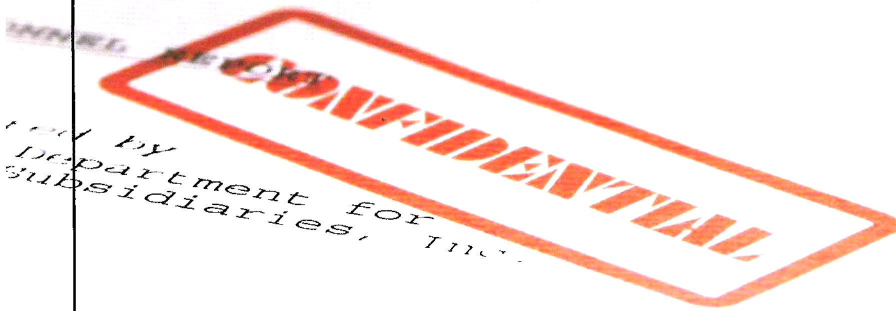
Insulating Your Business Against Legal Liability



Talk to a human resources or employment law professional and he or she will tell you to develop and distribute written personnel policies. Any time I speak to employer groups, such as the NFA, I emphasize the development of written policies, not only because some laws require them (such as the Family and Medical Leave Act), but important defenses to legal claims (such as sexual harassment) largely hinge on having a written policy communicated to employees. If that is not reason enough, in order to have favorable underwriting for employment practices liability insurance, your business needs to show it has written personnel policies.

BY DOUGLAS H. **DUERR**

If your business has invested the time, money and effort in developing current, written policies and has even gone so far as to distribute them to employees, then you have taken a very important first step on the road toward insulating the business against legal liability. Unfortunately, it is only that: an important first step. While written policies are a critical component of your employment practices, more must be done.

This was recently demonstrated in an appellate court decision in which the United States Equal Employment Opportunity Commission (EEOC) prevailed against an employer with a policy prohibiting harassment. The female, African-American plaintiff had followed the policy for raising her complaints of sexual and racial harassment, complaining numerous times first to the offenders and then to her supervisors. The court found that having a policy was not enough. Even though the employee's supervisors spoke to the offenders on a few occasions, the harassing conduct continued to occur and the employer failed to take increasingly severe actions against the offenders. Thus, the policy was ineffective in preventing unlawful harassment.

In another victory for the EEOC, a court found an employer liable for failure to accommodate an employee's deeply–held religious belief when it strictly followed its policies. In that case, the employee's religious beliefs prevented her from working on a Sunday. Although the employer's policy allowed her to swap shifts with other employees in order to accommodate her religious beliefs, she also believed that she could not ask other employees to work on Sundays. When she did not appear at work on Sunday, she was terminated. The trial court, ruling against the employer, held that policy alone was an insufficient accommodation of her religious beliefs.

While these two decisions might cause an employer to wonder why bother with the time and expense of a policy if you are just going to lose anyway, doing so misses an important point. These employers were able to at least start mounting a defense because they had policies addressing the situation. They came up short because they did not go further in their application of those policies. The first employer failed to ensure its managers, who were charged with receiving and acting upon complaints of harassment, actually took appropriate action after receiving those complaints. From the court's decision, it is unclear whether the employer had taken the additional step of training its managers on the policy and the actions they should take, but the court's silence on that issue is indicative of the employer's likely failure to have done so.

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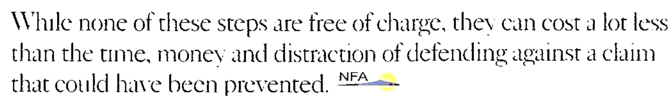
In the second case, the employer had a policy addressing mandatory work on a religious Sabbath, but then applied it too strictly, failing to recognize that issues of accommodation, whether they are religious beliefs or disabilities, must be addressed on a case-by-case basis. More recently, I have seen rigid applications of policies for automatically terminating an employee who has been out on disability or Family and Medical Leave Act (FMLA) leave for a certain period of time, without first conducting the required "reasonable accommodation" analysis under the Americans with Disabilities Act (ADA) or similar state law.

Personnel policies are, and will remain, an important tool for businesses seeking to insulate themselves from legal liability. But like all tools, they must be used effectively, not just left in the toolbox. What does this mean for the BURGER KING® franchisee?

1. Ensure you have written personnel policies addressing issues such as harassment, discrimination, grievances, benefits, leave and so forth.
2. Make sure that legal counsel experienced in labor and employment reviews those policies on a regular basis to ensure that they comply with the law. The rules frequently change, requiring either modification of existing policies or development of new ones.
3. Train managers and employees (and new hires) regarding their rights and responsibilities under those policies. Follow up that training with regular assessments of whether additional training/counseling is needed.
4. Make sure that managers and employees know that they should go to human resources with any questions. A competent HR manager can help prevent many situations from developing into legal claims.



While none of these steps are free of charge, they can cost a lot less than the time, money and distraction of defending against a claim that could have been prevented. NFA

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Funds in the Red

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vidual company's unemployment experience rating. Employers on average will pay a rate of more than $1,000 per employee.

State benefit funds are running out and more than 20 states are currently borrowing from the federal government to pay benefits. Presently, over $16 billion remains outstanding in loans to states from the federal government.

Many states have automatic mechanisms that increase the unemployment insurance tax rate when the funds come close to insolvency; others are reviewing the balances and determining solutions. While the Department of Labor projects that almost 40 states will be accessing loans from the federal government by the end of 2010—and a resolution must be found—many see potential rate hikes as a deterrent to hiring.

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