

Delaware Employment Law Letter

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WORKPLACE ISSUES

Top 10 New Year's resolutions for Delaware employers

by Scott A. Holt

New Year's resolutions shouldn't be limited to personal aspirations. In addition to that annual pledge to eat right and exercise more, business owners and HR professionals would be wise to reflect on ways to avoid specific workplace pitfalls and improve the general tone of employer-employee relations. Whatever your resolutions, make them specific and realistic. As you know from your personal life, resolutions usually end up as empty promises, often because you're overly ambitious or vague about how you'll achieve them. To get your creative juices stirring, we've provided some possibilities.

Resolution #10

Improve your hiring to decrease your firing. It all starts with whom you hire, so invest the time and effort it takes to hire the right personnel. It's much easier to reject an unqualified applicant than to progressively discipline and eventually fire a bad apple. Read employment applications and resumes carefully before interviewing candidates so you can focus on any red flags raised in them. Gaps in employment are particularly troubling and need to be explored during the interview.

Remember, however, that the Americans with Disabilities Act (ADA) and Delaware's Handicapped Persons Employment Protections Act (HPEPA) prohibit you from being overzealous in your questioning. All questions, whether they appear on the application or are asked during the interview, must be job-related and geared toward helping you find the best-qualified person for the job.

Finally, take the time to conduct reference and background checks. If someone has left a bad enough impression in the past, you may find out about it with minimal investigative effort.

Resolution #9

Update documents. How old is your employee handbook? Do the policies in it accurately reflect your practices and recent developments in the law? And what about your job descriptions — do they accurately reflect the duties of each position? Anything that's put on paper eventually becomes outdated as practices, personnel, and legal requirements change. If your documents don't keep pace with those changes, they may become more harmful than helpful.

How, for example, are you going to win a disability dispute over the essential functions of a job if your written job description is so old that it doesn't reflect the duties you now consider essential? What are you going to do if an employee claims she's entitled to a leave benefit that was included in an outdated handbook but hasn't been allowed in years? Avoid the confusion and conflict that outdated documents can create by updating them periodically.

Resolution #8

Engage in the interactive process required by the ADA and the HPEPA. Delaware and federal law require an interactive process once an employee notifies you about a disability and requests assistance. Don't be shy in discussing the employee's needs. Both sides have an obligation to proceed in an interactive fashion to determine if a reasonable accommodation exists. A reasonable accommodation may not be possible, but by exploring all the possibilities with the employee, you demonstrate that your decision is business-related rather than discriminatory, which, we hope, will prevent any legal action.

Resolution #7

Adopt and distribute a computer/Internet use policy. A large portion of the workforce continues to take liberties like installing unauthorized software on your computers or wasting paid time surfing the Internet for personal reasons. Unmonitored and unfettered computer access will eventually lead to disastrous results, such as legal liability, disclosed trade secrets, lost productivity, or costly viruses.

To help safeguard against those problems, you must adopt, distribute, and consistently enforce a policy that restricts employees' personal and prohibited use of the Internet and your computer systems. Your policy should explain to employees that they have no expectation of privacy when using company computers.

Remember, Delaware law requires those who monitor e-mails or Internet access to notify employees in writing ahead of time. That can be done by providing an electronic notice at least once a day when they access e-mail or the Internet. You also have the option of giving each employee a one-time notice that can be acknowledged electronically.

Resolution #6

Ensure that you're in compliance with the FLSA. The U.S. Department of Labor's revised regulations changed the requirements for exemption from overtime pay under the Fair Labor Standards Act (FLSA). Employees who were exempt in the past may no longer be exempt because of changes in the salary and duties tests. If you haven't done it already, now is the time to audit your exempt positions to ensure that they remain exempt from overtime under the new regulations.

Resolution #5

Document all performance and conduct issues. Defending your disciplinary actions usually requires a solid paper trail. If, for example, you want to fire an employee for poor performance, having a record of his performance is necessary to defeat a claim that discrimination actually motivated your decision. Spotless performance evaluations and a lack of documented warnings undermine your claim that someone was a poor performer from the start. Make sure supervisors complete evaluations accurately to reflect employees' performance and take the time to document when an employee does something wrong.

Resolution #4

Train your employees. Training is one of the most — if not *the* most — important functions of an HR department. Companies that have effective harassment and discrimination training will not only prevent claims but also establish defenses that could forestall legal liability or high damage awards. Therefore, training is a cost-effective method of controlling labor and employment disputes. If you take the time to train supervisors and employees to do their jobs correctly in the first place, you won't have misunderstandings erupting into lawsuits later on.

Resolution #3

Spend time in the trenches. When was the last time you walked around the "factory floor" and chatted with your employees? Doing that on a regular basis broadens your perspective and conveys to employees a real sense of empathy. The more you show your company cares about its workers, the less likely they are to complain

at the drop of a hat. In other words, taking just a little time to be proactive may keep you from spending so much time being reactive.

Resolution #2

Be professional. Spending your time dealing with complaint after complaint about unfair treatment certainly wears on your patience. As difficult as it may be, always respond to complaints in a respectful, honest, and timely fashion. Employers often get themselves into more trouble with retaliatory reactions to a discrimination claim than they face because of the claim itself.

Your reaction to a worker's complaint is frequently more important because of your eventual legal liability than because of anything you've done up to that point. In fact, retaliation claims may follow on the heels of bogus discrimination charges. The more ludicrous the discrimination claim, the more likely some resentful supervisor may be to lash out.

And the #1 New Year's resolution is . . .

Learn from your mistakes. To err is human, and it's inevitable that mistakes will be made. When a mistake happens, work to identify why it occurred and what can be done to prevent it from recurring. If you act on this one resolution, the others will fall into place.

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