

Self-Audits Of Employment Practices

by: [John C. Cashen](#)

A. Introduction

With the complexity of statutes and regulations affecting the workplace, every employer can benefit from a periodic examination of its employment practices. An internal self-audit is a prudent way to measure compliance with federal and state laws. Noncompliance which is discovered internally, prior to investigation by a governmental agency such as the Equal Opportunity Commission or the Department of Labor and before complaints or lawsuits by employees, can be more readily corrected, often without additional costs, penalties or adverse publicity.

B. Who Should Conduct The Audit?

A team concept is the best approach to self-audits. While the head personnel official of the workplace, e.g., the human resource manager or office administrator, can serve as the leader of the audit, the assistance of an attorney, either from the in-house legal department or outside counsel, is usually required. Staff members participating in the audit must be dedicated to the importance and confidentiality of the task. Finally, the support of senior management is essential.

C. Audit Areas

The scope of the audit should be determined at the outset. An employment audit can be very specific, e.g., whether the required documents for the hiring process are completed as a regular practice, or very broad, including functions such as a statistical review of the composition of the employer's workforce or the hiring or promotional rates for minorities or by age categories. The following outline suggests areas for examination in a basic self-audit.

1. Pre-Employment Inquiries

Federal and Michigan law prohibit not only employment discrimination but also inquiries, whether verbal or by a document, on a pre-hire basis into certain areas. The prohibited questions are those which will naturally produce information regarding an applicant's race, color, religion, national origin, sex, age, height, weight, marital status or disability. The self-audit team should review all applications and interview outlines to ensure that applicants are not asked prohibited questions. See the "Pre-Employment Inquiry Guide" published by the Michigan Department of Civil Rights.

2. Employment Application

Of critical importance is that all applicants be required to complete a standardized written application form even if they have submitted resumes. Generally advisable as well is to have current employees complete updated employment applications when applying for a new position. The audit team should review the content of the employment application to ascertain whether it contains any prohibited pre-employment inquiries. The questions on the application should be checked for job relatedness. The only permissible question concerning disability is whether the applicant can, with or without reasonable accommodations, perform the essential duties of the job. The application should also include the following: an equal employment opportunity statement; an acknowledgment that if the applicant is hired, the employment will be "at-will;" a release for information from third parties (such as former employers and schools); a release for all required medical exams, drug and alcohol testing; a statement that incomplete, misleading or false information is cause for disqualification or dismissal; a limitation on litigation rights, such as establishing

Article: Self Audits of Employment Practices

information is cause for disqualification or dismissal, a limitation on litigation rights, such as establishing the maximum time in which an applicant may file a lawsuit (which, if reasonable, e.g., one year, is enforceable under Michigan law).

3. Interviews

It is important that interviews for job openings be structured, so that each candidate is asked the same questions. This permits more accurate comparisons, ratings and rankings. The employment audit should determine whether (a) interviewers use a prepared set of questions, with all candidates asked the same questions, (b) some open-ended questions are asked to provide the candidate with an opportunity to talk about relevant education or experience, (c) interviewers avoid statements that might be construed as promising job security or just cause employment, (d) interviewers promptly record (during or after each interview) the applicant's responses and a general evaluation of the applicant's qualifications for the job, being as specific and objective as possible, (e) the questions are job-related, (f) the questions are not discriminatory or overly intrusive, (g) the candidate understands the job duties and (h) the candidate is asked about restrictions from previous employers (in some businesses it is common practice for employees to sign restrictive agreements that limit the type of employment they may accept after leaving that employer).

4. Post-Offer Medical Exams

The employer should review its policies and practices to determine if it is properly utilizing pre-employment physicals. An employer may require a medical examination only after it makes an employment offer to a job applicant and prior to the commencement of employment duties. An offer of employment may be conditioned on the results of the examination only if all employees entering in the same job category are requested to undergo an examination regardless of disability and, with limited exceptions, the information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and treated confidentially. In addition, the audit should confirm that the physician performing the physical has been notified of the job duties for the position sought by the candidate.

5. Reference Checks

The audit should ensure that all personal, employment and education references are contacted once an applicant has become one of the final candidates for a position.

6. Anti-Harassment and Discrimination Policies

An employer can protect itself against claims of harassment and discrimination by adopting and properly enforcing policies against discrimination and harassment. Every employer should adopt a policy statement or handbook provision stating that it is an equal opportunity employer and that employment decisions are made without regard to the candidate's age, race, sex, etc. All employers should likewise adopt an anti-harassment policy which, at a minimum, defines sexual and other harassment and provides examples, states that the employer will not tolerate harassment, sets forth a complaint procedure, assures that complaints will be investigated and remedial action taken if appropriate and explains protection against reprisal or retaliation. Finally, the audit should determine whether there is a training mechanism in place so that supervisors are taught to respond appropriately to complaints of discrimination and harassment and to requests for accommodation.

7. Wage and Hour Issues

The federal Fair Labor Standards Act requires that non-exempt employees be paid overtime for all hours worked in excess of forty (40) hours per week. The audit should review whether employees are properly categorized as exempt or non-exempt and that overtime is being authorized in advance, recorded and paid.

The audit should also ensure that the employer has a time keeping system which accurately records time worked for all non-exempt employees.

8. Employee Handbook and Other Policies

Article: Self Audits of Employment Practices

Employers should have an employee handbook which compiles basic policies for distribution to employees. The handbook and other policies should be reviewed as part of the audit to ensure that they are up to date. The handbook should contain an at-will statement with a provision that the relationship can only be modified by an express written agreement between the employee and the head official of the employer.

An employee's claim to privacy regarding messages sent or received via e-mail, the Internet, voice mail or fax can be defeated if an employer has a clear written technology policy. The policy should (a) state that such messages sent and received by employees are not private messages, (b) require that such communications be sent only for legitimate business reasons, (c) state that the employer can monitor and review all such communications and (d) state that inappropriate messages, *i.e.*, disparaging, off-color, abusive, potentially embarrassing or damaging remarks, are prohibited.

9. Personnel Forms and Required Posters

Employers should use an audit to determine that supervisors and employees are using forms correctly and consistently. There should also be a practice of periodically reviewing personnel files to make certain that the files contain all necessary documents and that the information is complete and accurate, including signed and dated records where appropriate. At a minimum, personnel files should contain: (a) job application, (b) attendance records, (c) performance reviews, (d) records of warnings, discipline and counseling services, (e) records of commendation, (f) records of jobs held with references to job descriptions, compensation, etc. and (g) transcripts of training and education.

Records to maintain separately from the employee's personnel file are (a) FMLA forms and other documents which reveal medical information, (b) workers' compensation documents, (c) Americans with Disabilities Act materials, such as documentation of medical conditions or accommodations and (d) I-9 forms and related documents.

An audit should ascertain if the required employment posters are displayed. The posters must be posted in an area routinely accessible to employees. In addition, three posters - the federal Equal Employment Opportunity Commission poster (if there are 15 or more employees), the Michigan Elliot-Larsen Civil Rights Act poster and the Federal Employee Polygraph Protection Act notice - must be displayed in an area accessible to applicants as well as employees. Copies of the posters may be used, rather than originals, so long as the copies are at least 8½ by 11 inches and legible. The required posters, in addition to the above three, are: (a) Federal Minimum Wage poster, (b) Michigan Minimum Wage poster, (c) Michigan Whistleblowers Protection Act poster, (d) Michigan Employment Security notice, (e) Michigan OSHA poster, (f) Michigan Department of Labor Employment Standards poster, (g) Michigan Department of Labor Overtime Compensation Rules, (h) Michigan Employment of Minors notice and (i) Family and Medical Leave Act poster (if the employer has 50 employees in 20 work weeks in the current or preceding calendar year).

D. Conclusion

A self-audit of employment practices can be an effective preventative and updating measure. The audit promotes the detection and resolution at an early stage of issues which may become much larger problems as time passes and a wider range of employees are affected.

John C. Cashen is a partner at Bodman, Longley & Dahling LLP specializing in employment and labor law and employment litigation. This article draws on seminar materials prepared by one of his partners, Kathleen A. Lieder.

(This article originally appeared in the Spring 2000 issue of The Agenda, the newsletter of the Metropolitan Detroit Chapter of the Association of Legal Administrators.)

