

Human Resources BRIEF



2022 New Year's Resolutions for Employers. Bring On the New Year!

• December 20, 2021 •

2021 has been a year that employers won't soon forget, regardless of how hard some may try! There has been a seemingly endless stream of COVID related regulations and ongoing court challenges to these regulations. Employers have faced supply chain shortages, labor shortages, and employee retention concerns. It is a credit to the resiliency of businesses and employees that our economy kept moving forward throughout 2021.

As the calendar rolls over into 2022, employers are presented with the opportunity to reflect and take pride in the obstacles overcome. More importantly, employers can look forward to the opportunities that lie ahead in the new year. One such forward-looking activity employers can tackle is to list and prioritize their 2022 compliance goals. This can be done in the form of business specific New Year's resolutions.

New Year's Resolutions with a Compliance Focus

Making New Year's resolutions can be a productive activity that can serve to close out the goals and achievements (and troubles) of the past year and set businesses up for the new year of meeting compliance requirements.

Defining and executing the work activities that comprise these resolutions can benefit employers in meeting their compliance requirements. An added benefit to well thought out New Years' resolutions is that it can also serve to demonstrate the many responsibilities and actions that must be completed to meet compliance requirements.

Compliance issues can go unnoticed but lead to significant issues and potential penalties. Compliance responsibilities are typically not as exciting to business leaders as pursuing more tangible business opportunities and bottom-line financial pursuits. They are, nonetheless, an essential aspect of conducting business. The compliance activities included in this bulletin are not a comprehensive list but demonstrate some areas employers may want to consider as they set their own priorities.

Job Descriptions

Maintaining accurate and thorough job descriptions is important for many reasons. Job descriptions are not an absolute legal requirement, but they serve many important purposes.

Creating accurate and up to date job descriptions is strongly advised for employers. We will look at some of the important reasons to maintain job descriptions below.

These reasons include providing clear communication of the requirements and responsibilities of the job to employees and candidates for employment. Job descriptions are also important for documenting the essential functions and physical requirements of the job for the purposes of any required Americans with Disabilities Act (ADA) accommodations. Reviewing and updating job descriptions at reasonable time intervals is important to ensure they continue to meet their intended purpose.

Reviewing the Essential Functions of Job Descriptions

A key element to any job description is a section listing the essential functions of the job. Essential functions are the primary and significant duties required to be performed in a particular job. Most employers fall under the purview of the ADA and must provide reasonable accommodations for qualified employees with disabilities.

Under the ADA employers must accommodate or change job functions that are nonessential, but not those that are essential. Under the ADA, an individual who can perform the essential job functions with or without reasonable accommodations would be deemed qualified for the position. It is important to note that employers cannot just deem every task an employee performs as essential. Job descriptions should not contain a nearly exhaustive list of duties that are labeled as essential and periodic review of job descriptions can identify this issue.

Reviewing job descriptions annually allows employers to determine if the job has significantly changed since it was created or last updated. Employers do not want to find out a job description doesn't reflect the necessary work when they are ready to recruit for an opening. This could delay the process of finding the right job candidates and adequately staffing the business.

FLSA Exemption Status

Job descriptions are also important in determining or supporting a previous determination related to an employee's Fair Labor Standards Act (FLSA) overtime exemption status. Many common elements of job descriptions can aid in determining the appropriateness of an employee's classification as an exempt or non-exempt employee.

It is important to recognize that jobs may change and evolve over time. A job that no longer aligns with the written job description to a significant degree can result in various negative impacts. These impacts can range from employee dissatisfaction to the job having an incorrect pay range. Negative results can include poor employee retention and difficulty hiring for position openings.

Self-Audit and Manage I-9s

Reviewing I-9 forms is another important activity that employers can undertake at the beginning of the year. Remember, all U.S. employers must properly complete Form I-9 for each individual they hire for employment in the United States. This includes citizens and noncitizens.

The Immigration Reform and Control Act of 1986 (IRCA) was enacted to prevent individuals who are not eligible to work in the United States from doing so. Under the act, employers must complete an I-9 form for each employee within three days of hire. Employers are required to ensure that their I-9s are properly completed and retained. Significant fines and penalties can be assessed to non-compliant employers.

Performing a self-audit can bring any issues to light and provide an opportunity to correct these issues. Ensuring an I-9 was completed for all current employees is the first priority. The next step is to make sure those I-9s that employers have on file have been fully completed. The I-9s need to meet the requirement of providing both proof of identity and proof of eligibility to work in the United States and the supporting documentation provided to demonstrate this needs to be recorded.

Finally, employers can review the I-9s for terminated employees and remove and destroy those documents that are beyond the required retention period. The rule is that employers are required to retain the I-9 forms of terminated employees for three years after the employee's date of hire or for one year following the date of termination, whichever date is later.

Pay Equity and Pay Transparency

There has been a recent legislative trend emphasizing pay equity and pay transparency. For employers to address any pay equity issues they must be able to identify and analyze them. Employers with comprehensive human resources information systems (HRIS) have easier access to robust reporting on employee pay rates. These employers can also quickly segment employees by their pay rates, specific jobs, experience levels, demographics, work location and other important factors.

While it is easier to perform pay equity reviews with comprehensive HRIS systems, every employer can and should perform pay equity analysis on their workforce. This will help ensure sound pay practices, improve employee morale, and limit potential liability.

An increasing number of states have enacted salary history bans that restrict an employer from requesting a candidate's salary history at various stages of the hiring process. Employers should make sure to know and follow these state and local laws for the jurisdictions in which they have employees.

Planning Required Training Programs

The turn of the calendar is a great time to review and plan for any required training for the year. Employers can have varying mandated training requirements depending on many factors. Those factors include the specific states employers operate in, the type of business they conduct and whether they are government contractors.

Construction businesses have different training needs than health care businesses. It is important that both comply with the employee safety training requirements placed on them. The new year is a great time to review the requirements for the business and jurisdictions an employer operates in. Employers can then plan how to complete the necessary training programs in a way that is efficient for the employees and does not, unnecessarily, interfere with business operations.

Anti-Harassment Training

A specific training that is advisable for all employers to conduct is a comprehensive harassment training program and the end of the year is a great time to plan for it to be delivered.

Technology has enabled knowledge management and learning systems that facilitate training delivery for all employees including those of employers with remote and distributed workforces. They also enable easy collection and storage of information to record which employees have completed their assigned training.

These system-based learning tools, however, are only as good as the data coming in, and there needs to be attention, oversight, and follow-up to ensure compliance. Employees who have not completed training must be reminded of their non-compliance and understand the accountability they have and the consequences of failing to complete the requirement. Managers must be aware of any non-compliance of their employees and follow up and hold them accountable.

Being able to show that harassment prevention training has been delivered to employees can be helpful if the employer is sued by an employee for workplace harassment.

Review Employee Records and Apply Records Retention Practices

The beginning of the new year can be a good time to review employment files and apply your company's record retention policy. For employers who don't have these policies it is wise to consider implementing them. Most of the regulations governing employment recordkeeping arise under federal law. It should be noted, however, that individual states and even some cities may have their own requirements related to certain employment records. It is important

that employers consider all applicable laws and make sure they are retaining records accordingly.

Keeping your employment records aligned with your recordkeeping policies and practices can improve your efficiency and protect your business from a range of negative impacts. We will explore some of those impacts in the following paragraphs.

Manage Records

Because of the sheer volume of records created throughout the employment relationship, records management policies have become increasingly important. Policies and programs around records management can reduce electronic and physical storage costs and enable appropriate records to be more easily accessed when needed. Implementing and executing on records management and records retention policies can also protect sensitive employee information. This is especially the case when hard-copy records are stored in HR and leader files.

While it is important to purge employee records that should no longer be retained under retention requirements, this activity must be undertaken with the proper level of care. Disposing of records that are no longer required to be retained by employers under their policies requires diligence. Employers should ensure appropriate destruction which often requires shredding the documents. Any document disposal equipment or service provider should be able to demonstrate that the content of shredded documents can't be reconstituted and that the correct privacy and security protocols are adhered to.

Records Related to Pending Litigation, Administrative Charges and Claims Must Be Retained Records

Notwithstanding an employer's record retention policies, an employer must retain any records related to pending claims or litigation until the matter is resolved. Destruction of documents related to litigation that should have been retained can have resulting negative legal consequences for employers.

Conclusion

Meeting the extensive compliance requirements placed on businesses can be a year-round challenge for employers. The transition into the new year presents a great opportunity to celebrate successes of the past year and refocus efforts for the new year.

As employers get ready to don their party hats, sound the noisemakers, and toast to 2022 they will be able to do so enthusiastically. They will do so because they have identified key compliance related initiatives and activities for the upcoming year. With the proper planning

in place, they will be ready to charge forward into the new year. We can all make a New Years' toast and raise our glasses to that!