THE HOPKINS GROUP
HUMAN RESOURCES BUSINESS SOLUTIONS

HUMAN RESOURCES UPDATE

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WHAT ARE YOUR EMPLOYEES UP TO AFTER WORK?

You have a set of policies in place regarding use of alcohol and drugs at the workplace and showing up at work under the influence of alcohol or drugs. You also have a policy about disclosing confidential information to your competitors.

But what about what your employees do after work? What if your best salesperson is dating someone from a competitor? What if you find out an employee drinks every weekend a bit hardier than you thought possible?

Regulating and then disciplining employees for behavior outside of work is tricky business, particularly if the behavior is lawful. The litmus test is if an employee's off-duty activity puts your company in legal or financial jeopardy, then the courts are more willing to let you regulate the behavior.

As with so many things, focus on job performance. If the off-duty behavior affects job performance then there may be a legitimate business reason for disciplining the employee.

Avoid trouble with blanket non-fraternization statements by having your employees sign nondisclosure agreements to protect your company secrets instead.

Verify that your state isn't one of the 28 (plus the District of Columbia) that prohibits employers from discriminating against workers because they smoke or engage in other lawful activities. Do this before developing and publishing any policies and re-verify that the laws haven't changed for your state before you discipline someone.

Lastly, as always, be consistent in disciplining employees based on certain types of behavior.

COMMUNICATING POLICY CHANGES

It's the beginning of the year and you have some changes and new policies for your employee handbook. Your employee population has access to computers and all have work email addresses. You don't see the need to print out all these new policies and distribute them when technology will do it for you, so off goes your email explaining all the changes.

Sounds good, but some court decisions have been in the favor of the employee when the dispute centers on notifying employees of a new policy, particularly one that involves key legal rights and obligations, such as a mandatory arbitration policy.

In Campbell v. General Dynamics Government Systems Corp., No. 03-11848-NG, 2004, part of the court's opinion stated, "In some cases, policy notifications sent via e-mail could be binding. But important policies in which employees surrender their rights should be held to a higher standard."

So if you are changing the smoking area from the front of the building to the rear, you're likely on solid ground sending an email. If you are changing the way disciplinary procedures or harassment investigations are handled, consider making the change on paper and having each employee sign an acknowledgement that they have received, read, had the opportunity to ask questions, and understand the new policy.

This issue's tip: Don't use Social Security Numbers as employee ID numbers, especially on security badges. Choose a numbering scheme that is completely unrelated.

Human resources business solutions

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The Courts Have Been Busy

- Cracker Barrel (the Tennessee restaurant chain), settled several class action suits to the tune of $8.7M. The lawsuits involved discrimination against African-American customers; public accommodation issues; and FLSA claims. The latter suit involved, among other things, Cracker Barrel demanding work from hourly employees who were asked to clock out first. This should appear to be an obvious no-no to all of our readers.
- Elgin Riverboat Resort won summary judgment in an unlawful failure-to-hire suit brought by two African-American women. There is a four-prong test and while the court agreed that two of those were met: the plaintiffs belonged to a racial minority and they were not hired, the plaintiffs failed to show they met the other two prongs of the test. Those were that they were qualified for the job and that the positions were given to someone of a different race who had similar or lesser qualifications. Clear job descriptions with skills criteria, clear policies, and documentation helped ensure that Elgin won their summary judgment.
- Cingular Wireless agreed to pay $5.11M in back wages to settle government charges that Cingular violated federal overtime laws. The Labor Department found that Cingular wasn't tracking employees' time when they started work before their scheduled shift or completed work past their scheduled end time.
- Honeywell International settled a class action discrimination suit with the EEOC for $2.15M. The EEOC alleged that during a 1997 restructuring at Honeywell a class of employees in a particular division were either terminated or demoted because of their age, while, in many instances, younger workers with less experience were retained or offered the positions vacated by the older workers. As part of the settlement, Honeywell agreed to provide training in specifics of the Age Discrimination in Employment Act.
- Susan Strong won a case against Western Longterm Care for an unlawful termination in violation of the National Labor Relations Act allowing "concerted activity for the purpose of mutual aid and protection." Western Longterm Care had a policy prohibiting employees from discussing their salaries and they terminated Ms. Strong for violating this policy. This is a protected activity by employees, even in non-union environments. The relief to the plaintiffs in these types of cases typically provide for reinstatement, back pay with interest, and a public statement from the company about the violation.

Should you question an employee's W-4 form?

The IRS states that a W-4 from an employee that claims more than 10 withholding allowances is questionable. The IRS has established a Questionable W-4 Program and requires employers to submit suspicious forms to the IRS for review with their next 941 filing. Include a cover letter indicating the SSN of the W4, your federal employer identification number and why you are submitting the W-4 copy. The IRS has deemed this your responsibility, as an employer, to notify the IRS of these suspicious forms.

USERRA Updates

We provided information to you in an issue last year on the Uniformed Services Employment and Reemployment Rights Act. This Act has been updated with new requirements that include:

- Providing *all employees* with a notice of their rights under USERRA by March 10, 2005. This notice should also detail employers' rights as well. A sample notice will be published by the government prior to March 10. We will provide you with a link in the next issue of this newsletter.
- The COBRA period for those on military leave will be increased from 18 months to 24 months, effective December 10, 2005. This will be true even for companies not otherwise covered by COBRA regulations (those companies with a group health plan and fewer than 20 employees). Make certain you stay on top of your provider on this one, especially if you have an employee out on USERRA leave.