

**E**mployment issues can be daunting for the new corporate generalist. However, knowing how to recognize and effectively handle common labor and employment issues can limit your company's exposure and make you a valuable asset to your organization.

## Employment Law Basics

BY ADAM PALMER AND WINDY ROSEBUSH CATINO

**Concern #1:** The HR director suggests that Model Co. implement its own drug-testing policy and test the marketing manager, who was recently seen reading *High Times*, immediately.

**Advice:** Deciding to take on a drug-testing program (or to individually test an employee for drugs), has far reaching implications and should not be undertaken without a thorough review of the federal and state laws regulating drug-testing. There is no federal mandate requiring or permitting drug-testing (except for occupations involving public safety), and numerous states and local governments have statutes that regulate, limit, or prohibit workplace drug-testing. In addition, depending on the manner in which the testing is done, the company may inadvertently violate the employee's right to privacy, the Health Insurance Portability and Accountability Act (HIPAA), the Rehabilitation Act, the Americans with Disabilities Act (ADA) (depending on whether the employee is a current drug user or a rehabilitated addict), and the Family and Medical Leave Act. You should advise that the company first adopt drug-testing guidelines that are compliant with applicable federal and state law and have survived legal challenge—such as the *Manda-*

*tory Guidelines for Federal Workplace Drug Testing*, which were developed for federal agencies.

**Concern #2:** Fred in accounting hates to exercise and his supervisor has reported that he frequently takes smoke breaks on company time. Can we force him to shape up?

**Advice:**


Model Co. can prohibit smoking in the workplace or require Fred to limit the

number of smoke breaks he takes to the number allowed under company policy, but federal courts have found that smoking is not a disability within the meaning of the ADA. Moreover, the ADA and regulations interpreting the ADA do not require a public accommodation for smokers. However, a slight majority of states and the District of Columbia have enacted legislation which prohibits employers from taking adverse employment action based upon an employee's use of tobacco products. Although the language and scope of these statutes vary and exemptions may apply, violation of these statutes may subject an employer to civil liability. In addition, HIPAA protects employee participants in a group health insurance plan from discrimination based upon their health status. The Department of Labor has interpreted HIPAA's nondiscrimination provisions to mean that an employee cannot be denied eligibility for health care benefits or charged a higher premium, contribution, copayment, or deductible based upon a health factor.

**Concern #3:** The employee handbook is over 400 pages long. Everyone signs a statement during orientation acknowledging that they have read it cover to cover. Our COO frequently emails out

new policy updates. Is this ok?

**Advice:** Having thorough employment policies means nothing if the company cannot demonstrate that the policies were in place and were received by the employees to which they apply. As policy updates are issued, there should be procedures to ensure that the company has documented the distribution and receipt of those updates by its employees. Email can be an effective tool if: efforts are made to ensure that all employees are on the email distribution list; a record is kept of the policy and the manner in which it was distributed; and some form of acknowledgment of receipt (electronic or hard copy) is obtained from the employee. This documentation, along with other written acknowledgments signed by the employee, should be maintained in a central file and in the individual personnel files. The company must ensure that these "updates" do not contradict the handbook, and that the updates find their way into (or at least supplement) the handbooks provided to new hires. Moreover, employees should be required to acknowledge receipt of an updated, comprehensive company handbook on a regular basis, such as during their annual reviews. In addition, publishing summaries of key company policies and obtaining written employee acknowledgments can also be helpful.

Being aware of federal or state regulations for almost every employment issue is half the battle. There will always be times when you must consult outside employment counsel. However, proper handling of common labor matters will greatly improve your ability to protect the company and prevent minor issues from becoming costly legal problems. 

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