

# First Wednesday

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A Monthly Discussion of Employment Law Issues and Other Hot Topics for Management

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## Employment Law Risk Avoidance

### Top Ten Preventive Things Employers Should Do Now (Part I)

Employers know that employee lawsuits and claims are on the rise. The economic downturn has caused layoffs and other downsizing initiatives such as part-time schedules, furloughs, forced vacations and other programs that tend to reduce take-home pay. It has become more difficult for terminated or “downsized” employees to find new work. The result: current and former employees are taking their complaints to the courts and Department of Labor Standards Enforcement (“DLSE”) more frequently than ever before.

So, what actions can general counsel, business owners and managers take to minimize lawsuits and risk? The following five “hot topics” should be reviewed and, where feasible, action taken to reduce the risk of future lawsuits. The next five will appear in April’s *First Wednesday*.

#### 1. Exempt/Non-Exempt Analysis

Many employers continue to have mis-classified employees on the company payroll. Employers, not employees, bear the burden of proving that an employee is properly classified as “exempt” under state and federal law. The presumption is non-exempt status. Non-exempt employees are entitled to overtime, rest and meal breaks. Some are aware of the problem but are hesitant to conduct an internal audit. It is a mistake to simply ignore the issue and wait for a claim to be made. The real question employers should ask is who would they rather have conduct an audit – the company itself or a government agency? It is important to also keep in mind that once an external audit is triggered or a formal legal claim is filed, it is too late – the question then becomes “How do we minimize the damages and defense costs?” Voluntary internal audits which, if done right, preserve the attorney-client privilege, should be considered. (*Costco v. Superior Court* (2009) 47 Cal.4th 725.)

#### 2. At-Will Employment Agreements

A solid at-will clause is a good first line-of-defense to an ex-employee’s wrongful termination case. Classic and simple works best: “This confirms our employment relationship is at-will, meaning that either you or the company may terminate employment at any time, with or without cause and with or without notice.”

Companies don’t need lengthy employment agreements for most employees. A short standardized letter confirming the relationship is at-will should be used. The letter should include an integration or “merger” clause and confirm the agreement cannot be modified or trumped by any statements that the employment is for a specified term or is anything other than at-will. By using the integration clause, the company should be able to defeat any

arguments about what was said in the hiring process (so-called “truth-in-hiring” cases). Companies should also make sure that all other standard employment documents (such as applications, handbooks, and performance improvement plans, or PIPs) include similar at-will language.

### 3. Employee Handbook Updates

To be sure that new laws and policies are included, the Employee Handbook should be reviewed and updated at least once every two to three years. For example, consider the rise in social networking activity – two to three years ago nobody would have felt the need for a “social media policy.” Yet, these are now being added to handbooks, to supplement the usual computer monitoring and technology usage policies. Without these, employers are open to suits for privacy violations among other problems relating to misuse of their systems.

New policies on medical, pregnancy and other legally-required leaves need to be regularly updated as the law changes often in these areas. Vacation policies, meal and rest breaks and other payroll issues need to be addressed because uncertainty in these areas, if created by the employer’s lack of clear policies, can cause huge problems and class action lawsuit exposure. As handbooks are updated, companies should be sure to distribute them and obtain signed acknowledgements for each employee’s personnel file. Well-written handbooks can indeed serve as great risk-avoidance tools.

### 4. Arbitration Agreements

In California, arbitration agreements between employers and employees are only enforceable if certain conditions are met. By ensuring employment agreements and Employee Handbooks contain enforceable arbitration clauses, employers can try to steer employees’ claims to the forum the employer prefers. In most cases, a disgruntled current or former employee will automatically file the claim with the DLSE or the courts. Then, if the employer prefers to have the case heard in arbitration, it can require the employee to use the arbitration process and potentially minimize the time and money required to defend a court claim and avoid a jury trial. Some arbitration clauses will also include a more complete dispute resolution process to encourage the parties to resolve issues through direct discussion and/or mediation before resorting to arbitration.

### 5. Sexual Harassment Prevention Training for Supervisors

Supervisors must be trained every two years about the laws against unlawful sexual harassment and retaliation. Employers who ignore this requirement put themselves in jeopardy if an employee claims they have been harassed, discriminated against, or retaliated against in the workplace.

Providing the training is a simple step all employers with 50 or more employees must take. Increasingly, employers who provide the training use online training programs that don’t include the required elements prescribed by law. A program must be interactive and cover specific areas of sexual harassment law.

Supervisors report that they learn more preventative strategies and retain more of the substantive information included in “live” trainings conducted by employment law experts qualified to conduct the training. The “live” session has also been found to strengthen the sense of a team relationship among the supervisors attending the session. Employers must comply with the law and provide the training to all supervisors of California employees, and should carefully consider the quality of the training provided.

Employment counsel can add great value by managing risks to avoid costly mistakes resulting in lawsuits. Please contact us to discuss any of these topics or others, and be sure to read April’s *First Wednesday* which will round out our current top ten “hot topics” in employment law.

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