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10 Steps to Help Make Your Practice Labor Compliant, *Physician's Practice, by Keith Gutstein*

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With employment litigation prevalent, most employers have come to expect that a former or current employee will at some point sue or file a complaint. It is this fear that often persuades a medical practice to delay or avoid terminating an employee who has become a problem. Likewise, employees are sometimes drawn to take such action due to news of significant monetary awards and misguided sentiment that they are not to blame for their terminations. As such, medical practices have to be more proactive to protect themselves. The steps below may not only help prevent the problem, but better position a medical practice to defend a case brought by an employee should one arise.

1. **Update Your Medical Practice Handbook. A good handbook should contain policies aimed at protecting employees and the medical practice. Handbooks should have a clear policy about the type of conduct that is unacceptable and will result in discipline and a detailed, easy-to-use policy encouraging employees to report claims of discrimination and harassment to a designated representative. Not only will this allow the practice to promptly address issues internally, but it may also allow the practice to assert a defense in court if the employee failed to follow the policy.**

2. Make Sure Employees Receive Training. To help avoid possible harassment or discrimination claims by employees, a practice should ensure that employees are trained to know what conduct is and isn't acceptable. Similarly, supervisors must be trained so they can intervene and stop conduct that, if left unattended, may result in a lawsuit against not only the practice, but possibly individual managers and employees as well.

3. Properly Classify Employees. Some employers believe that employees who are paid a weekly salary are not entitled to receive overtime compensation, but this is not entirely true. In order for an employee to correctly be classified as exempt and not entitled to overtime pay, they need to not only receive the requisite salary (the amount of which is changing effective Dec. 1, 2016), but must also satisfy the applicable duties test. While many practices are aware that managers and administrators may be considered exempt, the application of an exemption hinges on more than just a job title. Actual duties performed are critical to the analysis.

4. Maintain Proper Time Records. The only way to properly defend your practice from a claim that an employee was not paid overtime or the correct minimum wage, is to take steps to ensure your business is in compliance with the Fair Labor Standards Act and local labor regulations. The practice must maintain contemporaneous time and payroll records showing, among other things, the hours worked and the compensation paid. If the records are not maintained or do not accurately show that the employee was paid properly, including overtime, the employer may have difficulty proving their case.

5. Maintain Employment Forms. All medical practices should maintain the requisite employment forms or be subject to monetary penalties. All employers are required to obtain and maintain I-9 forms for each employee (and the forms are to be maintained for three years from hire or one year from termination, whichever is later). Practices should also be aware of various state requirements mandating the securing and maintenance of critical forms.

6. Well Document Employee Conduct. Poor employee performance and employee misconduct must be documented. When it comes to defending a practice against claims of discrimination, especially those arising from a claim of discriminatory termination, most employers will claim the termination was based upon months or years of poor performance or misconduct. The employee will often argue that their performance was exemplary and that the termination was motivated by their race, religion, gender, etc. When a warning or counseling of the employee is not documented, the employee will almost always argue that it did not happen.

7. Address Equal Pay Concerns. With the passage of the Lilly Ledbetter Act in 2009, which helps extend the applicable status of limitations for a potential Equal Pay Act violation, and with the increased focus on equal pay statutes across the country, medical offices are advised to evaluate pay practices to ensure that compensation is not in any way motivated by an employee's gender.

8. Ensure Hiring Protocols Are in Order. To avoid claims of discrimination from the interview process, it is imperative to be aware of those laws that govern such action. For example, medical practices that use job applications should not ask an applicant their age. Should this information be asked and the applicant is denied the job, the applicant may claim the decision was motivated by age. Though the decision may have been based upon an entirely different reason, the fact that the age was requested prevents the employer from having plausible deniability. In addition, certain jurisdictions now prevent inquiries about an applicant's criminal background until after an initial hiring decision has been made.

9. Engage in the Interactive Process When an Accommodation is Requested. Medical practices must not act hastily, nor dismissively, when confronted by an employee's request for a reasonable accommodation, which may be a modification to the employee's job, a change in their work schedule, or another adjustment that may allow the employee to perform the essential functions of the job . Ignoring such requests, or denying them out of hand, may result in liability both for the practice and the individual who aided in that decision. Should a request be made, engage in discussions with the employee – and document the efforts — to determine if some form of reasonable accommodation is possible and does not present an undue hardship to the medical practice.

10. Properly Classify Independent Contractors and Employees. Recent guidance from the Department of Labor reveals that they will defer to the existence of an employment relationship, unless there is ample evidence to support the existence of an independent contractor relationship. Should such a determination be made, not only will the applicable agencies in the jurisdiction seek to recover certain tax revenue, such as unemployment insurance contributions and worker's compensation premiums, but the worker may also be able to seek unpaid overtime pay that he was denied. Before designating a worker as an independent contractor, or continuing such a relationship, an analysis of the classification is warranted.

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