cost increases of 12% to 13% are likely and near 70% for small firms. Workers' Compensation expected to increase 15%. Average cost per employee per year will top \$5,000.

IRS GIVES A BREAK TO SMALL CONTRACTORS

Landscapers, pavers, roofers, drywallers and others who buy materials one job at a time will be allowed to use the more favorable "cash accounting" method instead of the present "accrual method."

MULTI-STATE EMPLOYERS

QUESTION:

We are planning on starting a 2 to 3 year project in a neighboring state. I would like some of the new employees needed to come from that state. Do I have to comply with the employment regulations in that state or in our headquarters state? Also, what about our employee handbook? Can I still use it for those employees?.

ANSWER:

You must follow the regulations that exist in the state in which the work is taking place. This is where the individual is employed. If the individual is from one state and the work is taking place in another state, you may have two concerns. First you must comply with all the regulations in the state where the employment exists. Plus, you may have to deal with the tax filing, unemployment compensation and payroll issues of the state where he or she lives. In many states this does not have to be accomplished until the employee exercises those options in their own state (i.e., paying taxes, filing for unemployment benefits, etc.).

Initially you need to deal with the application forms, the reference checking process, the legal job postings, the announcement of pay periods, differences in Equal Employment Opportunity (EEO), access to personnel files, jury duty, vacation pay. etc. for the state where they will be employed.

On the issue of employee handbooks, you should create a modified version to accommodate the new state regulation or conditions. Otherwise you could be faced with the new state regulations and the

possibly contradictory policies in your handbook. You could be required to comply with both. Your labor attorney or an HR consultant may have to sort those out and clarify them.

COBRA

QUESTION:

Under the Consolidated Omnibus Budget Reconciliation Act (COBRA), I realize that I am not required to provide continuing benefits to an employee terminated for "gross misconduct." I terminated an employee for repeated periods of absenteeism and insubordination. Would that be covered under "gross misconduct?"

ANSWER:

No, it is not. You are correct that COBRA rights must be offered to an exiting employee except in cases of "gross misconduct." However, this is another regulation that is vague and confusing. Gross misconduct is not defined, nor have the regulators further defined it in all their rulings and private letters to employers. Based on the legal history of COBRA cases, it is a very high degree of fault! For example, a recent ruling stated that if an employee purposely committed an act upon a supervisor so heinous that it caused their death, and if that resulted in a sentence of life in prison, that may (but not necessarily) be considered "gross misconduct." Excessive absenteeism, insubordination or even theft, although solid grounds for termination, would almost certainly not be considered "gross misconduct" for the purposes of COBRA.

BUYING ANOTHER COMPANY

QUESTION:

As a means to expand our business we are planning to acquire a smaller competing company. Must we just take in all their existing employees? Can't we selectively hire just those we judge best?

ANSWER:

Although you need to discuss the details of this with your attorney, there are problems if you automatically hire *any* of the former employees. Normally you want those employees as they are probably the reason the business is worth buying. However, if it is the equipment and the clients or the

elimination of a competitor that you are interested in or the opportunity of selecting a team of professionals, you may want to separate the process of acquiring the company from the process of hiring the employees. In some cases it is the difference between an "acquisition" and a true "merger."

When you "merge" or "acquire" a company along with all the employees, you become the "inheritor" of any and all ongoing EEO complaints, employee lawsuits, sexual harassment claims, injury suits, etc., even those long dormant or forgotten. We once won a termination suit, then five years later an obscure action by an appeals court six states away, ruled that the company was justified in their actions but that termination was probably too harsh an act. They ruled that we must re-hire the employee. If this had happened in the company you acquired, you would be forced to hire this unknown person.

In addition, if you bring along all those employees and then select those you choose to hire, you will be faced with the task of terminating all those that are not selected for continued employment. Lawsuits today are often automatic with terminations.

As an option, you may want to consider this. Your purchase of the company may be defined as acquiring all equipment, materials, supplies, customers, copyrights, patents and all other proprietary values, but not the employees. All employees are terminated by the former owner and paid off in full including any unused vacation, sick leave, COBRA rights etc. You then announce that you are going to hire new for all positions, but that you will give preference to those who have experience with the company. Not a guarantee of hire but a decided preference. A first opportunity. You then interview all those interested and allow a measured credit to each based on their desirability. You can also offer to credit their time with the former employer to their new position for the purposes of vacation levels etc.

This should be done quickly and can be accomplished with little or no lost time. The interview process can begin long before the final day. Although you may lose some employees who choose not to apply, you would probably have lost them anyway. Primarily the advantage is that you are not going to inherit the lawsuits and claims or the other

consequences of the former owners misfortune, mismanagement or negligence. Nor will you have to accept unqualified employees or face the risks of terminating those you choose not to hire.

It is often mistakenly assumed that you can merely require all employees to sign an agreement surrendering any pursuit of employment claims. However, this is seldom recognized during the claims process for many reasons. The major reason is that no employee or American citizen is allowed to sign away his/ her constitutional rights.

There are, to be sure, many other implications and considerations that you need to discuss with your attorney.

EMPLOYEE HANDBOOKS

QUESTION:

I agree that all companies need to have an employee policy handbook. Since the employment regulations are the same for everyone, why couldn't I just use another company's book and white-out their name and put mine in?

ANSWER:

Big Mistake. You can do this, and of course many companies do. Here's the problem. A properly developed employee handbook is one in which you have reviewed all your past policies and procedures, whether written or not. You have addressed any past or present employment problems. You have considered your company's experiences and goals, your practices and concerns and have dealt with them in this important communications tool to your employees and to your public.

You would have considered the true culture in your company. Are you *really* an open door company? Can an employee interrupt the president's day and just walk in and chat about his or her problems? Or do you want employees to follow procedures and channels? Are you prepared to guarantee all employees opportunities for advancement or are you going to offer development only to those that prove themselves and earn it?

When you sign on to someone else's policies, you are not only passing up this outstanding one-time opportunity to communicate your values to your employees and the opportunity to determine who you are and where you intend to go and how you're going

to get there, but you are also risking a lot when you agree to follow a philosophy that your company will not find natural for its culture. You need to follow a set of policies and procedures that are based on the way your company truly functions. To do otherwise leads to misunderstandings and lawsuits.

Ultimately, the short cuts and the quick fixes we all seek lead to deeper, long range problems. My recommendation is to create your own "Company Bible" or bring in a consultant or an experienced HR professional who, working with your company, will pull together a handbook that deals directly with *your* company's needs, *your* employees' concerns and the philosophy and values of *your* company.

Bill Cook

Human Resource Associates

HUMAN RESOURCE ASSOCIATES

6050 Greenway Court
Manassas, Virginia 20112-3049
(703) 590-3841, Fax (703) 590-6437
e-mail: hrahtl@consulthra.com
website: www.consulthra.com