Employment Issues Confronting Start-Up Companies

Brian M. Gaff, Timothy P. Van Dyck, and Elizabeth A. Peters
Edwards Wildman Palmer LLP

The twelfth in a series of articles providing basic information on legal issues facing people and businesses that operate in computing-related markets discusses employment law issues that new companies encounter.

Employment law encompasses all the rights and obligations that define a company’s relationship with its employees, as well as job applicants, and former employees. Understanding and complying with these sometimes overlapping state and federal laws can be overwhelming, especially to a first-time entrepreneur. New companies often need help identifying and understanding the employment laws and regulations that apply to them. This article provides an overview of some of the more significant legal challenges faced by new employers.

Be sure to check the IEEE Computer Society’s website for the podcast that accompanies this article (www.computer.org/portal/web/computingnow/computing-and-the-law).

Questions to Avoid in Interviews

Interviews with job applicants allow employers and prospective employees to learn more about one another and about the available job to determine whether the applicant would be a good fit for the position. While there are many things an employer might like to know about a prospective employee, employers must be cautious about what subjects they broach in an interview.

Employers are prohibited from asking questions that might be interpreted as discriminatory—even if that is not their intent. This means that employers can’t ask questions related to a candidate’s religion, race, ethnicity, national origin, citizenship, age, marital or family status, disability, sexual orientation or gender, or genetic information.

Even if a candidate volunteers information relating to these topics, it’s wise for the employer to simply move on to the next question. The best way to avoid any appearance of discrimination is to stick to issues related to the job. Asking someone whether they have children might seem like chit chat to you, but if it’s completely unrelated to the candidate’s qualifications, it could be interpreted as discriminatory.

FLSA Exempt and Nonexempt Classifications

The Fair Labor Standards Act (FLSA) establishes standards for minimum wage, overtime pay, recordkeeping, and child labor. Some employees are exempt from FLSA’s minimum wage and overtime pay provisions. This includes executive, administrative, professional, outside sales, and computer employees. These exemptions are narrowly defined, so employers should carefully check the requirements for each potential exemption before classifying an employee as FLSA-exempt.

For example, to qualify for the computer employee exemption, today the employee must be compensated...
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CONFIDENTIALITY AND NONCOMPETITION AGREEMENTS

If employees will have access to the employer’s confidential information or trade secrets, it is imperative that the employer require them to sign a stand-alone confidentiality and nondisclosure agreement on the commencement of employment. The agreement should provide a general description of the categories of confidential information that are protected, and prohibit the employee from disclosing that confidential information both during and after the employee’s employment with the company.

Also, employers might want employees to sign noncompetition or nonsolicitation agreements on the commencement of employment. Such agreements are generally enforceable in most states (California is one major exception), as long as they’re reasonably tailored to project a legitimate business interest of the employer. Legitimate business interests might include, for example, the protection of confidential information and trade secrets and long-term customer relationships. The noncompetition or nonsolicitation restrictions should be limited in time, and tailored in scope to fit the geographic region where the employee works for the employer or the customers with whom the employee has contact.

Employees are increasingly mobile. Companies should take steps to protect their confidential and proprietary information to minimize the chances that a former employee takes this kind of information with him to use at a new job.

EMPLOYEE PRIVACY ISSUES

Employers understandably don’t want employees surfing inappropriate websites, shopping, or playing games while on the clock, let alone selling trade secrets or using company computers to harass their coworkers. The law generally allows employers to monitor employees’ Internet use and communications while on the job and within reason, as long as the monitoring does not infringe upon the employees’ privacy rights.

Employers are generally allowed to monitor the websites that employees visit on their work computers. Employers are also generally permitted to monitor employees’ use of their company-provided email accounts, as long as the employer has

at a rate of not less than $455 per week or $27.63 per hour, and must be employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field. The employee’s primary duties must consist of: (1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications; (2) the design, development, documentation, analysis, testing, or modification of computer programs related to machine operating systems; or (4) a combination of these duties, the performance of which requires the same level of skills.

Employers should be sure to properly classify workers as FLSA-exempt or nonexempt at the commencement of their employment. Misclassification of employees as FLSA-exempt could lead to significant liability on the employer’s part in both unpaid wages and monetary penalties.

INDEPENDENT CONTRACTORS VERSUS EMPLOYEES

New companies might be tempted to hire workers as “independent contractors” instead of as employees to avoid the complications and obligations of being an employer. The proper classification of workers as independent contractors or as employees is one of the most important issues facing employers today.

Proper classification determines a company’s obligations with respect to issues ranging from minimum wage and overtime requirements, payroll taxes, benefit plan eligibility, workers’ compensation, unemployment benefits, and potential exposure under workplace discrimination laws.

Government agencies have varied interpretations of the proper classification standards for independent contractors, but the factors tend to fall under three general requirements.

First, to be properly classified as an independent contractor, the worker must be free from the company’s control or direction in the performance of the services, both under the terms of the contract and in fact. Second, the services provided by the independent contractor must be outside the usual course of business of the company. Third, the worker must be engaged in an independently established business. It’s important for employers to realize that the existence of an independent contractor agreement, by itself, is not determinative of a worker’s status.

In recent years, government agencies have been cracking down on employers who misclassify employees as independent contractors. New employers should be careful to properly classify their employees.
Employment law is complicated, especially in view of different requirements imposed by individual states in the US, and how those requirements interrelate with applicable US federal law. Consequently, it can be easy to inadvertently run afoul of one or more regulations. Some oversights can result in large penalties. To minimize the chances of your company having to contend with this, work closely with your employment lawyer to ensure that your human resources policies and procedures are fully compliant with all applicable laws.

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