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Legal Issues in the Onboarding Process

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By: Viane Lopez Braun

I. Introduction:

The process of onboarding a new employee is important for a variety of reasons. The employer wants to give new employees a good impression, make them feel welcome and engaged, and start the employment relationship off in a positive way. In most cases, the employer is also trying to convey a great deal of information, not only about its policies and procedures, but also about its organizational culture and performance expectations. At the same time, there is usually a supervisor waiting in the wings, anxious to have the new employee actually start work and be productive.

This already complex scenario is complicated by several legal issues and requirements. Some requirements, like immigration law compliance, are mandatory and demand attention from all employers. Other legal issues are not mandatory *per se*, but deserve attention as well. For example, if the employer is in a business where trade secrets are important, then processes should be in place to protect the employer's own trade secrets, and also ascertain that a new employee is not violating obligations to a prior employer.

There is a tension between the desire to keep the onboarding process positive and welcoming, and the knowledge that this is the best time to get potentially controversial documents signed. For example, depending upon their role, new employees may be asked to sign agreements containing confidentiality, non-solicitation and non-compete provisions. Employers with concerns about litigation may also choose to have employees sign arbitration agreements or jury waivers. These types of documents may be controversial, but the start of employment is the right time to get them signed. The challenge is to accomplish this without sending the wrong message or upsetting the new employee.

Finally, onboarding is the right time to start emphasizing the employer's commitment to a positive and respectful workplace culture. In light of the #MeToo movement, preventing workplace harassment and discrimination is a higher priority than ever. These issues should be specifically discussed with new employees, and then revisited as part of the employer's ongoing training programs. And of course, the employee handbook should include strong anti-harassment and anti-discrimination policies, and the new employee should acknowledge receipt of the handbook as part of the onboarding process.

Many employers use automated systems to walk new employees through the onboarding process, and for most onboarding functions, this is acceptable. It is a good idea, however, to have human resources personnel monitor the onboarding process closely and be available to answer

¹ Please note that sections IIB and IIC of this article discuss issues under Texas law; this article is intended for Texas employers and does not cover multistate considerations.

questions and concerns. For key documents, like non-compete agreements, arbitration agreements or jury waivers, the best practice is to obtain a physical signature.

In addition, there should be an in-person orientation process to introduce the organization's mission, vision and culture, and address key workplace issues such as harassment / discrimination prevention. Depending upon the amount of information that needs to be conveyed, the orientation process may extend over a period of weeks or even months.

II. Legal Issues:

A. Immigration Law Compliance:

1. Form I-9:

In the current political climate, immigration law compliance is critical. Under the Trump administration, U.S. Immigration and Customs Enforcement (ICE) is substantially increasing its enforcement capabilities. Employers should be prepared for worksite enforcement audits focusing on a review of their I-9 forms.

Completing Form I-9 is supposed to be a routine part of the onboarding process. It is interesting, then, that the U.S. Citizenship and Immigration Services (USCIS) "Handbook for Employers" is 116 pages long. The Handbook answers questions and provides photos of acceptable documents, so it is helpful, but it also shows that the I-9 process can be complicated and is not strictly routine. The Handbook can be printed or downloaded from the following URL: <https://www.uscis.gov/i-9-central/handbook-employers-m-274>.

Form I-9 must be completed within three business days of hire, so it is one of the first tasks of the onboarding process. The new employee can show eligibility to work in the U.S. by showing the employer a document or combination of documents from List A (showing identity and employment authorization, List B (showing identity) and/or List C (showing employment authorization). Employers are not required to keep copies of the supporting documents, but if they choose to do so, they must be consistent and do so for all employees. Employers can be penalized for only keeping copies of supporting documents for selected employees.

The employer may not specify which documents are required; rather, the employer must accept any document or combination of documents allowed under the Form I-9 procedures. Employers tempted to require a specific document (e.g. Form I-551, Permanent Resident card, for permanent residents), or to preferentially hire U.S. citizens, should resist the temptation since those options are unlawful.

Employers can get into trouble both for being too lax and for being too strict regarding authorization to work in the U.S. ICE has issued substantial penalties to employers who required new employees to provide a specific type of document, or who discriminated in favor of (or against) U.S. citizens in hiring.

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