

DealersEdge

Labor & Employment Law Land Mines for Car Dealers

With

Kevin B. Walker

Partner, Bressler, Amery & Ross

Moderated by

Mike Bowers

Editorial Director, DealersEdge

Presented by

DealersEdge



KEVIN B. WALKER

is a partner with the law firm of Bressler, Amery, & Ross in Florham Park, New Jersey. He concentrates his practice in employment law and benefits litigation, counseling, and policy preparation. Mr. Walker counsels clients on a myriad of employment law issues, including employee discipline, harassment, and leaves of absence. Mr. Walker has also spoken on these topics to groups of employers. Mr. Walker is active in reviewing and preparing employer handbooks and policy manuals.

A. PRE-EMPLOYMENT INQUIRIES – WHAT YOU CANNOT ASK

1. Rule of Thumb
 - a. Questions should relate to the job requirements
2. Inquiries

<p>High Risk Inquiries</p> <p>Age Related Questions –</p> <p>1) Date of birth and questions that tend to identify applicants over the age 40 if no bona fide occupational qualification is present.</p>	<p>Acceptable Inquiries</p> <p>Are you over the age of 18?</p> <p>If under 18, can you submit a work permit (after employment)?</p>
<p>Disability Related Questions –</p> <p>1) Questions about an applicant’s general health.</p> <p>2) Do you need any reasonable accommodations?</p> <p>3) Have you ever been treated for drug addiction?</p>	<p>1) Can state the physical requirements of the job and ask whether applicant can perform essential functions of position.</p> <p>2) With a known disability, whether and what type of accommodations would the applicant need?</p> <p>3) Are you currently using illegal drugs (past addiction to illegal drug or controlled substances is a covered disability under the ADA)</p>
<p>Religion Related Questions –</p> <p>1) Questions regarding an applicant’s religion unless it is a BFOQ e.g. church hiring a pastor.</p>	<p>Statements by employer of regular days, hours or shifts to be worked and whether employee can meet the requirements.</p>
<p>Gender and Marital Status Questions</p> <p>1) Are you married?</p> <p>2) How many children do you have?</p> <p>3) Do you intend to have children?</p>	

High Risk Inquiries	Acceptable Inquiries
<p>Race, National Origin and Citizenship Related Questions –</p> <p>1) Birthplace or citizenship of applicant, applicant’s parents, spouse or other relatives.</p> <p>2) How applicant acquired the ability to read, write, or speak a foreign language.</p> <p>3) Attendance or participation in schools, churches, temples or mosques generally used by persons of national origin group</p> <p>4) Questions about a person’s arrest record has a disparate impact on minorities.</p>	<p>How applicant acquired the ability to read, write, or speak a foreign language if use of language other than English is relevant to the job applied for</p>

3. Under What Theories May An Applicant/Employee Bring A Lawsuit

- a. Failure to hire
- b. Failure to promote
- c. Wrongful discharge

4. How To Avoid Problems

- a. Train those involved in the interviewing process

B. MEANINGLESS JOB CLASSIFICATIONS UNDER ERISA AND THE TAX CODE

1. Two Primary “Misclassifications”

- a. The “temporary employee”
- b. The “independent contractor”

2. Two Primary Reasons To Classify

- a. Avoid Paying Benefits

i. Courts have generally held that under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 (“ERISA”) certain “classes” of employees may be properly excluded under a welfare benefit plan such as health insurance. *Clark v. E.I. Dupont de Nemours & Co.*, 1997 WL 6958 (4th Cir. 1997); *Epright v. Environmental Resources Management, Inc.*, 81 F.3d 335 (3^d Cir. 1996). However, the exclusion must apply to the entire class and the applicable plan must clearly contain the exclusion. *Id.* Most health insurance plans contain language which limits participation to permanent employees working more than a specified number of hours per week. It is proper to deny participation to employees that do not meet the requirements specified in the plan. However, be careful of mislabeling employees. Employees who are labeled “part time” or “temporary” but are working similar hours on a long-term basis have successfully sued for benefits improperly denied them. See, e.g., *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002).

b. Avoid Tax Withholding

- i. Similarly, it is improper to label an employee as an “independent contractor” or otherwise to avoid tax withholding requirements. The IRS has audited and fined companies for this practice, even where the company reports the income on a Form 1099.
- ii. The IRS considers a number of factors in determining whether a worker has been properly classified as an “independent contractor”:
- (a) Control the employer exercises over the worker’s actual job duties, including instructions as to how to do the work, training, financial control, whether employer reimburses the worker’s business expenses, whether the worker uses his/her own equipment and where he/she works.
 - (b) Relationship between employer and worker, including 1) tax treatment; 2) whether the employer provides benefits; 3) whether the relationship has a specified term.

Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989); IRS Publication 15-A; IRS Code § 3509.

C.

EXEMPT STATUS UNDER THE FAIR LABOR STANDARD ACT

1. Why Does It Matter?

a. Significant liability if an entire class of employees is misclassified because:

i. Statute of limitations for willful violations is three years

ii. Double damages

iii. Attorney's fees and costs to the prevailing employee. 29 U.S.C. § 216(b)

2. Overtime Defined. Employees are required to be paid time and one-half for hours worked in excess of 40 per week. Actual hours worked means precisely that – if an employee takes a personal day, those hours do not count toward the 40 hour requirement. Hours must be calculated on a weekly basis, even if employees are paid bi-weekly.

a. Exemptions. Overtime and minimum wage must be paid for all “non-exempt” employees. Employees/employers who meet certain requirements may be “exempt” from the above requirements. To be exempt, an employee must be paid on a salaried basis (fixed amount per week) and fall within one of the following. The following are applicable to auto dealerships:

i. Salesmen, partsmen and mechanics employed by automobile dealerships are specifically exempt from the overtime pay provisions of the FLSA so long as the following requirements are met: (29 U.S.C. § 213(b)(10)(a); 29 C.F.R. 779.372(c))

(a) Dealership must have a regular pay period (bi-weekly, monthly). USDOL Fact Sheet # 11.

- (b) The dealership has at least \$500,000 a year in gross sales or the specific employee's work regularly involves interstate commerce. USDOL Fact Sheet #11.
 - (c) Note, however, that service managers, service writers, service advisors, or service salesmen who are not primarily engaged in the work of a salesman, partsman or mechanic are not exempt. 29 C.F.R. 779.372(c)(4).
- ii. Commissioned sales employees of retail and service establishments are also exempt from overtime under § 207(i) if more than half of the employee's earnings come from commissions and the employee averages at least one and one-half times the minimum wage for each hour worked. 29 U.S.C. §207(i).
- iii. Executive, administrative, professional and outside sales employees are exempt from both the minimum wage and overtime provisions of the FLSA. 29 U.S.C. §213(a)(1).
 - (a) Executive - Primary duty (50% of time or more) consists of managing the business in which they are employed. 29 C.F.R. § 541.1. Managing includes but is not limited to the following tasks: hiring and discharge decisions, evaluating employee performance and establishing compensation levels.
 - (b) Administrative - Office work which i) is directly related to the employer's management policies or general business operations and ii) requires the exercise of discretion and independent judgment. An administrative employee is not exempt if he/she routinely takes direction from others as to how to perform his/her job, i.e. secretarial and clerical employees are almost always non-exempt. Furthermore, the fact that an employee is salaried is not controlling.
 - (c) Professional - Customarily exercise discretion and independent judgment and their work consists of: i) advanced knowledge in a field of science or learning acquired by a long course of specialized study; or ii)

creative work in a field of artistic endeavors the result of which depends upon the invention, imagination, or talent of employee.

3. Maintenance Of Employee Wage Records For Non-Exempt Employees.

Under federal law, employers must keep records showing employees' names, hours worked, rates of pay, regular and overtime pay, home addresses, dates of birth (if under age 19, gender and occupation). Your state may have additional requirements. Most states require that time records be kept for all non-exempt employees. However, this requirement can be satisfied by a punch clock or sign in/out sheet. In the event the employer is audited, these records will be reviewed by the DOL to determine compliance with federal and state wage & hour law. It is important to note that failure to keep the required records is a separation violation of wage & hour law, and subjects the employer to significant liability, as the DOL will often assume that an employee complaining of an overtime violation, for example, is telling the truth if the employer has no records establishing otherwise. 29 C.F.R. § 516.1 - § 516.9.

D. PREVENTIVE MEASURES DESIGNED TO LIMIT WORKPLACE PROBLEMS

1. Employee Handbook

a. No legal obligation to have one

b. Why have one?

i. Can define at-will employment

ii. One area to find all important

relationship

policies

- Anti-harassment policy and employee complaint procedure
- Employee leaves of absence

- E-mail or computer policy
 - Employee disciplinary procedures
 - iii. Promotes clarity for employees
 - iv. Can be a key document if litigation arises
- c. Make sure employees acknowledge receipt of the handbook

2. Establish Important Policies

a. Nondiscrimination and Harassment Policies.

It is important for all employers, even those with few employees, to establish and enforce non-discrimination and harassment policies. Why? First, to prevent the conduct, and lawsuits. Second, to provide a defense in the event of a lawsuit by an employee who claims discrimination or harassment. The courts have held employers not liable for harassment where the employee was aware of a non-discrimination/harassment policy and failed to take advantage of a complaint procedure therein.

Even if an employer has no employee handbook, the employer should distribute a non-discrimination and harassment policy that communicates the following:

- i. The employer is committed to a workplace free of discrimination and harassment based on race, color, religion, age, gender, national origin, disability, veteran status, or any other protected category under state or federal law.
- ii. That offensive conduct or harassment based on the above characteristics will not be tolerated. Policy should provide examples of offensive conduct (e.g., offensive language, slurs).
- iii. States that any employee who engages in conduct in

violation of the policy will be disciplined up to and including termination.

- iv. Provides a complaint procedure that includes at least one alternative avenue of complaint other than the employee's supervisor (in case the supervisor is the alleged harasser), and states explicitly that employees who complain of discrimination or harassment will not be retaliated against.
- b. Leaves of Absence. These policies cover time off for employees. Employers are required to communicate to the workforce the provisions under the Family and Medical Leave Act in any handbook that describes employee's rights to leave/benefits/etc. 29 C.F.R. § 825.301.
- c. E-Mail or Computer Policy.
 - i. E-mail and other electronic media is owned by the employer and is to be used for business purposes only.
 - ii. Policy should state that employer reserves the right to view all e-mail and that there should be no reasonable expectation of privacy.
 - iii. Employees who use e-mail for non-business related purposes will be subject to discipline, including termination.
- d. Wage and Hour
 - i. Employer may revoke deductions from salary of an otherwise exempt employee for violations of written work policies.

E. DEALING WITH EMPLOYEES WHO MAY BE DISABLED OR HANDICAPPED

1. The Americans With Disabilities Act. Under the Americans with Disabilities Act ("ADA"), employers with 15 or more employees must provide reasonable accommodations to employees with disabilities unless it would cause undue hardship.

2. Defining “Disability”. Under the ADA, a “disability” is an impairment that substantially limits one or more major life activities. Examples of a major life activity include caring for ones self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 29 C.F.R. § 1630.2(i). Some state statutes have lower thresholds for disability status, however.

3. Steps In The Reasonable Accommodation Process. The ADA requires employers with 15 or more employees to provide reasonable accommodation for individuals with disabilities, unless it would cause undue hardship. 29 C.F.R. § 1330.2(o). See also Small Employers and Reasonable Accommodation, EEOC Fact Sheet (1999). A reasonable accommodation can be any change in the work environment or the way a job is performed that enables a disabled person to perform the essential functions of the job. The following are the steps in the interactive process:
 - a. An employee must advise the employer that he or she needs an accommodation related to a medical condition. However, the employee need not specifically invoke the ADA or “reasonable accommodation.” The request need not be in writing.
 - b. After receiving a request, the employer may ask for reasonable documentation regarding the disability/impairment, unless it is obvious (i.e. a person in a wheelchair unable to access certain areas in the workplace).
 - c. The employer and employee should engage in an informal discussion to clarify what the employee needs and what type of accommodation would be appropriate. This is referred to as the “interactive process.”
 - d. The employer should respond as promptly as possible to the request and provide the reasonable accommodation. However, the employer need not provide the exact accommodation requested if it reasonably determines that another alternative reasonable accommodation is effective. Moreover, the employer need not provide the accommodation if it will create an undue burden.

4. Types Of Reasonable Accommodations (29 C.F.R. §

1630.2(o)(3))

- a. Job restructuring/shift change
 - b. Unpaid leave (separate legal obligations may apply under the Family and Medical Leave Act or state law)
 - c. Modified or part-time schedule, breaks
 - d. Reassignment to a vacant position
 - e. Modification of exams, training materials or policies; provision of readers, interpreters, etc.
5. However, The Employer Need Not:
- a. Bump other employees or create a position for a disabled employee. However, the employee is required to reassign the employee to a vacant position the employee can function in, unless it causes undue hardship. The employee must be qualified for the vacant position and able to perform the primary job tasks thereof.
 - b. Eliminate a primary job responsibility.
 - c. Lower production standards.
 - d. Provide personal use items, such as prosthetic limbs, eyeglasses, wheelchair, etc.
 - e. Excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity. (see EEOC Fact Sheet).
6. Undue Hardship. Whether a requested accommodation causes an “undue hardship” is determined on a case by case basis, taking into account the following:
- a. The nature and cost of the accommodation needed
 - b. The overall financial resources of the business
 - c. The number of persons employed by the business

- d. The effect on expenses and resources of the business
- e. The impact of the accommodation on the business
- f. If cost is an issue, funding may be available from an outside source, such as a state rehabilitation agency. See 29 C.F.R. §1630.2(p).

F. HOW TO LIMIT LEGAL EXPOSURE AT THE TIME OF DISCHARGE

- 1. Take Care To Identify The Employer/Employee Relationship – At Will Employment.
 - a. Evidence of the employee relationship are typically found in offer letters, employment agreements, and written policies. These documents should confirm that the employee is employed at-will, which means that he can be discharged at any time for any (legal) reason, just as he can leave the employer at any time for any reason.
- 2. Dealing With Performance Issues
 - a. Counsel the employee
 - i. Establish a formal evaluation process
 - ii. Provide employees with timely and accurate performance appraisals
 - iii. Meet and discuss an employee's work performance
 - iv. Establish performance goals and enforce them
 - b. Consistent treatment of employees
 - i. Avoid the argument that a certain class of employees is receiving more favorable treatment
 - c. Documentation

- i. Have written performance appraisals
- ii. Have the employee acknowledge receipt and review of the appraisal

3. Investigate Complaints Promptly

a. If a complaint is made, it is the employer's obligation to investigate it promptly and take any remedial action, if necessary. Again, courts have held employers not liable for harassment when the employer responded promptly and effectively to the complaint. An investigation can be done in several ways, but it is a good idea to seek guidance on how to proceed, even if the employer decides to conduct the investigation itself. Generally speaking, an investigation should include interviewing the complaining employee and alleged violator, and any alleged or probable witnesses to the conduct. It is important to document these interviews. Furthermore, if there is any written evidence of the discrimination or harassment (i.e. e-mails, etc.), such documentation should be collected and reviewed in connection with the investigation.

b. Take Temporary, Corrective Action Pending Outcome of Investigation

While the investigation is proceeding, you should separate the complaining employee and alleged violator, where practical. If this requires physically moving an employee, move the alleged violator, not the complaining employee. Tell the alleged violator and the complaining employee not to communicate with each other while the investigation is proceeding.

c. Prompt, Remedial Action Following the Investigation

Once the investigation is complete, the employer's action should be based upon its findings. If the complaint is found to be valid, the violator should be disciplined. The severity of the discipline should be based upon the seriousness of the violation. Again, it is a good idea to communicate with counsel in this regard. If the complaint is found not to be valid, that fact should be communicated to both the complaining employee and the alleged violator, and no further action taken. Do not take adverse action against a complaining employee

whose complaint has not been determined to be valid unless the complaining employee admits that the complaint was baseless. To do so could result in a retaliation claim.

4. Discharging Employees For Cause

a. Evaluating the Conduct

- i. Review the facts to confirm that the employee's conduct warrants termination
- ii. Evaluate whether there are other employees who have received a lesser degree of discipline for identical or similar conduct

b. Document the reasons for discharge

- i. As with performance issues, it is important to document the misconduct contemporaneously with the event. If the misconduct, for example, involved insubordinate statements or conduct, the individuals involved should be instructed to prepare memoranda or e-mails detailing the incident. This evidence will be critical in the event that the employee sues the employer.

c. Ensure that company property is secure (i.e., lap tops, documents and other information)

d. Pay all monies due under any applicable policies (e.g. vacation pay)

e. Have a witness attend the termination meeting . Keep the meeting short and treat the employee with respect

5. Terminations Not For Cause/Layoffs

a. Process Establish neutral criteria to determine those employees who will be subject to termination;

b. Disparate Impact Analysis – Evaluate demographics of employees to be terminated, i.e. age, race, disabled etc.;

- c. WARN – If more than 50 employees are terminated, the layoff may trigger the obligations under the federal WARN Act, 29 U.S.C. § 2101 et seq. Seek advice of counsel

- d. Releases. Consider some form of severance that will support a separation agreement. A release agreement must contain specific language depending upon 1) the circumstances of the termination (RIF, etc.); 2) the employees age and 3) the employee's level of access to confidential information or company property. It is important not to use a "canned" form release, but rather to consult an attorney to have a release +drafted for each termination.