

WHY AND HOW TO CONDUCT A HUMAN RESOURCES AUDIT IN MINNESOTA

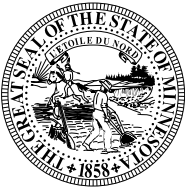
A Collaborative Effort

Minnesota Department
of Trade and Economic
Development

Rider, Bennett,
Egan & Arundel, LLP

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Minnesota Small Business Assistance Office
Rider, Bennett, Egan & Arundel, LLP

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TABLE OF CONTENTS

Introduction	1
General Considerations	2
What is a Human Resource Audit?	2
Why Conduct an Audit?	3
What are the Disadvantages of Conducting an Audit?	4
What are the Steps in an Audit?	5
Sample Audit Checklists	9
The Hiring Process	11
Key Legal Concerns	11
Audit Checklist	12
Documents to Collect and Review	15
Employment Records and Agreements	16
Key Legal Concerns	16
Audit Checklist	17
Documents to Collect and Review	19
Communications	20
Key Legal Concerns	20
Audit Checklist	21
Documents to Collect and Review	24

Discrimination and Harassment	25
Key Legal Concerns	25
Audit Checklist	26
Documents to Collect and Review	28
Compensation and Benefits	30
Key Legal Concerns	30
Audit Checklist	31
Documents to Collect and Review	33
Time Off	35
Key Legal Concerns	35
Audit Checklist	36
Documents to Collect and Review	38
Behavior and Performance Management	39
Key Legal Concerns	39
Audit Checklist	40
Documents to Collect and Review	42
Termination of Employment	43
Key Legal Concerns	43
Audit Checklist	44
Documents to Collect and Review	47
Safety and Health	48
Key Legal Concerns	48
Audit Checklist	49
Documents to Collect and Review	52
References	53

INTRODUCTION

The material provided in this booklet is not intended as legal advice. While we have attempted to provide useful information often needed by employers, with illustrative examples of human resources audit checklists, users of this booklet should be aware that no one source can apply to every employer or every employment situation. In particular, employers with unionized workplaces and public sector employers will need to enlarge upon the checklists. Users of this booklet are encouraged to use procedures that reflect their own specific situations, and to seek assistance from knowledgeable legal counsel as they conduct a human resources audit.

GENERAL CONSIDERATIONS

WHAT IS A HUMAN RESOURCES AUDIT?

A human resources audit is a review of an employer's formal and informal systems and procedures to determine whether they meet current and projected practical needs, and whether they provide sufficient protection from legal liability. The audit includes review of the employer's documents, policies, procedures and daily practices. It may be conducted by an individual or a group depending on the nature and needs of the organization. Some employers may choose to select an outsider to conduct it, such as an attorney or human resources consultant.

A properly conducted audit will answer such questions as:

What are the current formal and informal employment policies?

Where are these policies found? Are they in writing? If so, who has access to them, and how is access attained?

If policies are not in writing, who is aware of the policies, and how is knowledge attained?

Are the employer's policies applied consistently? How is consistency assured?

Certain employment documentation is required by law. Is the employer in compliance?

What mechanisms are in place to assure compliance with federal and state wage and hours laws?

How does the employer assure compliance with legal employee time off mandates?

How does the employer assure compliance with federal and state discrimination laws?

What procedures ensure that policies and procedures are updated regularly?

What training exists, especially for managers and supervisors?

WHY CONDUCT AN AUDIT?

Today's employment climate is risky. Employers must attract, manage and retain excellent employees while avoiding legal liability based on employment practices. Employment laws today are a "moving target," and in managing employees the right balance of caution with the assumption of risk is important to business success. Employers must be aware of the current state of employment laws as compared to their own business systems.

Also, as businesses continuously grow and change, they need different employment systems to manage employees effectively. Whether their needs derive from changing legal requirements or just from internal changes in the business itself, addressing them on a timely basis will contribute to long term success.

A human resources audit will provide any employer with valuable information regarding its current employment systems and procedures, as a basis to determine their adequacy to meet the current and projected needs of the business. A properly conducted audit will create opportunities to:

- Prevent legal claims, because potential problems can be identified in advance and corrected. Even the United States Supreme Court has endorsed prevention measures recently.¹
- Educate managers about human resources systems and procedures, by including managers and supervisors in the process of conducting and implementing the results of the audit.
- Integrate human resources systems with the employer's other business priorities; for example, an audit might identify the need to link an employer's sales compensation system with its procurement and shipping procedures.

WHAT ARE THE DISADVANTAGES OF CONDUCTING AN AUDIT?

Practical and law-related concerns relating to human resources audits include:

Time and expense. An audit may be time-consuming and expensive depending on its scope, how efficiently and by whom it is conducted. Any human resources audit should be based on a plan developed to meet the organization's unique needs. Unless it is timely and practical, the expense of an audit will outweigh its usefulness.

Legal liability. A human resources audit is designed to highlight deficiencies in the employer's systems and procedures, so they can be corrected. Its end products may include the auditor's notes and a written report or roadmap for improvement. Under Minnesota law, there is no assurance that such documentation of deficiencies would be protected from disclosure in the event of a legal claim, unless it has been prepared on behalf of the organization's legal counsel.² Although the benefits of conducting an audit may well outweigh this risk, any employer conducting an audit without legal counsel should consider in advance what

documents to create, how to control document distribution and the lifespan of any document created.

WHAT ARE THE STEPS IN AN AUDIT?

1. **Select the audit team.** Depending on the size of the organization, the auditor may be an individual or a group. An ideal audit team might consist of managers and supervisors from across the organization, representing diverse levels and functions. A diverse audit team has the advantages of:
 - More accurately collecting data about the current formal and informal systems and policies throughout the organization, because it can represent all views and bases of information in the workplace.
 - Acting as a built-in mechanism for communicating across the organization about the process of the audit and its eventual results.
 - Assuring organization-wide acceptance of changes which may eventually be recommended as the result of the audit, because representatives from all segments have participated from the start.
 - The audit may be conducted by someone from outside the organization, such as an attorney or consultant, or an outsider may work as part of the audit team.
2. **Develop an audit plan based on the organization's needs and resources.** Planning the audit means deciding its scope, choosing topics to be examined and building a timetable. It may be helpful to consult with the employer's legal counsel at this stage to be sure that all key issues are covered and assigned correct priority. The scope of the audit depends on the needs of the organization, available resources and long

term plans. In developing a timetable, the auditor or team will decide whether to examine the organization immediately and as a whole, or whether to conduct the audit in segments, perhaps in priority order. In choosing topics, the team should consider:

- Asking key managers and supervisors what human resources issues concern them the most.
- Reviewing the subjects addressed by any legal claims based on employment, brought against the organization since the last audit.
- If the workplace is unionized, determining whether any outstanding collective bargaining issues should be addressed as part of the audit or reserved for a separate process.

3. Communicate to the organization in advance of the audit.

Depending on its scope, the audit may be expected to come to the attention of some employees while in progress. The auditor or team should decide in advance how broadly and to whom to communicate about the audit and its scope. In general, communications should be narrowly directed and discrete.

4. Conduct the audit using checklists prepared in advance.

Checklists such as those contained in this manual provide a roadmap for an efficient audit. Based on the plan, the auditor or team should customize the checklists in advance to reflect the needs of the organization. Especially if the audit is conducted by a team, documentation of the process and results should be carefully controlled, so that it can be collected at the termination of the audit process and stored or destroyed.

5. Review the audit results and develop a list of issues for discussion with management. Making effective use of the

audit depends on identifying and analyzing the human resources issues which it raises, and reviewing them with appropriate managers to make changes as necessary. The first step is development of a list of issues for discussion with key managers. This should be done as soon as possible after the completion of the audit. If a team has conducted the audit, the team will be the logical group to develop the list of issues. Even if a single person has conducted the audit, a team may be helpful in completing this task.

6. **Review the results and develop an implementation plan with management.** This step ensures that issues raised by the audit are broadly discussed and understood by management, and that managers will accept responsibility for implementing indicated change. Managers participating in this step should be selected on the basis of the nature and scope of the issues identified by the audit. When significant and broad scope matters are raised, top management normally needs to be involved. Depending on the organization, top management may prefer to be involved no matter what the results. The end product of this step is an implementation plan to be used by a broad group of managers. It should include issues identified, actions planned, the assigned responsible manager and the timetable. As appropriate, management should seek legal advice at this stage to fully understand issues and design action steps. The resulting plan may be formatted as follows:

Audit Implementation Plan

Issue	Action Steps	Responsibility	Timetable
Wage and hour status of "exempt" positions	<ol style="list-style-type: none"> 1. Examine each position description 2. Compare duties to legal requirements 	Mary Jones	April, 2002

7. **Launch the implementation plan.** At this point, the auditor or team transfers responsibility for the results of the audit to the managers identified in the implementation plan. However, depending on the implementation plan, the auditor or team may maintain responsibility for follow-up to ensure the progress of implementation.

8. **Maintain documentation as needed.** Unless records of the audit are required to be maintained because of a pending legal claim or for some other legal reason, they should be destroyed as soon as possible during and following implementation. Only documentation which is required for follow-up or as a roadmap for a future audit should be maintained.

SAMPLE AUDIT CHECKLISTS

The following pages contain topical audit checklists and comments. Employers should review and revise the checklists to meet their current needs and obtain their own legal advice as needed. Individual audits may need to be more or less detailed, and some employers may have special needs. For example, employers with a unionized workforce and public sector employers will need to examine topics not covered in detail in these checklists. References in the comments are to sources identified in the list of References beginning on page 53 of this booklet. References include only publicly available resources. Abbreviations used in the comments include:

Abbreviation	Full Reference
AWAIR	A Workplace Accident and Injury Reduction Act
DHS	Minnesota Department of Human Services
DOJ	United States Department of Justice
DOL	United States Department of Labor
DOLI	Minnesota Department of Labor and Industry
EEOC	United States Equal Employment Opportunity Commission
FTC	Federal Trade Commission
HIPPA	Health Insurance Portability and Accountability Act

INS	United States Immigration and Naturalization Service
IRS	United States Internal Revenue Service
Minnesota Tax	Minnesota Department of Revenue
MDH	Minnesota Department of Health
MDHR	Minnesota Department of Human Rights
MHRA	Minnesota Human Rights Act
MNOSHA	Minnesota Occupational Safety and Health Act
OSHA	Federal Occupational Safety and Health Act
Small Business Assistance Office	Minnesota Department of Trade and Economic Development
WorkForce Centers	Minnesota Department of Economic Security WorkForce Centers

THE HIRING PROCESS

KEY LEGAL CONCERNS

A claim of discrimination based on the way applicants are attracted or treated.

Incomplete or inaccurate documentation which might be needed later; for example, to defend a discrimination claim or in a government audit focused on the hiring process.

Incomplete or incorrect documentation collected after the hire, such as lack of I-9 documentation or child/spousal support documentation.

Violation of drug testing statutes.

Violation of legal requirements relating to pre-employment medical examinations.

Violation of legal requirements relating to background checks.

Penalty imposed by a government entity because required workplace posters are not displayed.

Failure to comply with an Affirmative Action Plan, resulting in a state or federal compliance audit and threatened government funding.

THE HIRING PROCESS AUDIT CHECKLIST	COMMENTS
Is the hiring process conducted on the basis of an accurate job description ?	Job descriptions provide a legal road map for the interviewer. The interview should always focus on the applicant's ability to perform the essential job functions, which should be listed in the description. Give the applicant a copy of the job description during the interview. See the EEOC, DOJ and MDHR websites.
Does the description define "essential" and "nonessential" job functions?	If not, it should be revised. Disability discrimination laws place requirements on employers and employees on the basis of whether functions are "essential." The regulations to the Americans with Disabilities Act ("ADA") emphasize this. See the EEOC website.
Does the recruiting process comply with the employer's Affirmative Action Plan ("AAP"), (if any)?	Government contractors of sufficient size are required to have an AAP which tracks hiring and promotion processes and results. See the DOL and MDHR websites.
Does the recruiting process comply with the employer's personnel policies and collective bargaining agreement (if any) with respect to internal applicants?	Many employers have "job posting" policies and procedures, written or unwritten. These should be followed or changed. Failure to follow a policy may be perceived by some employees as creation of an unfair barrier to success.
Does the recruiting process comply with federal and state discrimination laws, including making reasonable accommodation for applicants who request it as part of the hiring process?	<p>The ADA requires "reasonable accommodations" for applicants when requested. These are modifications in the process to enable a person with a disability to participate. See the EEOC website.</p> <p>Also, federal and state discrimination laws prohibit the collection of information regarding age, race, color, creed, religion, national origin, sex, sexual orientation, marital status, welfare status, and disability during the hiring process. See the MDHR, DOJ and EEOC websites.</p>

Is the employer's job application form in compliance with state and federal discrimination laws?	See the references to discrimination laws above.
Does the employer's application form contain an "at will" disclaimer?	"At will" under Minnesota law means that employment may be ended by either party for any or no reason, as long as the reason is not illegal. This provision favors the employer, and applicants should receive written notice of it.
Are interviewers trained regarding requirements of state and federal discrimination laws?	See references to discrimination laws above.
Is there an internal procedure to collect and maintain documentation of each hiring process?	Each employer should have an established policy relating to creation and retention of hiring documentation. Documentation is required of employers with AAP's. It is also critical for any employer who may at some time be required to defend a discrimination claim relating to a failure to hire.
Are medical examinations and drug tests conducted only after a conditional job offer?	The ADA and corresponding state law require this. See the EEOC website.
Do pre-employment medical exams seek only information necessary to verify that the applicant can perform the essential job functions?	The Minnesota Human Rights Act requires this. See the MDHR website.
Are all state drug-testing requirements met in the hiring process?	Applicant and employee drug testing, except for certain drivers of vehicles regulated by federal law, must be in compliance with state law. The state statute is Minn. Stat. § 181.938. See the Small Business Assistance Office publications, including An Employer's Guide to Employee Handbooks in Minnesota , which contains a sample policy with forms.
Are references routinely checked before each hire?	The employer may require a written release from the applicant to ensure that the references are complete. Reference checking is critical to avoid liability for potential future claims of negligent hiring.

<p>Are background checks done on the basis of an internal policy, in compliance with state and federal laws? Are background checks completed in all cases in which they are required by statute (such as for child care workers)?</p>	<p>State and federal laws require formal written disclosure of requests for credit information. See the FTC website. The Minnesota statute is Minn. Stat. Chapter 13C.</p> <p>Criminal background checks may be done on all jobs and are required for some. Arrest records should not be used as a basis for adverse action against an applicant.</p>
<p>Are all rejected applicants notified in writing on a timely basis?</p>	<p>Written notification of rejection clarifies that the applicant is no longer in the pool of potential candidates for the employer's open positions, reducing potential for discrimination claims with regard to future openings.</p>
<p>Has the employer completed the I-9 correctly within the required time frame after the commencement of employment?</p>	<p>See the handbook on the INS website.</p>
<p>Has the employer collected all child and spousal support and medical support documentation and submitted it to DHS as required by law?</p>	<p>See the employer's guide on the DHS website.</p>
<p>Has the employer met all state and federal tax documentation requirements?</p>	<p>See the IRS and the Minnesota Tax websites.</p>
<p>Does the employer display the posters required by state and federal discrimination laws?</p>	<p>See the EEOC and MDHR websites.</p>
<p>Does the employer have a record retention procedure to ensure that all records relating to the hiring process are maintained according to law?</p>	<p>See each of the websites referenced above.</p>

THE HIRING PROCESS DOCUMENTS TO COLLECT AND REVIEW

- Sample job advertisement
- Job application
- Sample job descriptions for management and staff positions
- Affirmative Action Plan (if any)
- Drug testing policy
- Internal job posting policy
- Internal policies and procedures regarding interviewing and hiring
- Reference/background check policy and forms
- Sample rejection letter
- Sample new hire personnel file

EMPLOYMENT RECORDS AND AGREEMENTS

KEY LEGAL CONCERNS

Incomplete or inaccurate documentation of employment, including, for example:

- Lack of an accurate written record of a job offer.
- An employment agreement which fails to reflect the agreement with the worker.
- An employment agreement which is not written or implemented correctly to enhance the chance of enforceability of a “noncompete” provision.

Hire of a worker who is incorrectly characterized as an independent contractor.

Hire of a new employee in violation of the employee’s preexisting agreement with a former employer.

Legal claim based on the employer’s failure to provide an employee required access to his/her own personnel file.

EMPLOYMENT RECORDS AND AGREEMENTS AUDIT CHECKLIST	COMMENTS
<p>Before making an offer, does the employer routinely check whether applicants are bound by any agreement with a prior employer which would interfere with his/her ability to perform on the new job?</p>	<p>Applicants, particularly for management and sales positions, are often bound by employment agreements limiting ability to contact customers and otherwise compete with a former employer. A new employer can have liability for violation of such a pre-existing agreement.</p>
<p>Are job offers made in writing, and does each written offer contain the "at will" statement? What is the process of preparing them? Who has the authority to make a written offer?</p>	<p>See the box below. Also see The Hiring Process above regarding "at will" employment. All offers should be made in writing on the basis of proper procedures.</p>
<p>Does the employer have any workers characterized as "contractors," "independent contractors" or "consultants," who are not treated as employees for purposes of employment taxes and benefits? Who has the authority to enter into such arrangements?</p>	<p>Many employers characterize certain workers in this way, unaware that there are complex state and federal legal definitions of "independent contractors." Significant legal problems can result from mischaracterization. See the WorkForce Centers and DOL websites.</p>
<p>If so, has the non-employee arrangement been reviewed by legal counsel to ensure that it meets the state and federal definition of an "independent contractor?" Is there a written agreement with each such worker?</p>	<p>Written agreements are legally required. Because the repercussion of a mistaken characterization of a worker are so far reaching, legal counsel should always be consulted.</p>
<p>Does the employer have a procedure to ensure that noncompete agreements are fully executed before new employees commence employment? Does the employer have a procedure to ensure that all noncompete agreements are valid and enforceable?</p>	<p>Noncompete agreements are not enforceable in Minnesota unless they are signed in exchange for something of substantial value. New employment is sufficient. However, after employment commences more is required. Employers should seek legal advice on this topic.</p>
<p>Are performance evaluations stored in the employee's personnel file for future reference?</p>	<p>Performance evaluations are legally part of the "employee record."</p>
<p>Are employee personnel files maintained in a secure central location?</p>	<p>Access should be restricted to maintain confidentiality and integrity of the files.</p>

<p>Does the employer have a policy to comply with employee and ex-employee requests to review personnel files?</p>	<p>State law permits review of the files by employees and ex-employees and defines a personnel file as an "employee record" narrowly. See <u>An Employer's Guide to Employment Law Issues in Minnesota (2000)</u>. Also consult with legal counsel before providing a copy of any personnel file if there is any doubt concerning appropriateness of access.</p>
<p>Is the manager in charge of personnel files trained regarding employee right of access, and regarding the legal definition of a personnel file? Is there a retention policy regarding personnel files, employment agreements and similar documents?</p>	<p>See above. As to retention, see the EEOC and DOL websites.</p>
<p>Are supervisors and managers trained to maintain supervision notes in their own possession, separate from the personnel file?</p>	<p>If kept in the manager's possession, these notes legally are excluded from the definition of "employee record" to which an employee or ex-employee may have access. Minn. Stat. § 181.960 et. seq.</p>
<p>Is employee medical information maintained in a file separate from the regular personnel file and protected from disclosure except as permitted by the ADA? HIPPA?</p>	<p>This is required by the ADA. See the EEOC website. See the DOL website regarding HIPPA requirements.</p>
<p>Are employee I-9s kept in a file separate from the personnel file?</p>	<p>See INS website.</p>

EMPLOYMENT RECORDS AND AGREEMENTS DOCUMENTS TO COLLECT AND REVIEW

- Sample offer letter
- Employment Agreements
- Independent Contractor Agreements
- Sales Representatives Agreements
- Policy regarding review of personnel files
- A sample personnel file and a sample employee medical file

COMMUNICATIONS

KEY LEGAL CONCERNS

Discrimination claim based on an employee's perception of unfair treatment, because application of personnel policies has been inconsistent.

Discrimination claim based on an employee's perception of an unfair performance evaluation or disciplinary process.

Contract claim based on an inaccurate or unauthorized communication to an employee.

Contract claim based on an employee handbook.

Penalty imposed by a government entity because required workplace posters are not displayed.

Legal claim based on violation of the state or federal drug testing statutes.

Inability to defeat a reemployment claim because workplace policies were not adequately communicated, or the employer cannot prove that they were.

COMMUNICATIONS AUDIT CHECKLIST	COMMENTS
Does the employer have an employee handbook which accurately describes the current policies of the organization?	Employee handbooks are a useful vehicle for ensuring consistent communications to employees. See <u>An Employer's Guide to Employee Handbooks in Minnesota</u> (2000).
Does the employer consistently require employee acknowledgement of the receipt of the employee handbook?	See <u>An Employer's Guide to Employee Handbooks in Minnesota</u> (2000). The acknowledgement form should be collected and kept in the employee's personnel file for future reference; for example, when the employer needs to be able to prove that an employee had notice of a certain handbook policy.
Does the handbook contain an "at will" statement and a disclaimer of contract?	These are necessary to protect the employer's rights. See <u>An Employer's Guide to Employee Handbooks in Minnesota</u> (2000).
Does the employer have a procedure for updating the handbook regularly and for obtaining written acknowledgement of changes?	See <u>An Employer's Guide to Employee Handbooks in Minnesota</u> (2000). The employee acknowledgement of modifications to policies is legally important and useful when correcting behavior which violates a policy. It may also be useful to defeat a reemployment claim, when the termination was based on violation of a written policy.
Does the handbook contain key policies relating to equal employment opportunity, offensive behavior, drug testing, FMLA, other time off policies and confidentiality as appropriate to the workplace?	FMLA and offensive behavior policies are required legally. See <u>An Employer's Guide to Employee Handbooks in Minnesota</u> (2000). Also see the DOL and EEOC websites. See Discrimination and Harassment and Time Off below.
Does the handbook omit detailed discipline and termination provisions?	See <u>An Employer's Guide to Employee Handbooks in Minnesota</u> (2000). Detailed discipline and termination guidelines should be omitted from the handbook, because they confine the employer rather than allowing discretion in the circumstances, potentially exposing

	the employer to a contract claim based on the terms of the employee handbook. However, a flexible policy on these subjects should be included.
If the handbook contains a grievance procedure, is it distinct from the procedure for reporting illegal discrimination or harassment?	The procedure for reporting illegal discrimination or harassment is legally critical, while the procedure for reporting other subjects of dissatisfaction is mostly a useful employee relations tool. See Discrimination and Harassment below. Employers need to ensure that employees are never confused about how and to whom to make a report of harassment or discrimination. Also, managers and supervisors need to be aware when an employee specifically intends to complain about perceived discrimination or harassment. Therefore, the procedure for making such a complaint should be distinct and separate.
Does the handbook contain accurate notices of employee benefits plans?	See Compensation and Benefits below.
Does the handbook contain other policies as necessary to administer employment matters consistently?	Employees who are not treated consistently may perceive discrimination.
Does the employee handbook contain the employer's drug testing policy (if any)?	Drug testing is regulated by state and federal law. See the DOL and DOLI websites. Also see <u>An Employer's Guide to Employee Handbooks in Minnesota</u> (2000).
Does the employer have legally adequate policies and procedures for implementing its drug testing policy, including forms required to communicate with the applicant or employee during the process?	Drug testing is regulated by state and federal law. See the DOLI website. Also see <u>An Employer's Guide to Employee Handbooks in Minnesota</u> (2000).
Does the employer have a process for training supervisors and managers about the content and use of the handbook?	This is required to ensure consistent application of policies to avoid discrimination claims.

<p>Is the handbook formatted to permit easy updating and to show the dates of most recent updates?</p>	<p>See <u>An Employer's Guide to Employee Handbooks in Minnesota</u> (2000).</p>
<p>Does the employer retain a record of updates and communications of them to employees?</p>	<p>See <u>An Employer's Guide to Employee Handbooks in Minnesota</u> (2000).</p>
<p>Does the employer display all legally mandated employee posters?</p>	<p>Federal and state laws require display of workplace posters and make them accessible to employers on the web. See the DOL, DOLI and EEOC websites. Failure to display a required poster may result in a penalty.</p>
<p>Does the employer perform regular employee performance evaluations, and are managers trained to do so effectively, including writing and delivering fair and accurate evaluations?</p>	<p>Performance evaluations are an excellent communication tool, and the evaluation meeting is an excellent occasion for discussion of workplace issues. Managers and supervisors should be trained to write and deliver evaluations in a nondiscriminatory manner. Inaccurate evaluations can be damaging to the employer in the event of a legal claim.</p>
<p>Are there checks and balances to ensure that performance evaluations are nondiscriminatory and fair?</p>	<p>Employers generally need a procedure for review by more than one manager before an evaluation is delivered.</p>
<p>Does the employer have a procedure for ensuring that managers and supervisors are updated on all workplace policies, whether or not contained in a handbook, and that they understand their responsibility for implementation of policies?</p>	<p>This is required to ensure consistent application of policies to avoid discrimination claims.</p>
<p>Does the employer have job descriptions and a procedure for ensuring their accuracy?</p>	<p>Job descriptions are a key communication vehicle regarding employee obligations. They also may be helpful in combating discrimination claims by clarifying the minimum qualifications of a job. They should be kept updated and reviewed periodically with the employee, perhaps at the time of a regular performance evaluation.</p>

Does the employer have checks and balances to ensure that offers of employment and employment agreements are only made in writing and only on the basis of established policies and procedures, by managers with adequate authority?	See Employment Records and Agreements above.
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COMMUNICATIONS DOCUMENTS TO COLLECT AND REVIEW

- Employee handbook
- Record of updates to employee handbook
- Required posters
- Policies regarding creation and delivery of performance evaluations
- Drug testing forms and procedures
- Sample job description
- Employee handbook acknowledgement forms

DISCRIMINATION AND HARASSMENT

KEY LEGAL CONCERNS

Liability for discrimination or harassment on the basis that the employer failed to take appropriate prevention steps.

Liability for discrimination or harassment on the basis that the employer failed to take timely and appropriate corrective action.

Failure of managers and supervisors to take appropriate action when they knew or should have known of harassment or discrimination.

Liability for disability discrimination on the basis that the employer failed to provide reasonable accommodations for an employee with a known disability.

A claim of retaliation by an employee who has made an internal or external discrimination claim, a workers' compensation claim, some other good faith report of a suspected violation of law, or a harassment complaint.

DISCRIMINATION AND HARASSMENT AUDIT CHECKLIST	COMMENTS
Does the employer have a policy prohibiting discrimination specifically on the basis of race, color, religion, national origin, sex, sexual orientation, marital status, disability and age?	This is the list of bases designated by federal and Minnesota law as “protected” characteristics. Employees and applicants are protected from discrimination on the basis of any one or more of them. They should be enumerated specifically in the employer’s policy. See the MHRD, EEOC and DOL websites.
Does the employer have a policy defining and prohibiting illegal harassment and notifying employees of the reporting procedure?	Employers are required by law to take adequate prevention steps, specifically including publication of a policy, to protect employees against illegal harassment, encountered from any source related to the work environment, which is harassment on the basis of any one of the “protected” characteristics listed above. “Harassment” is legally defined. See the EEOC website.
Does the reporting procedure allow more than one reporting option?	Allowing more than one reporting option is recommended by federal and state courts. See the EEOC and MDHR websites.
Does the employer require employees to sign an acknowledgement form indicating acceptance and understanding of the harassment and discrimination policy?	Employees should be given the resources to fully understand the policy before signing. The form should be retained in personnel files for future reference.
Does the employer have an established procedure for training managers and supervisors regarding their obligations under the harassment and discrimination policies?	Managers and supervisors legally represent the employer, and the steps which they do or do not take will most likely be imputed to the employer. They need to understand their obligations. Failure of a manager or supervisor to take timely and appropriate action to address discrimination or harassment may subject the employer to liability.

<p>Does the employer regularly train new and long term employees regarding the harassment and discrimination policies?</p>	<p>Employers benefit when employees use the harassment and discrimination policies. They need training to understand them.</p>
<p>Does the employer have a procedure to manage complaints of harassment or discrimination on a timely basis?</p>	<p>Employers are legally required to take corrective action on a “timely basis” or as soon as possible to prevent damage to the employee.</p>
<p>Does the employer routinely investigate claims of harassment or discrimination which are asserted at the time of termination, at an exit interview or after the termination of employment?</p>	<p>These claims should be investigated just as if the complainant were a current employee. Complaints made after termination often are accurate because the complainant is less intimidated by the prospect of the reaction of the employer.</p>
<p>Does the employer have checks and balances to ensure that changes in an employee’s position, compensation, job duties, and employment status are never made on a discriminatory basis? Does the employer have similar checks and balances to ensure that performance evaluations are nondiscriminatory?</p>	<p>Discrimination claims are normally made on the basis that an employee has suffered a job detriment on the basis of a discriminatory motive. Checks and balances often include the requirement that more than one manager approve significant changes in individual employee benefits or status. See Communications, above, and Termination of Employment below.</p>
<p>Does the employer have a system to ensure that its hiring process is in compliance with discrimination laws?</p>	<p>See The Hiring Process above.</p>
<p>Does the employer ensure that none of its human resources systems have the unintended effect of illegally discriminating?</p>	<p>Unintended discriminatory impact can be the basis of a claim for “disparate impact” discrimination. Employers need to review the effect of their human resources systems to ensure that effects are objectively fair.</p>
<p>Does the employer have policies and procedures relating to ADA and MHRA disability discrimination compliance? Are the required posters displayed?</p>	<p>Federal and state disability laws require reasonable accommodations for people with disabilities when requested accommodations do not present an undue hardship to the employer. These laws are complex, and employers may need to consult with counsel regarding compliance. See the EEOC and MHRD websites for guidance and free access to posters.</p>

<p>Are managers and supervisors trained regarding ADA and MHRA disability discrimination compliance?</p>	<p>Managers and supervisors must be trained to recognize circumstances in which disability laws apply.</p>
<p>Has the employer trained managers and supervisors regarding the legal claim of retaliation and developed a procedure for management of employees who have made internal or external complaints of discrimination?</p>	<p>Retaliation is a dangerous claim because it may be easier to prove than other discrimination claims. Therefore, managers and supervisors tend to fear applying normal management procedures to employees who have made claims of discrimination. However, it is critical that such employees continue to be managed effectively. It may be helpful to consult legal counsel in such a case.</p>
<p>Does the employer have a retention policy which applies to records of harassment and discrimination complaints and investigations? Does the employer have a policy regarding where such documents are to be maintained?</p>	<p>Laws regulate the retention period for such documents. See the EEOC, MHRD and DOL websites. See Employment Records and Agreements above regarding the placement of such documents outside of an employee personnel file.</p>

DISCRIMINATION AND HARASSMENT DOCUMENTS TO COLLECT AND REVIEW

- Harassment and discrimination policies
- Sample employee acknowledgements of receipt of the harassment and discrimination policies
- Records of training managers and supervisors about discrimination and harassment policies, including disability discrimination
- Sexual harassment investigation guidelines (if any)
- Records of training employees about its discrimination and harassment policies

- Policies and procedures for third party review of changes in employee benefits and status, including, for example, termination of employment
- Sample internal discrimination complaints (if any), and investigation documentation
- Recent external charges of discrimination

COMPENSATION AND BENEFITS

KEY LEGAL CONCERNS

Claim by an employee or government authority that an employee's compensation is illegal because:

- The employee is inappropriately being treated as "exempt" from law.
- A "nonexempt" employee is being paid less than the minimum wage.
- A "nonexempt" employee is not receiving overtime compensation as required.
- Documentation of hours worked and compensation paid is inadequate.
- Payroll practices, including practices with respect to pay upon termination of employment, are not in compliance with state laws.
- Child labor requirements are not met.

Claim by an employee or government authority that written notice of employee benefits, recordkeeping or required federal and state filings are not adequate.

Discrimination claim by an employee based on the federal or state equal pay act or other discrimination law.

COMPENSATION AND BENEFITS AUDIT CHECKLIST	COMMENTS
Has the employer analyzed its jobs to determine which positions are subject to the federal and state wage and hour laws (“nonexempt”) and which are not (“exempt”)?	All employers should assume that the federal wage and hour law, the Fair Labor Standards Act (“FLSA”), will apply to them. That law requires payment of the “minimum wage” and overtime for hours worked over 40 in a workweek, unless the employee is “exempt” from the Act. See the DOL website.
If so, do the jobs which are classified as “exempt” meet the definitions in the FLSA?	Penalties for failure to comply are substantial. See the DOL website.
Are the employees whose jobs which are classified as “exempt” paid on a salary basis in accordance with the FLSA?	See the DOL website for a discussion of “salary basis.”
Does the employer have policies regarding treatment of time off taken by “exempt” employees, to ensure that their salary is never docked except as permitted by the FLSA?	The salary of an exempt employee may not be invaded except on the basis of exceptions which are narrowly defined in the FLSA. See the DOL website.
Does the employer have policies regarding pay for hours over 40 worked in a workweek by a “nonexempt” employee (overtime)?	Overtime at the rate of time and 1/2 must be paid to all “nonexempt” employees for all hours “suffered or permitted to work” over 40 in a workweek. Any agreement by an employee to the contrary is void. See the DOL website.
If “nonexempt” employees work “on call,” during meal times, on overnight shifts, or in remote locations traveling, is the employer in compliance with laws relating to pay obligations and overtime computation?	Employers need to understand their pay obligations for nonstandard working hours. “Hours worked” may or may not include all such working hours. See the DOL website.
If minors are employed, is the employer in compliance with state and federal laws?	See the DOL and DOLI websites.
Are the employer’s policies relating to wage deductions in accordance with state and federal laws?	See the DOL, DOLI and IRS websites.

Does the employer use “comp time” instead of paying overtime?	If so, that practice should stop. Except in the case of a very narrow exception, it is illegal. See the DOL website.
Has the employer trained its managers and supervisors regarding the requirements of the FLSA and related policies?	Managers and supervisors need to understand the day to day issues which the FLSA raises, including the problems with docking an exempt employee’s salary and failing to pay overtime as required.
Does the employer maintain appropriate records of hours worked, deductions and wages paid?	See the DOL and DOLI websites.
Does the employer have policies and standards to determine and adjust compensation on the basis of consistent objective criteria?	Compensation which cannot be justified on the basis of objective criteria may become the basis for a claim of discrimination.
Does the employer have a standard procedure to ensure that employees are paid according to law at the time of termination of employment?	Failure to pay within statutory time frames, or to pay all amounts due, usually including accrued vacation, can result in penalties under state law. See the DOLI website.
Does the employer have a record retention plan to ensure that wage and benefits records are maintained as required by law?	See the DOL, IRS and EEOC websites.
Does the employer have a procedure to ensure that employee benefit plan design is in compliance with federal and state laws?	Plan design is frequently regulated by state and federal laws. Employers should obtain the assistance of counsel to ensure compliance. Also, see An Employer’s Guide to Employee Benefits in Minnesota (2000) and the IRS and DOLI websites.
Are the employee benefits plans subject to federal and state laws properly communicated to employees?	Plans must be described to employees and updated according to federal and state laws. Employers should obtain the assistance of counsel to ensure compliance. See An Employer’s Guide to Employee Benefits in Minnesota (2000) and the IRS and DOLI websites.

<p>Does the employer have adequate procedures to ensure that administration of benefits plans is in accordance with state and federal laws, including the laws prohibiting employment discrimination?</p>	<p>Plan administration is frequently regulated by state and federal laws. Employers should obtain the assistance of counsel to ensure compliance. Also, see <u>An Employer's Guide to Employee Benefits in Minnesota</u> (2000) and the IRS and DOLI websites.</p> <p>In addition inconsistent administration can result in a claim of employment discrimination or retaliation.</p>
<p>Does the employer have a procedure to ensure compliance with all required reporting to federal and state requirements regarding employee benefits plans?</p>	<p>Most employee benefit plans are regulated by state and federal laws. Failure to report as required may result in significant penalties. Employers should consult with legal counsel to ensure compliance. Also, see <u>An Employer's Guide to Employee Benefits in Minnesota</u> (2000) and the IRS and DOLI websites.</p>
<p>Does the employer have established procedures for providing legally required communications about employee benefits after termination of employment?</p>	<p>See Termination of Employment below.</p>

COMPENSATION AND BENEFITS DOCUMENTS TO COLLECT AND REVIEW

- Sample job descriptions
- Any policies, employee handbook provisions, notes or memos describing “exempt” and “nonexempt” status and its application to the employer’s jobs
- Policies and procedures regarding overtime work and pay
- Policies and procedures relating to the criteria for compensation rate and method

- Policies and procedures regarding pay due to terminating employees
- Sample summary plan descriptions and other employee communications of employee benefits plans
- Written procedures regarding employee communications relating to employee benefits plans
- Sample government reports relating to employee benefits plans

TIME OFF

KEY LEGAL CONCERNS

Legal claim based on the employer's failure to honor the requirements of the FMLA and other federal time off mandates.

Legal claim based on the employer's failure to comply with state law time off requirements.

Legal claim based on the employer's failure to correctly integrate employee rights pursuant to the ADA, FMLA, workers' compensation and the employer's short and long term disability benefits.

Claim of discrimination based on the employer's lack of consistent application of its discretionary time off policies and procedures.

Employer's inability, because of inadequate documentation, to defeat a reemployment claim, when termination of employment was the result of excessive absenteeism.

TIME OFF AUDIT CHECKLIST	COMMENTS
Is the employer subject to the FMLA?	The FMLA is a federal time off law generally applicable to employers of at least 50 employees. It is enforced by the DOL. See the DOL website.
If so, does the employer have a written policy notifying employees of their FMLA rights? If the employer has an employee handbook, is the policy in the handbook? Does the employer have the required poster?	These are required by the FMLA and detailed in its Regulations. See the DOL website. See Communications above regarding employee handbooks and updating of policies.
If required, does the employer have established policies and procedures for correct implementation of the FMLA?	See the DOL website. The DOL will aggressively enforce an employee's FMLA rights. Employers must ensure compliance with the FMLA Regulations.
If required, does the employer have procedures for ongoing FMLA compliance training for managers and supervisors?	Managers and supervisors are responsible for implementation of the FMLA. They must be trained to ensure compliance by the employer.
Do managers and supervisors understand that an employee on FMLA leave cannot be required to return to work on "light duty," even if that would be the best means of controlling workers' compensation costs.	Employees on FMLA leave may not be pressured or required to return until the leave concludes. See the DOL website.
Does the employer have a written policy to notify employees of the state parenting laws, including parental leave, time off for school conferences and sick leave availability to parents of sick children?	Written notice is not required, but it is advised to ensure clarity of employee understanding and consistent application in the workplace. Inconsistent application can trigger legal remedies and discrimination claims. See An Employer's Guide to Employee Handbooks in Minnesota (2000) and An Employer's Guide to Employment Law Issues in Minnesota (2000) .
Does the employer have written absenteeism guidelines, with procedures to ensure consistent adherence by managers and supervisors?	Employees may perceive discriminatory treatment when the right to be absent is applied inconsistently.

<p>Does the employer allow vacation leave, sick leave or PTO accrued leave? If so, are there procedures to ensure consistent application of them by managers and supervisors?</p>	<p>Employees may perceive discriminatory treatment when the right to take paid time off is applied inconsistently.</p>
<p>Does the employer have a military leave policy which complies with state and federal laws? What procedures ensure consistent application of the policy?</p>	<p>State and federal laws define military leave requirements. The Minnesota law is at Minn. Stat. § 192.26. For information on the federal law (USERRA), see the DOL website.</p>
<p>Does the employer have jury duty, witness leave and time off to vote policies which comply with state laws, and procedures to ensure consistent application?</p>	<p>See <u>An Employer's Guide to Employee Handbooks in Minnesota</u> (2000) and <u>An Employer's Guide to Employment Law Issues in Minnesota</u> (2000).</p>
<p>Does the employer allow bone marrow leave in compliance with state law?</p>	<p>See <u>An Employer's Guide to Employee Handbooks in Minnesota</u> (2000) and <u>An Employer's Guide to Employment Law Issues in Minnesota</u> (2000).</p>
<p>Does the employer allow other discretionary time off, sometimes called "personal time off"? If so, are there procedures to ensure consistency?</p>	<p>Employees may perceive discriminatory treatment when the right to take paid time off is applied inconsistently.</p>
<p>Does the employer have guidelines and resources for managers to ensure correct application and coordination of time off policies when more than one applies at once, or when they apply in sequence?</p>	<p>Overlapping application of the FMLA, ADA, workers' compensation and the employer's own absenteeism, leave of absence and disability policies can be confusing and the basis of a legal claim for each instance in which an employee is deprived of legal rights. It is critical that managers understand that overlap may occur and the consequences of mismanagement. The employer should provide training.</p>

TIME OFF DOCUMENTS TO COLLECT AND REVIEW

- The employee handbook (if any)
- FMLA policy and written procedures, if applicable
- Other time off policies
- Long and short term disability insurance policies
- Record of manager and supervisor training regarding time off policies, including overlapping obligations to employees
- Record of FMLA leave
- Recordkeeping system for all types of time off

BEHAVIOR AND PERFORMANCE MANAGEMENT

KEY LEGAL CONCERNS

Discrimination or retaliation claim resulting from employee discipline or performance correction.

Contract claim resulting from employee discipline or performance correction.

Discrimination or retaliation claim resulting from a performance evaluation.

Defamation or invasion of privacy claim resulting from employee discipline or performance correction.

Inability to defeat an employee claim because documentation is not adequate.

BEHAVIOR AND PERFORMANCE MANAGEMENT AUDIT CHECKLIST	COMMENTS
Does the employer have written policies regarding required employee behavior and the consequences of failure to comply?	These policies are necessary to achieve appropriate behavior and to ensure that performance correction is not perceived as unfair or discriminatory. They also can be helpful in defeating a reemployment claim when the basis of termination was misconduct.
Does the employer train managers and supervisors regarding employee discipline for inappropriate behavior?	Managers and supervisors need to understand the employer's policies and procedures to ensure consistency and fairness and avoid legal claims based on the perception of unfairness.
Does the employer have procedures to ensure that its written behavior and disciplinary policies are consistently followed?	Lack of consistency in applying policies which result in discipline is likely to result in legal claims based on the employee's perception of lack of fairness.
Does the employer have checks and balances, including resources for managers and supervisors, to ensure that employees are disciplined fairly? Are managers and supervisors trained to conduct fair investigations when necessary?	See above. Employees who believe they have been treated unfairly are more likely to seek a basis for a legal claim, such as discrimination.
When employees are disciplined based on inappropriate behavior, do they receive verbal and written communications and the opportunity to respond to employer complaints? Does the employer have a procedure for review of documentation of discipline before it is given to the employee?	Clear communications are less likely to be misunderstood. Written communications become permanent documentation of discipline and must be created carefully to avoid legal claims. Employees who have a realistic opportunity to respond may be able to affect the outcome of discipline and may believe they have been treated more fairly.
Is employee performance evaluated regularly, in writing and in accordance with employer policies?	Performance evaluation is critical to achieving long term employee success. Failure to perform evaluations as promised may be perceived as unfair or discriminatory treatment, especially when poor performance becomes the basis for discipline or termination. See

	Employment Records and Agreements above and Termination of Employment below.
Does the employer have written performance correction policies and procedures to ensure they are followed consistently?	Written policies are less likely to be misunderstood. When they are not followed consistently, however, they may present a basis for a claim of unfair or discriminatory treatment. See Communications above with regard to policy development.
When performance correction is required, is the employee given the opportunity to respond?	Employees who have a realistic opportunity to respond may be able to affect the outcome of the performance correction and may believe they have been treated more fairly.
In the event that an employee raises a disability issue during performance correction or a performance evaluation, is the manager or supervisor prepared to respond appropriately?	The ADA and MHRA impose obligations on employers. See Discrimination and Harassment above. Also see the EEOC website.
Do managers and supervisors know how to create and maintain adequate documentation of behavior and performance correction?	Documentation is critical to support performance correction and discipline decisions, but it may be a basis of liability unless created accurately and maintained consistently. See Employment Records and Agreements above regarding employee personnel files. Also, documentation may be useful to defeat a reemployment claim.
Are supervisors and managers trained to know how and when to create a formal performance improvement plan, with defined expectations and timeframes, and to communicate about it effectively?	A performance improvement plan can be very useful as a communication device and to document performance or behavior correction. In some cases, legal counsel should be consulted.
Does the employer have policies and procedures to protect confidential employee discipline information from inappropriate disclosure?	Disclosure should be confined to those with a "business need to know."

Does the employer have checks and balances to ensure that no employee discipline is ever based on an illegal motive?	Review of the discipline decision and supporting documentation by a third party or legal counsel is the best check against illegal discipline.
Does the employer have policies regarding retention and maintenance of discipline records?	Records of discipline should be maintained in the employee's personnel file for the period of time the file is maintained. Less formal supervision notes should be retained by the individual manager or supervisor. See Employment Records and Agreements above.

BEHAVIOR AND PERFORMANCE CORRECTION DOCUMENTS TO COLLECT AND REVIEW

- Employee behavior policies
- Employee performance correction policies
- Performance evaluation policies
- Sample performance evaluations
- Sample behavior and performance correction documentation
- Sample manager/supervisor discipline notes

TERMINATION OF EMPLOYMENT

KEY LEGAL CONCERNS

Legal claim arising from a termination of employment based on the employee's perception of unfair treatment.

Discrimination or retaliation claim arising from termination of employment.

Claim of breach of contract or violation of public policy mandate ("whistleblowing") arising from termination of employment.

Claim for unpaid wages with penalties arising from a termination of employment.

Claim of defamation arising from the termination of employment or based on the employer's failure to give a fair and factual reference to a potential new employer.

Inability of the employer to defeat a claim for reemployment benefits when the termination was based on employee misconduct.

Breach of the employer's state or federal obligations regarding post-termination notices, including insurance continuation and HIPPA.

TERMINATION OF EMPLOYMENT AUDIT CHECKLIST	COMMENTS
Is termination consistent with the employer’s policies and procedures? Has the employer published “at will” language to the workforce?	See Communications above. Consistency is important to promoting the perception of fairness and the absence of illegal discrimination.
If not consistent, is there adequate documentation of the employer’s legitimate business purpose for terminating?	In the event of a legal claim the employer will be required to demonstrate its “legitimate business purpose.” Contemporaneous documentation of discipline and termination is the best evidence.
Is the documentation of the reason for termination complete and accurate?	See above.
Has all documentation regarding the employee been reviewed before termination? Do the employee’s performance evaluations support the decision? Has a third party been consulted?	Documentation which is inconsistent with the stated reason for termination will be troublesome in the event of a legal claim. If inconsistent documentation exists, the problem should be addressed, perhaps with the assistance of legal counsel, before termination. The opinion of a third party (HR or other manager) is often helpful in assessing a decision to terminate.
Has a lesser penalty than termination been considered? If so, why was it rejected?	A lesser penalty is not always the right answer, but it may serve to maintain employment and leave the employee feeling more fairly treated. It may also be useful to defeat a legal claim.
Has the employee recently made any legally protected complaint which might qualify as “whistleblowing?” Has the employee recently sought workers’ compensation benefits? Has the employee recently made any internal or external claim of discrimination or harassment?	If so, the termination should be reconsidered. An employee who has made a legally protected complaint including, for example, “whistleblowing” or a charge of discrimination or harassment, or sought workers’ compensation benefits is protected from retaliation. Termination of employment within a short time of the complaint or workers’ compensation activity may be defined as retaliation. Legal counsel should be sought in this case.

<p>Has the employee been given any oral assurance of continued employment?</p>	<p>If so, the employee may be able to demonstrate a contract for continued employment. In this event legal counsel should be sought.</p>
<p>Is the employee likely to be surprised by the termination? If so, is the employer prepared to discuss the reason and to provide documentation of it?</p>	<p>The employer should be careful of statements made during the termination interview which might later be viewed as illegal or unfair. The interview should be carefully planned in advance.</p>
<p>Is the termination the result of a reduction in force? If so, have all of the employer's policies and procedures been followed? Is the basis for the elimination of the employee or his/her position documented? Has the employer complied with federal and state plant closing laws, if applicable?</p>	<p>The employer may be required to demonstrate the "legitimate business purpose." See the Small Business Assistance Office and DOL websites regarding state and federal plant closing laws regarding large scale layoffs.</p>
<p>Has a written document describing the reason for termination in the form most favorable to the employer been prepared to give to the employee at the termination interview?</p>	<p>The employer should not miss the opportunity to state its case in writing, in the appropriate amount of detail, and provide it to the departing employee.</p>
<p>If the termination is based upon an event, has there been a full and neutral investigation of the facts before the termination?</p>	<p>Documentation of such an investigation is part of the employer's proof of its "legitimate business purpose."</p>
<p>Does the employer have a procedure to ensure fairness and dignity when the employee leaves the workplace?</p>	<p>An employee who is humiliated, particularly in view of coworkers, at the time of termination often will seek to make a legal claim based on the termination. The manner of exit may form the basis for a claim of defamation.</p>
<p>Does the employer have a procedure to ensure that the employee is paid according to state law mandates upon termination?</p>	<p>See the DOLI website. Normally accrued and unused vacation or PTO time must be paid upon termination as if it is accrued wages. See Compensation and Benefits above.</p>

<p>If the employer has a formal severance pay policy, is the termination in compliance?</p>	<p>A standardized severance pay policy may be an employee welfare benefit plan regulated by federal law, requiring strict compliance. See Compensation and Benefits above.</p>
<p>If the employer chooses to offer severance pay on an individual basis in exchange for a release of claims, is the language of the severance document complete and legally correct, and is the release in compliance with the Older Workers Benefits Protection Act and the MHRSA?</p>	<p>See the EEOC and MHRD websites. Legal counsel should provide advice and draft the severance documents.</p>
<p>If the employer uses exit interviews, is there a procedure to follow up on information learned?</p>	<p>The employer legally is placed on notice of information learned in an exit interview. Follow-up is important. See Discrimination and Harassment above.</p>
<p>Does the employer have a procedure to ensure limited communication regarding the termination on the basis of "business need to know?"</p>	<p>Inappropriately broad communication can form the basis for a defamation claim.</p>
<p>Does the employer have procedures to ensure compliance with federal and state insurance continuation and HIPPA obligations?</p>	<p>See the DOLI and DOL websites. Penalties for noncompliance are substantial.</p>
<p>Does the employer have procedures to manage the reemployment process after the termination of employment?</p>	<p>The process requires significant responses to requests for information and decisions which may have long term consequences. A manager or supervisor should be assigned and trained.</p>
<p>Does the employer have procedures governing references for ex-employees, including identification of managers or supervisors authorized to respond to requests for references and guidelines regarding information to be disclosed?</p>	<p>Employers should carefully prepare such procedures and require adherence to prevent liability based on a claim of defamation.</p>
<p>Does the employer have record retention policies regarding documentation of termination of employment?</p>	<p>See Employment Records and Agreements above.</p>

TERMINATION OF EMPLOYMENT DOCUMENTS TO COLLECT AND REVIEW

- Termination policies and procedures
- Sample termination documentation
- Reduction in force/layoff policies and procedures
- COBRA and HIPPA policies and procedures
- Reference policies
- Sample investigation documentation
- Policies and procedures regarding pay upon termination of employment, including vacation policy
- Sample exit interviews
- Sample severance agreements

SAFETY AND HEALTH

KEY LEGAL CONCERNS

Failure to comply with state or federal safety requirements which results in penalties by the federal or state government.

“Whistleblowing” claim by an employee on the basis that s/he suffered a job detriment as the result of asserting his or her rights under the OSHA or workers’ compensation statute.

Failure to comply with state workers’ compensation requirements which results in penalties imposed by the state.

Failure to comply with the requirements of the ADA or the MHRA which results in a discrimination law claim.

SAFETY AND HEALTH AUDIT CHECKLIST	COMMENTS
Is the MNOSHA poster displayed as required?	See the DOLI MNOSHA website for the rules and to obtain a copy of the poster. The DOLI website also provides a link to the federal OSHA website.
Is the employer maintaining a log of injuries and illnesses as required?	See the DOLI MNOSHA website for the rules and to obtain a copy of the form and instructions for its use. The required log documents changed as of January, 2002. To determine whether to change your forms immediately, check the DOLI MNOSHA website.
Is the employer maintaining a safe workplace in compliance with law and providing safety equipment as required?	See the DOLI MNOSHA website for a full description of the standards and helpful employer resources, including consulting services, as well as a link to the federal OSHA website.
Is the employer in compliance with the state "Employee Right-to-Know" Act, including evaluation of the workplace, employee training, and written documentation for employees regarding hazardous substances in the workplace, and recordkeeping?	See the DOLI MNOSHA website for a full description of the requirements and helpful employer resources, including consulting services.
Is the employer in compliance with the Minnesota AWAIR act?	Minnesota employers in certain industries are required to implement written accident and injury reduction programs. See the very helpful information including forms and employer guides on the DOLI website.
Is the employer in compliance with the Minnesota Clean Indoor Air Act?	See the MDH website.
Is the employer in compliance with federal OSHA workplace regulations regarding blood borne pathogens, including HIV and AIDS?	Access the federal OSHA website through the DOLI website.

<p>Does the employer have procedures in effect to ensure that no employee who asserts his or her rights under OSHA (including filing a complaint or participating in the investigation of another complaint) suffers retaliation?</p>	<p>An employee who suffers retaliation as the result of a legally protected complaint may subject the employer to a legal claim for damages. Managers and supervisors need training.</p>
<p>Is the employer involved in an industry affected by a local or national emphasis program?</p>	<p>Local and national emphasis programs are created by OSHA to decrease work-related injuries in high-hazard industries. Affected organizations are more likely to be inspected by OSHA. See the OSHA and DOLI websites.</p>
<p>Does the employer have established procedures for responding to an OSHA inspection?</p>	<p>Employers have legal rights and OSHA has responsibilities in the event of an inspection. Legal counsel should be consulted.</p>
<p>Does the employer have workers' compensation insurance or self-insurance in compliance with Minnesota law?</p>	<p>See the DOLI website for detailed information and instructions. Failure to comply results in serious penalties.</p>
<p>Has the employer posted notice of employee workers' compensation rights as required?</p>	<p>See the DOLI website for information and access to the required poster.</p>
<p>Does the employer have an established procedure to be used in the event of a workplace injury or illness, including filing of the "First Report of Injury," the provision of required information to the injured employee and report to the insurance carrier (if any), on a timely basis?</p>	<p>Accidents and injuries must be reported within established timeframes to avoid penalties. See the DOLI website for detailed instructions and copies of the required forms.</p>
<p>Does the employer have satisfactory policies and procedures for ongoing communications with its insurance carrier regarding workers' compensation claims?</p>	<p>Employers need updated information regarding the status of claims to evaluate their options relating to the Family and Medical Leave Act ("FMLA"), ADA and continued employment, and to respond to questions from the injured employee. Employers never should assume that a claim is being managed in a satisfactory way just because it has been referred to an insurer.</p>

<p>Does the employer have an established procedure to ensure compliance with the requirements of the ADA, MHRA and FMLA when applicable in the event of a workers' compensation claim?</p>	<p>Because management of a work-related injury can be complicated, employers sometimes forget that they may also have obligations to the injured employee under the FMLA and ADA. These obligations often overlap. See the EEOC website. Also, do not hesitate to obtain advice of counsel to prevent liability under one or all of these statutes, because the overlapping obligations can be difficult to manage.</p>
<p>Do managers and supervisors understand that an employee on FMLA leave cannot be required to return to work on "light duty," even if that would be the best means of controlling workers' compensation costs.</p>	<p>See Time Off above.</p>
<p>Have supervisors and managers been trained to comply consistently with the employer's policies regarding workplace injuries and related claims? Do managers and supervisors understand that the employer can have liability for retaliation if an employee suffers a job detriment as the result of making a workers' compensation claim?</p>	<p>Consistent application of the employer's policies and procedures is only possible to the extent that all managers and supervisors understand them. Liability may result from inconsistent application and from retaliation.</p>
<p>Do managers and supervisors understand that liability based on the workers' compensation statute can result from failure to offer an open position to an injured worker when the worker is qualified and the position is physically suited?</p>	<p>See the DOLI website. A monetary penalty can result.</p>
<p>Are employee medical records filed separately from the standard personnel files as required by the ADA?</p>	<p>See the EEOC website. See Employment Records and Agreements above.</p>
<p>Does the employer have policies and procedures regarding record retention to ensure compliance with OSHA and workers' compensation requirements?</p>	<p>See the DOLI website.</p>

SAFETY AND HEALTH DOCUMENTS TO COLLECT AND REVIEW

- Sample documentation required by MNOSHA, including log of injuries and illness
- Written policies and procedures regarding compliance with MNOSHA
- Documentation required to comply with AWAIR (if any)
- Records retention policies relating to safety and health
- Policies and procedures relating to workers' compensation
- Sample copies of the "First Report of Injury"(if any)
- Written policies and procedures relating to the interaction among the FMLA, ADA and workers' compensation
- Employee medical files

REFERENCES

Federal Trade Commission

www.ftc.gov

Provides information regarding the federal requirements relating to background credit checks by employers.

Minnesota Department of Health

www.health.state.mn.us

Provides information regarding the Minnesota Clean Indoor Air Act.

Minnesota Department of Human Rights

www.humanrights.state.mn.us

Provides helpful information about the state discrimination law and affirmative action requirements, together with references and links to other resources for employers.

Minnesota Department of Human Services

www.dhs.state.mn.us

Contains the Employer's Guide to Child Support Laws, including detailed information regarding required disclosures and withholding relating to child and spousal support and medical support obligations.

Minnesota Department of Labor and Industry

www.doli.state.mn.us

Provides helpful information and numerous reference sources and links for employers relating to state wage and hours laws, state safety laws, state workers' compensation laws, and free access to required forms and the workplace posters required to be displayed by Minnesota employers.

Minnesota Department of Labor and Industry - OSHA Site

www.doli.state.mn.us/mnosha

Provides information specifically about Minnesota OSHA requirements, including rules, state consultation and other resources, and a link to the federal OSHA website, which provides special resources for small employers.

Minnesota Department of Labor and Industry - Workers' Compensation Site

www.doli.state.mn.us/workcomp

Provides information specifically about Minnesota workers' compensation requirements, including forms, timetables and benefits.

Minnesota Department of Revenue

www.taxes.state.mn.us

Contains helpful information regarding state employment taxes and business training and consultation resources.

Minnesota Small Business Office

www.dted.state.mn.us

Provides helpful information about its current resources for small employers, including access to its current publications for employers. Also, under the heading “Workforce Development,” provides guidance for compliance with the state and federal plant closing laws.

Minnesota Small Assistance Business Office, An Employer’s Guide to Employee Handbooks in Minnesota (2000).

Available at no cost from the Minnesota Small Business Assistance Office.

Minnesota Small Business Assistance Office, An Employer’s Guide to Employee Benefits in Minnesota (2000).

Available at no cost from the Minnesota Small Business Assistance Office.

Minnesota Small Business Assistance Office, An Employer’s Guide to Employment Law Issues in Minnesota (2000).

Available at no cost from the Minnesota Small Business Assistance Office.

Minnesota Department of Economic Security WorkForce Centers

www.mnwf.org

Provides a summary of the criteria which legally describes an independent contractor in Minnesota. Also describes the reemployment insurance process in detail, provides guidance specifically tailored to employers and employees, and permits application for reemployment insurance on-line.

United States Department of Justice

www.usdoj.gov

Provides helpful information and links relating to federal discrimination laws, employer obligations relating to military leave, the Department of Justice Office of Special Counsel for Immigration-Related Unfair Labor Practices, and a technical assistance manual regarding compliance with the ADA.

United States Department of Labor

www.dol.gov

Provides very helpful information for employers relating to the FMLA, the Fair Labor Standards Act, the Drug-Free Workplace Act, HIPPA, the WARN Act and other laws and regulations which this department enforces. The site contains a Small Business Handbook and access to posters required to be displayed by employers.

United States Equal Employment Opportunity Commission

www.eeoc.gov

Provides helpful information relating to the laws which the Commission enforces and its enforcement policies and procedures, including Title VII of the 1964 Civil Rights Act and its amendments, the Equal Pay Act, the Age Discrimination in Employment Act and the ADA.

United States Immigration and Naturalization Service

www.ins.gov

Contains information for employers regarding immigration law compliance, including the “Handbook for Employers - Instructions for Completing Form I-9.”

United States Internal Revenue Service

www.irs.gov

Provides a summary of the criteria which legally describes an independent contractor. Also provides copies of required forms and instructions for compliance with federal regulations regarding employee benefits. Employee benefits information is found by searching within the website for “employee benefits.”

¹ Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Ellerth v. Burlington Indus., Inc., 524 U.S. 951 (1998).

² Stabnow v. Consol. Freightways Corp. of Del., No. Civ. 99-641MJDRLE, 2000 WL 1336645 (D. Minn. Aug. 15, 2000).



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