

**LEGAL CONSIDERATIONS FOR  
RECRUITING, RETAINING AND COMPLYING**

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**By**

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**I. RECRUITING.**

**A. CAN-SPAM Act of 2003**

The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. Sections 770-713, restricts the mass broadcast of unsolicited e-mail messages, requires that such messages used for marketing purposes be labeled as advertising, prohibits the use of false or misleading information in such messages, and requires that recipients be permitted to opt out of the receipt of unsolicited e-mail messages.

An employer who broadcasts e-mail messages to recruit may violate this statute if the prospect's current employer has posted terms of use of its computer system which prohibit unsolicited e-mail messages. Also, the failure to identify the sender, label the solicitation as an advertisement, or provide the recipient with information as to how he can opt out of receiving future solicitations can also be violations of the act. See The Dangers of E-Mail Recruiting, Theodore A. Olsen, *The Labor Lawyer*, Fall 2007.

**B. Ohio CAN-SPAM Act.**

Ohio has a statute that is very much like the federal law. This would apply to employers who do not recruit outside of Ohio. See Ohio Revised Code Section 2307.64.

**C. Background Checks.**

Employers who have outside firms conduct background checks on applicants must comply with the Fair Credit Reporting Act, 15 U.S.C. Sections 1681 *et. seq.* This law restricts the use of such information to employment related purposes, requires that background reports be treated as confidential, and requires that disposal of such reports be done in a manner to assure that unauthorized parties cannot obtain them.

**II. RETAINING.**

**A. Rewarding Merit.**

Employers want to cultivate and encourage those employees who are the best performers. Discrimination, however, is a comparative claim. That is, the person who claims discrimination compares himself or herself to someone else who has been treated differently. How does an employer reward and retain the best performers while avoiding claims of discrimination?

1. *Explicit performance standards.*
2. *Documented appraisal of job performance.*
3. *Documented counseling and discipline regarding poor performance or behavior.*
4. *Consistent treatment of similar performers.*
5. *Current policies, currently communicated.*

**B. Leave Policies and Flexible Schedules.**

The EEOC issued an enforcement guidance document in May, 2007 addressing discrimination against caregivers. Among the issues identified in the document was lack of flexibility in dealing with work/family conflicts. The guidance also notes that many women who have families encounter the “maternal wall” when they attempt to advance in their careers.

Laws governing leave include the Family and Medical Leave Act, the Pregnancy Discrimination Act, and Ohio Civil Rights Commission regulations which require that an employer give pregnant employees “reasonable” time off for pregnancy and childbirth. The FMLA was recently amended to address the needs of employees who have family members in the military and who must take time off for the transition of family members to and from active duty, and for the care of family members injured while on active duty.

Retention of employees who need time to care for themselves and their families requires:

1. *Express, current policies addressing leave.*
2. *Willingness to accommodate special needs through flexible work hours and telecommuting.*
3. *Proactive efforts to identify the reasons for time off, and an inclusive, interactive process leading to agreement.*

### **III. COMPLYING.**

#### **A. “You Can Pay Me Now, or You Can Pay Me Later,” The Importance of Getting Help.**

Litigation is the black hole of legal practice. If you are the subject of an employment claim, you will spend large sums of money and resources, and will suffer great stress. Getting regular, competent advice from an experienced human resource professional or employment attorney is, in the long run, much less expensive than suffering through a lawsuit.

#### **B. Current Policies.**

Every month, the laws governing the employment relationship change in some way. While not every change will affect every employer, it is prudent for an employer to have a professionally prepared employment policy handbook, and to update the handbook once each year.

#### **C. Best Practices and Training.**

Some employment laws are counterintuitive. Some are very complex. There is a constant need to undergo training to identify new requirements and to implement best practices.

**D. Institutional Memory.**

Consistent treatment is one means to avoid allegations of discrimination. Because most employers experience turnover, it is difficult to maintain institutional memory. Documentation of employment practices not only aids the employer in justifying specific decisions, it adds to the institutional memory in a manner that allows current managers to retrieve information about how similar situations were handled in the past.