What Small Business Owners Should Know About Employment Law

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The ability to identify and manage HRM problems in small businesses is a key area in which small firms can gain competitive advantage. For this paper, a Small Business (SBO) will refer to those companies with 15 or less employees. The authors present five important legal topics that should assist SBOs in meeting some of the most critical employment law regulations. A brief overview of these areas includes: Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, Equal Employment Opportunity Commission, Equal Pay Act of 1963, and Americans with Disabilities Act of 1990.

The American Dream -- the Pot of Gold at the end of the rainbow. It means something different to everyone. To some it is the reality of owning their own business. Unfortunately, some of those dreams turn into nightmares due to negligence in preparing for the many obligations associated with business ownership. All too often, small business owners are so concerned with making a profit and keeping the doors open that they fail to address those things that can bring disasters that often close the doors on their American Dream.

As with any business, regardless of its size, the most important asset of the company is its people, and that is also the most challenging asset to manage. Ambitious small business owners may think that it cannot be that hard to manage the day-to-day affairs of 15 or 20 employees. For the most part, they would be right. However, on any given day, those few employees can be more challenging for the owner than hundreds of employees may be in a larger company. The reality is not the number of employees, but the complex dynamics of the situations and problems that can occur. This is where the Human Resource Management Discipline (HRM) comes into play.

HRM problems have been an area of interest in entrepreneurship research for at least 20 years. The inability to identify and manage HRM problems in a small to mid-sized firm is a common cause of failure, and conversely the ability to perceive and overcome HRM problems is a key area in which small firms can gain competitive advantage (Barney, 1995; Hornsby & Kuratko, 1990). Research indicates that small business owners are not likely to focus on administrative issues, such as HRM, unless they perceive such issues to be at a critical level of importance to the firm (Cooper, Ramachandran,& Schooman,1997). These owners and managers are frequently time starved and, as a result, are unlikely to perceive or may even ignore minor issues. Thus, HRM problems are unlikely to be in the forefront of the owner's mind until they reach an acute level (1997). Lack of time to attend to details along with a lack of infrastructure can quickly bring legal problems to the small business owner (SBO). Even so, it is important for the SBO to be very knowledgeable of the laws and statutes that relate to its business creation, operation and

management, as well as other current employment trends and issues. The HRM function presents both opportunities and challenges for the SBO. The legal relationship between employer and employee is the core of the working relationship, regardless of the number of employees.

Historically, Congress has generally sought to exempt *small businesses* from federal regulation in the area of employment law. This usually means the employer has fewer than 15 employees. However, some federal statutes define thresholds at 20, 50, or 100 employees, and some federal thresholds start at one employee. “Typically, state statutes ratchet down the numbers even lower than their federal counterparts- often to just one employee" (Bryant, 2010). Local, state and federal requirements may differ according to location. For this paper, a *Small Business* will refer to those companies with 15 or less employees. The authors present five important legal topics that should assist SBOs in meeting some of the most critical employment law regulations.

IMPORTANT EMPLOYMENT LAWS AND REGULATIONS

A brief overview of five employment law areas important to every SBO follows. The key to success in all five of these areas is documentation. All important business transactions must be in writing. "Documentation, when prepared carefully, confidentially and according to company policies, is the backbone of human resources" (Mayhew, 2011). In general, if it is not written down, it did not happen.

1. FLSA - Fair Labor Standards Act. This act was passed in 1938 and establishes the minimum wage, overtime pay, recordkeeping, and youth employment regulations that affect full-time and part-time employees in the private sector, as well as federal, state, and local governments. This act also covers nonexempt employees. Nonexempt employees are defined as those employees who are subject to overtime and time-keeping requirements. This means that employees have to keep track of the hours they work in a week. They must be paid overtime for any hours worked over 40 in a given work week, unless there are differing state regulated daily overtime requirements. The rate of overtime pay for any hours worked over 40 in a workweek must be at least one and one-half times their regular pay rate. Pay due to an employee who is covered under FLSA is due on the regular payday of the pay period. Any deductions made to an employee’s pay for items such as cash shortages, required uniforms, tools, etc., are not legal and cannot be deducted if the deduction causes the employee's wages or overtime rate to fall below the minimum wage rate. Some employment practices are not regulated by the FLSA. The act does not require employers to provide vacation days, holidays, or premium pay for working on weekends or holidays. Employers do not have to provide sick pay when an employee is out sick nor do they have to pay for meal or rest periods. The act does not stipulate that an employer has to give pay raises or provide fringe benefits. Under the act, employers do not have to provide severance pay to discharged employees. In addition, an employer does not have to issue a discharge notice or give a reason for discharge, and they are not required to give discharged employees immediate payment of their final wages.

Making a determination as to who is covered under the FLSA is relatively simple. All employees working for a company that engages in interstate commerce, or produces goods for interstate commerce, fall under the FLSA. If the new business is one in which employees will receive tips, the tips can be considered part of their wages provided the employee is paid at least $2.13 an hour in straight wages. However, if this is your plan, employees must be informed that their tips will be included as part of their pay. Employers must be able to show that employees received at least minimum wage. If combined tips and wage do not equal at least minimum wage, the employer will have to make up the difference. "Some employees are exempt from the overtime pay provisions or both the minimum wage and overtime pay provisions. Because exemptions are generally narrowly defined under FLSA, an employer should carefully check the exact terms and conditions for each. Detailed information is available from the local Wage-Hour Offices" (SHRM, 2008)

The FLSA requires that employers keep records of time worked and wages. A time clock is not required, but accurate time information must be captured and retained. There are no set rules as to how

records should be kept. The following records must be kept for employees subject to the minimum wage provisions or both the minimum wage and overtime pay provisions:

- personal information, including employee's name, home address, occupation, sex and birth date if under 19 years of age
- hour and day when workweek begins
- total hours worked each workday and each workweek
- total daily or weekly straight-time earnings
- regular hourly pay rate for any week when overtime is worked
- total overtime pay for the workweek
- deductions from or additions to wages
- total wages paid each pay period
- date of payment and pay period covered
  (SHRM, 2008).

Accurate record keeping is a must in any business but especially in the small business environment. Failure to accurately record employees' time can result in miscalculation of overtime pay. Left unabated, these inaccuracies can result in employee law suits, and budget busting fines by the U.S. Department of Labor. After an approved amendment in 2008, the maximum civil penalties for FLSA violations were increased to $1,100 per violation. "The top 10 private settlements for wage and hour class-action lawsuits totaled $252.7 million last year, according to Seyfarth Shaw's *Annual Workplace Class Action Litigation Report*. The report notes that the volume of wage and hour-related litigation has grown exponentially during the past several years, and the data suggest that employees and their attorneys are bypassing DOL and pursuing private lawsuits more frequently" (Arnold, 2009).

2. Title VII of the Civil Rights Act of 1964. This act applies to all employers with 15 or more employees including federal, state and local governments, employment agencies, and labor organizations. It protects against employment discrimination which is based on sex, race, color, religion, or national origin. Equal employment opportunities cannot be denied to an individual based on any of these characteristics. It also protects individuals based on these characteristics regarding wages and benefits, recruiting, hiring, promotion, transfer, performance measurements, job training, discipline and discharge. "Examples of potentially unlawful practices include: (1) soliciting applications only from sources in which all or most potential workers are of the same race or color; (2) requiring applicants to have a certain educational background that is not important for job performance or business needs; (3) testing applicants for knowledge, skills or abilities that are not important for job performance or business needs" (SHRM, 2011). When asking for information pertaining to these characteristics, there should be a legitimate occupational qualification or business need for the information, and it should be collected on all individuals involved. If information is needed for affirmative action reasons, it is best to have employees fill out a separate form from the employment application to address this need.

Title VII is an all-encompassing act. It affects almost all areas of employee relations including hiring, firing, promotions, harassment, training, wages, and benefits. The act should not be taken lightly due to the legal implications it can bring upon a business. Title VII covers all types of harassment and hostile work environment situations. This includes the total prohibition of offensive behavior, derogatory comments, or physical conduct based on an individual's race/color. The conduct has to be unwelcome and offensive to the employee. Both the employee and the employer have a responsibility when it comes to this type of behavior. The employer is responsible for taking appropriate action to see to it that the behavior does not happen and, if it does, it is investigated and then followed by appropriate action to correct the problem. The employee is responsible for reporting any type of harassment when it occurs to prevent it from continuing.

One of the most notable Title VII cases involving harassment in the workplace is no doubt the Clarence Thomas Supreme Court confirmation hearing. The hearing took a dramatic and historical turn

when Anita Hill came forward with accusations that Clarence Thomas had sexually harassed her during the time that she had worked for Thomas at the EEOC. She alleged that she had been harassed by Thomas with inappropriate discussions of sexual acts and pornographic films after she had turned down his advances and requests for dates.

This case eventually turned into a verbal exchange of he said, she said, but it had far reaching effects on the employment environment within the United States. Prior to this confirmation hearing, sexual harassment was a topic that was very seldom if ever openly discussed in the business community. These hearings produced a nationwide heightened awareness of sexual harassment and its potential liability in the workplace. Now all prudent businesses, regardless of their size, should exercise extreme diligence when it comes to sexual harassment and make sure appropriate policies and training are in place for all employees. Based on filings with the EEOC, sexual harassment claims have more than doubled and awards have quadrupled to more than $27.8 million since this landmark case.

3. Equal Employment Opportunity Commission – EEOC. The U.S. Equal Employment Opportunity Commission (EEOC) is an independent federal law enforcement agency created by the Civil Rights Act of 1964 which went into effect on July 2, 1965. It was created to oversee a number of Federal Acts including Title VII that makes it illegal to discriminate against a job applicant based on race, color, religion, sex, or national origin. Most of the laws that the EEOC oversees relate to employers with 15 or more employees with the exception of the Age Discrimination in Employment Act (ADEA), which applies to employers with 20 employees or more. The EEOC has authority over Title VII, The Pregnancy Discrimination Act, The Equal Pay Act of 1963, The Age Discrimination in Employment Act of 1967, Title 1 of the American with Disabilities Act of 1990, Sections 102 and 103 of the Civil Rights Act of 1991, Sections 501 and 505 of the Rehabilitation Act of 1973, and The Genetic Information Nondiscrimination Act of 2008. The EEOC has the authority to investigate any allegations of discrimination and then to issue their findings. They will work with the employee and the employer to try and settle the charge, but if a settlement cannot be reached they have the authority to file a lawsuit on behalf of the employee.

The EEOC is one of the areas with which new SBOs should familiarize themselves extensively. Even the best of Human Resource Departments with airtight policies and procedures at some point in time will have to deal with the EEOC. It can be both an intimidating and expensive process for a business. Documentation is the greatest ally when it comes to an EEOC hearing. An employee can file an EEOC claim in person or by mail within 180 days of the alleged discrimination. "The 180 calendar day filing deadline is extended to 300 calendar days if a state or local agency enforces a state or local law that prohibits employment discrimination on the same basis" (Commission, 2011).

When an EEOC claim is filed against a business, the business owner will receive notice within 10 days along with the name of the investigator who has been assigned to the case. At this time, the charging employee will be asked to provide information and paperwork pertaining to the charge. The investigator will review the provided information and decide if there is reasonable cause. Employers will be asked to submit a *Position Paper* stating their side of the story. This is where the employer needs to document all information concerning the case. The employer may also receive a "Request for Information" (RFI) asking for copies of personnel policies, personnel files of all individuals involved, and any other pertinent information deemed necessary. The employer may also receive a request for an on-site visit at which time the investigator may want to interview witnesses to the alleged discrimination. Once the investigator has finished his/her investigation, the EEOC will make a determination. If there is no reasonable finding of discrimination, the charging party will be issued a letter called a *Dismissal and Notice of Rights* explaining that he or she has 90 days to file a lawsuit in Federal Court. If the EEOC determines there is cause, both parties will be issued a *Letter of Determination* stating that there is reasonable cause and will be invited to seek resolution through an informal process known as conciliation.

If conciliation fails, the EEOC can file a lawsuit in Federal court on behalf of the employee or the EEOC will send the charging party a *Notice of Right to Sue* in Federal Court within 90 days. For example, "The EEOC filed suit (*Equal Employment Opportunity Commission v. Cavalier Telephone Company,*

Inc.; Civil Action No. 3:10-cv-664 in U.S. District Court for the Eastern District of Virginia, Richmond Division) after failing to reach a pre-litigation settlement through its conciliation process" (Hastings, 2011). This suit filed in May 2003 involved the hiring practices of Cavalier Telephone Company. Cavalier had a practice of not hiring applicants age 40 or older for sales account executive positions. The company had expressed both verbally and in writing that they were seeking candidates who were recent college graduates in their 20's and 30's. In their filing, the EEOC also included two incidents of retaliations. One of these employees resigned and the other was terminated after continuing to complain about age discrimination. After eight years, Cavalier Telephone Company, Inc., agreed to pay $1 million to the two individuals who claimed retaliation and to the class action participants of 40 and older individuals who were not hired because of age according to the EEOC findings. In addition to the $1 million in awards, Cavalier had to enter into a consent decree with the EEOC to help prevent the same situation from occurring again.

All claims filed with the EEOC should be taken very seriously. Not all claims result in law suits, but as this case emphasizes, they can be very costly. A case like this can be devastating to a small business. Even if it is a claim with little or no monetary value, it can be very costly in time resources for small businesses that do not typically have Human Resource Departments.

4. Equal Pay Act of 1963. This act falls under the jurisdiction of the EEOC. "The Equal Pay Act requires that men and women be given equal pay for equal work in the same establishment. The jobs need not be identical, but they must be substantially equal. It is job content, not job titles, that determines whether jobs are substantially equal. Specifically, the EPA provides that employers may not pay unequal wages to men and women who perform jobs that require substantially equal skill, effort and responsibility, and that are performed under similar working conditions within the same establishment." (SHRM, Equal Pay Act of 1963, 2011) These factors are summarized as follows:

- *Skill:* the experience, ability, education and training required for the job; based on the skills required for the job, not the skills of the individual.
- *Effort:* the physical or mental energy used to perform the position.
- *Responsibility:* based on the overall accountability of the position.
- *Working Conditions:* based on physical surroundings and hazards.
- *Establishment:* a distinct physical location and not an entire business.

It is legal to have pay differentials between men and women which are referred to as affirmative defenses, provided they are part of a system that is based on seniority, merit, or quantity/quality of production.

5. Americans with Disabilities Act of 1990. ADA was one of the most controversial pieces of legislation passed during the twentieth century. Businesses viewed ADA as the piece of legislation that was going to cause a large number of businesses to close their doors. Now more than 20 years after the passage of the act, it is still being challenged in the courts daily. This legislation has been challenged before the U.S. Supreme Court. The SBO should be concerned with Title I of the ADA. "Title I of the Americans with Disabilities Act (ADA) of 1990 prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training and other terms, conditions and privileges of employment" (SHRM, 2011). The Act came about as a result of the U.S. Congress not feeling that the disabled individuals in our country, including our service men and women, were getting a fair opportunity at employment due to their disabilities. Thus, ADA was born.

Under the act, a *disabled* individual is someone with a physical or mental impairment (that substantially limits one or more major life activities), the impairment is documented, and the individual is regarded as having the impairment. A *qualified* individual is a person with a disability who can, with or without a reasonable accommodation, perform the essential functions of the job in question. *Reasonable Accommodation* may include but is not limited to making the existing facility accessible to the disabled;

restructuring the job or modifying the work schedule or potentially reassigning the person to a vacant job (a new position does not have to be created); modifying equipment, training materials or examinations; or providing a qualified reader or interpreter.

"An employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an *undue hardship* on the operation of the employer's business. Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources and the nature and structure of its operation" (SHRM, 2011). For example, a firm may have a position open for an Accountant in the Accounting Department located on the third floor of the building. After careful consideration it is found that the most qualified person for the position is an individual who is confined to a wheel chair, but after doing a cost analysis it is deemed cost prohibitive to put in an elevator. Therefore, the elevator would not be a reasonable accommodation. If the person could be located in a vacant office on the first floor and someone could collect their work several times a day, this would, in fact, be a reasonable accommodation. The act does not say nor does it imply that production or quality standards must be lowered, nor does the employer have to provide personal use items like glasses or hearing aids.

Title I also covers medical examination and drug and alcohol abuse. The act restricts employers from asking job applicants about their disability. You cannot ask about the severity or the nature of their disability. You can, however, question applicants about their ability to perform specific job functions. The act does not prohibit you from making a job offer contingent upon the results of a physical exam and drug screen as long as you do the same for all employees in the same or similar jobs.

Persons with disabilities who engage in illegal use of drugs are *not* covered by the ADA. As stated in Title 42, Chapter 126 "Equal Opportunities for Individuals with Disabilities," Section 12114, Sub-chapter (d) of the act, "a test to determine the illegal use of drugs shall not be considered a medical examination" (Justice, 2009).

Due to the large amount of litigation that has been brought before the court system, and a number of the decisions that have been handed down by the Supreme Court, the Americans with Disabilities Act was amended and the new law was signed on September 25, 2008, by President George W. Bush. This new law is referred to as the ADA Amendments Act of 2008 (ADAAA) and became effective on January 1, 2009. The Act was amended to restore the intent and protections of the Americans with Disabilities Act of 1990.

"The ADAAA focuses on the discrimination at issue instead of the individual's disability" (Center, 2009). "The Act emphasizes that the definition of *disability* should be interpreted broadly. The Act makes important changes to the definition of the term *disability* by rejecting the holdings in several Supreme Court decisions and portions of Equal Employment Opportunity Commission's (EEOC) ADA regulations" (Commission, Notice Concerning The Americans With Disabilities Act (ADA) Amendments Act of 2008, 2008). The Act retains the ADA's basic definition of *disability* as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that the statutory terms should be interpreted in several ways. Most significantly, the Act:

- Directs EEOC to revise the portion of its regulations that defines the term *substantially limits*;
- Expands the definition of *major life activities* by including two non-exhaustive lists:
    1. The first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);
    2. The second list includes major bodily functions (e.g., functions of the immune system, normal cell growth, digestive, bowel, bladder, respiratory, neurological, brain, circulatory, endocrine, and reproductive functions);
- States that mitigating measures other than ordinary eyeglasses or contact lenses shall not be considered in assessing whether an individual has a disability;
- Clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;

- Changes the definition of *regarded as* so that it no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity, and instead says that an applicant or employee is *regarded as* disabled if he or she is subject to an action prohibited by the ADA (e.g., failure to hire or termination) based on an impairment that is not transitory and minor;
- Provides that individuals covered only under the *regarded as* prong are not entitled to reasonable accommodation (Commission, 2008).

The intent was to make it easier for an individual to seek protection under the ADA. In its original form, most laws or acts were intended to help employers and employees maintain a working relationship. However, every time a law or act is tested within our judicial system and new interpretations are issued, these same laws seem to put a wedge between the very entities they were meant to bring together. The legal aspects of business are ever changing and must be a continuing study for anyone in the business arena.

CONCLUSION

Developing competitive advantage through better understanding and implementation of HRM practices may be more important to SBOs because small businesses do not usually have the tangible resource bases to compete with larger and more established firms (Cardon & Stevens, 2004). The advantages developed through HRM can result in intangibles such as a positive organizational culture and a strong firm knowledge base. Such intangible assets are valuable, rare, and difficult to imitate (Arthur, 1994; Huselid, 1995).

For the SBO the legal aspects of running a business are only a small part of a very large and dynamic picture. Running a small business is no small task. SBOs bear the burden of their family, their employees, customers, and the community, but the rewards can be great.

It is important to build a solid foundation of systems and processes around complying with all of the federal, state and local government regulations. The road to success for SBOs will not always be a smooth one. "You must maintain unwavering faith that you can and will prevail in the end, regardless of the difficulties, and at the same time have the discipline to confront the most brutal facts of your current reality, whatever they might be". (Collins, 2001).

RECOMMENDATIONS

An extension of this project could include developing a Resource Guide specifically designed for SBOs with 15 employees or less to include the most up-to-date listings of laws, statutes, agencies, resources (both online and print), and historical examples of legal cases most pertinent for these small firms and business owners.

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