Business law basics for HR: 8 things every HR professional needs to know

Business law isn't just for lawyers, HR professionals also need to know the basics. Human Resource professionals navigate an increasingly complex business and legal environment. One misstep can mean entangling your organization in a web of regulatory red-tape and litigation. But a good grounding in business law can prevent or ameliorate most problems. From the Constitution to contracts and employment law, here are some top do's and don'ts.

The constitutional basics of business law

We are a nation of laws and every organization — whether for-profit, non-profit or governmental — must follow those laws. Laws flow from our founding documents — first and foremost the U.S. Constitution. Here are some of the Constitutional protections and provisions that apply to businesses.

- **Commerce clause.** Article I, Section 8, Clause 3 gives Congress the "power to regulate Commerce with foreign Nations, and among the several States…" It is that power that allows Congress to pass laws outlawing discrimination in employment, for example. Title VII (The Civil Rights Act) was passed under the Commerce Clause. So was the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA).
- **Fifth Amendment.** Among the provisions that apply to employers are that no person may be "deprived of life, liberty of property, without due process of law." Because the U.S. Supreme Court has found that the definition of "person" includes corporations, those protections apply to businesses too. The

amendment is the basis, for example, for a public employee to require “some sort of a hearing” before being fired. It is also the basis for an employer’s right to run its business without fear government will shut it down without compensation and due process.
- **Fourteenth Amendment.** The Constitution also guarantees the right to freedom of contract. It upholds the common law rights of individuals and organizations to enter freely into contracts, subject to legislative restrictions passed under other sections of the Constitution. This includes the right to enter into an employment contract. The most common form is the at-will employment contract.

Basic federal employment laws

Based largely on the Commerce Clause, Congress has passed expansive federal laws regulating how employers may operate. These include dozens of employment discrimination and wage and hour laws. Congress has also delegated to various federal agencies' enforcement authority. These agencies in turn can create regulations that have the full force of laws. As long as regulations are consistent with the laws upon which they are based, they are binding.

Some federal employment laws passed under the Commerce Clause that can impact business law and HR include:

- Fair Labor Standards Act, which sets the federal minimum wage and overtime rules.
- National Labor Relations Act, which sets the rules for unionization and protects the right of workers to agitate for better conditions.
- Civil Rights Act of 1964, which bars employment discrimination based on race, religion, color, sex, and national origin.
- Americans with Disabilities Act, which bars discrimination based on disability.
- Pregnancy Discrimination Act, which bars pregnancy discrimination.
- Equal Pay Act, which requires equal pay for equal work.
- Family and Medical Leave Act, which provides job-protected unpaid leave.
- Genetic Information Nondiscrimination Act, which bars discrimination based on genetic information.
- Uniformed Services Employment and Reemployment Rights Act (USERRA), which bars discrimination based on military service.
- Age Discrimination in Employment Act, which bars age discrimination.

Which agencies’ regulations apply to HR

Three key federal administrative agencies impact human resource management.

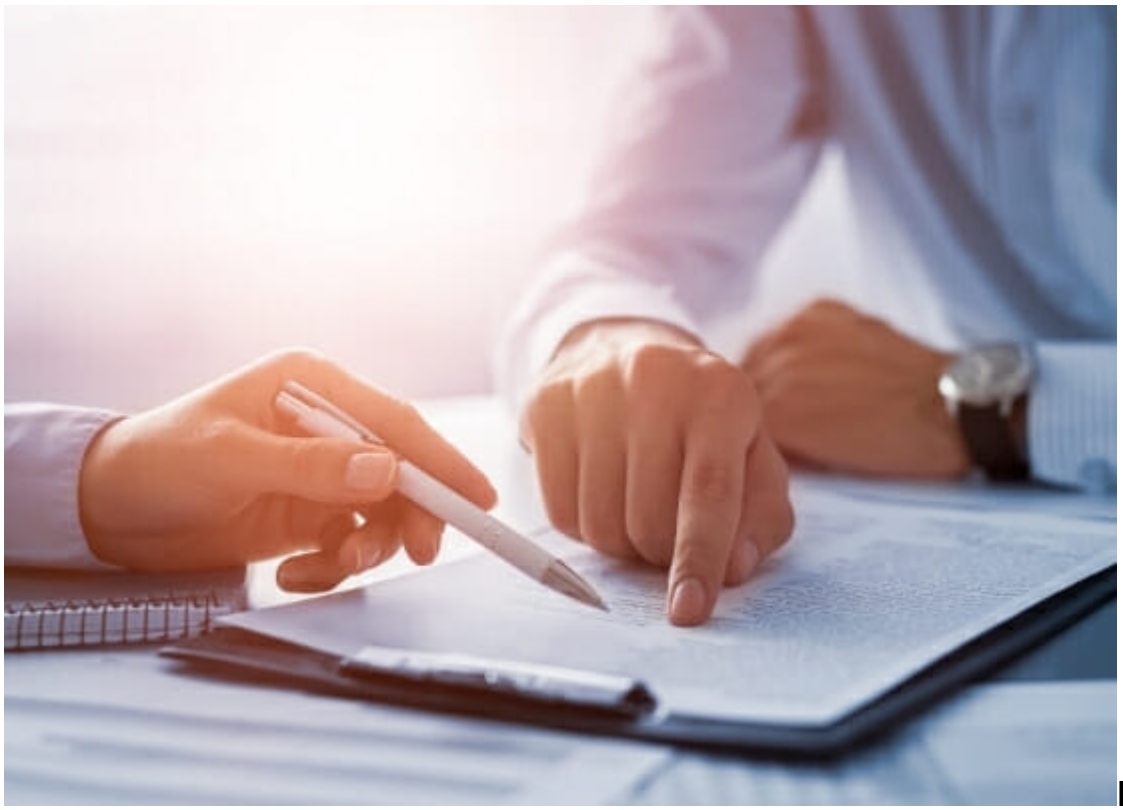
- The U.S. Department of Labor (DOL).
- The Equal Employment Opportunity Commission (EEOC).
- The National Labor Relations Board (NLRB).

Each of these agencies is responsible for enforcing one or more federal employment laws. Each also has authority under those laws to issue regulations as well as other guidance. These agencies issue regulations through a long process that includes seeking input, putting proposed regulations out for comment, and then issuing final regulations. The process may take from a few months to a year or more.

In addition to regulations, the agencies provide other HR and business law guidance. For example, DOL regularly publishes opinion letters answering questions it has received. Those opinion letters provide employers and workers with the DOL’s view of a law or regulation. Recently, the EEOC announced it would begin issuing opinion letters too.

Both the EEOC and DOL also publish frequently asked questions (FAQs) to help employers facing tricky

questions.



How contracts form

Each state has its own contracting laws, though almost all are based on common law contract basics. There are four elements to a basic contract; agreement, consideration, legality, and capacity. All four elements must be present to establish a valid, enforceable contract.

A contract is formed when:

- One party makes an offer and the second party accepts that offer. This forms an agreement.
- For there to be an agreement, there must also be an exchange of "consideration." This often involves exchanging money for a service or product. But it may also be a promise for a promise. The exchange must always be something of value. When, for example, an employer hires a worker to perform a job, both parties make an exchange. In this example, the worker promises to trade her time and labor in exchange for wages and perhaps benefits.
- The subject matter of the contract must also be legal. There can be no valid contract, for example, for the delivery of heroin in exchange for cash. Nor can a worker and an employer agree that the worker's wages will be less than minimum wage.
- Finally, all parties to the contract must have the capacity to enter into a contract. For example, a child of ten could not enter into a contract to work for an employer. He does not have the legal capacity to do so.

Preserving at-will employment status

In the United States, the default employer/worker relationship is at-will. At-will is the presumed relationship between the employer and the worker. In at-will employment either party can end the arrangement at any time. The worker is free to quit. The employer is free to stop offering work. Neither needs a reason for walking away. However, the employer cannot end the agreement for an illegal reason. For example, the employer could not fire the worker because she's pregnant. It could, however, dismiss the worker because there's no work or even because the worker wore an orange shirt today.

Employers have to make sure that at-will status isn't accidentally changed. Do this by reminding workers that

employment with your organization is governed by at-will status.

Reminders can come in the form of:

- Disclaimers in the employee handbook. Have each employee sign the disclaimer.
- Training for managers and supervisors. Remind them that they are *not* authorized to offer other terms of employment.
- A strong at-will statement prominently displayed that makes clear only the CEO or owner can agree to another status.

Understand non-disclosure or non-compete agreements

Sometimes, an employer might want to bind an employee to terms during and after employment. This is common for many high-level positions, especially where the employee will have access to proprietary information. These may include trade secrets, customer lists, secret formulas, or other important business assets that give the employer a competitive edge. To bind the employee, the employer must create something other than an at-will contract. Typically, non-disclosure agreements will include terms both parties have to follow to terminate the contract. It may include penalties for early termination or penalties for breaching secrecy.

Employment contracts may also include a non-compete clause. This prevents the employee from going to a competitor or entering into competition with the employer. These agreements are frequently regulated at the state level. Some states allow expansive non-compete terms. Others are more restrictive. For example, the District of Columbia just passed a strict law limiting non-compete contract terms. When it goes into effect, it will prohibit all DC employers from requiring or requesting employees to sign any agreement containing a non-compete provision.

Remember arbitration agreements are contracts

Some employers want to avoid the time, risk, and expense of litigating employment disputes in state or federal courts. One way to do so is with an arbitration agreement. By agreeing ahead of time to let a neutral arbitrator handle disputes, complaints can quickly be resolved out of court.

Arbitration agreements are contracts and must meet the basic contract formation rules outlined above. Most are offered through several national arbitration associations and include standard language. Before implementing one, though, have your counsel review the terms. You must also keep the agreement separate from your employee handbook. That’s because you don’t want the handbook to create a contract. Under current business law, that would prevent your organization from making changes to it as you see fit.

Severance agreements have special rules

Sometimes, you may want to end the employment relationship on good terms. One way is with a severance agreement that pays the employee at least a token amount at departure. Employers typically condition receiving the extra payment on a promise not to sue. The severance agreement then becomes a contract banning a subsequent lawsuit. If you merely make the payment without the promise, the employee can still sue.

For some employees, a release in exchange for a severance payment must follow strict rules. For example, for those employees over age 40, you must comply with the Older Workers’ Benefit Protection Act (OWBPA). This federal law gives workers time to consult counsel and review the offer before accepting or rejecting it. Get your counsel to approve the language.

Additional Resource: Employee handbooks should be a valuable tool, not a legal liability. Consider updating

your handbook with recommended sample language to keep you out of legal trouble.

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