



Your Dealership's 2009 "To Do" List

By John Donovan (Atlanta)

As we move into 2009, we are all hoping for the best but planning for the worst. Most dealerships have already cut their staff to the bone, reduced benefits, and even cut employees' hours in an effort to bring down costs and conserve cash. Dealers are now turning their attention to finding ways to bring customers back into the showroom and the service department. This is obviously important if a dealer is going to survive this downturn.

But the poor economy and difficult business conditions have caused many dealers to forget about the importance of making sure that their house is in order when it comes to employment matters. Dealers should realize that one employee lawsuit or Department of Labor investigation can cost thousands of dollars, and quickly offset other cost-saving efforts. While most discrimination claims are covered by insurance, you will still have to pay the deductible, still face the bad publicity that accompanies such claims, and still have to deal with the distraction of a lawsuit, when the business requires your full attention.

In this issue we are listing the ten areas where dealers experience most of their employee claims. Focusing on these areas and taking effective preventative steps, can significantly reduce or even eliminate your exposure to employee claims.

1. Update Your Employee Handbook

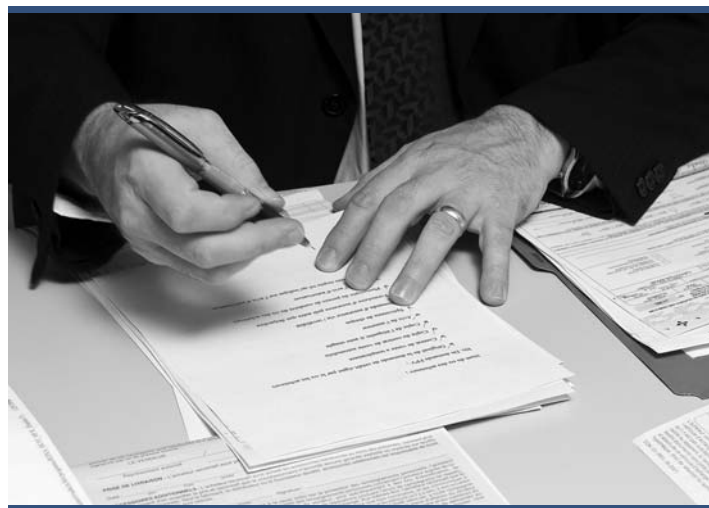
Over the years, most dealers have come to recognize that adopting a well-drafted employee handbook is a good idea which will protect them from a wide range of employee-related problems. But we find that, at many dealerships, once the handbook is printed and distributed, no one gives it another thought. As a result, the handbook gradually grows old and no longer reflects the dealership's actual policies, or worse, does not contain important new policies such as a Customer Safeguards policy, cell phone policy and a broad no-harassment policy. Like all business documents, handbooks need to be reviewed at least every few years and revised as necessary to keep up with the latest challenges.

We recommend that dealers have their controllers and all department managers read through the handbook at least once a year and determine if changes need to be made.

2. Clean Up Your New Employee Package

Many dealerships have new employees sign a stack of policies and memos along with the handbook during their orientation. In many cases, the policies were adopted years before on an *ad hoc* basis. Often these policies are out-of-date or even conflict with the employee handbook or with other policies.

While a number of documents such as W-2s, I-9s and insurance forms must actually be signed by the employee, many of these individual policies can and should be included in the handbook. One signature at the back of the handbook is just as binding as a signature at the bottom of each separate policy. Rule of Thumb: If the policy is important enough to have every new employee sign it, it is important enough to include in the handbook.



If you have multiple dealerships, be sure that all dealerships are using the same set of forms. If a particular policy or form is a good idea at one location, it's probably a good idea at all locations.

3. Update Your Sales-pay Plan

Most dealers understand the importance of ensuring that their sales people receive at least the minimum wage on a weekly or monthly basis. That protects you from wage-hour claims. But dealers are also vulnerable to contract and wage-payment claims.

Over the last few years, we have seen a flood of litigation against dealerships involving the wording of their sales-pay plans. Typically, the dealer has agreed to pay "25% of commissionable gross" but does not clearly explain what calculations go into determining the amount on which commissions will be calculated. This vagueness can allow a plaintiff's attorney to drag the dealer in front of a jury and seek back pay for every sales person going back as far as six years. Many state laws also provide for liquidated damages and attorney's fees if an employer fails to pay "all wages due."

Make sure that your sales-pay plan says what you mean for it to say and says it in clear, layman's terms. That will go a long way toward ensuring you are never sued over it, and if you are, that the jury will have no difficulty determining what the pay plan actually means.

4. Update Your Managers' Pay Plans

We see as many lawsuits and threatened lawsuits over poorly-drafted managers' pay plans as we do over sales-pay plans. Because managers are generally pretty well-paid, these disputes often involve enough money to make it worthwhile for the manager to hire an attorney. Fortunately, it's relatively easy to draft a pay plan which will head off most wage disputes. Take a close look at every manager's pay plan every time a new manager is hired. The plan that was appropriate for the predecessor may not fit the new manager.

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5. Check On Your Dealership's Overall Wage And Hour Compliance

As dealerships have downsized over the last few months, employees' job duties and pay plans have changed. This can result in employees losing their exemption from overtime. Review your payroll to ensure that you are not accruing back wage liability.

And familiarize yourself with your state's wage-hour laws. A number of states have raised their minimum wages effective January 1, which may require adjustments to your pay plans.

6. Fine Tune Your "No Harassment" Policy

While sex-harassment charges have declined over the last couple of years, other forms of harassment including religious and national-origin harassment have been increasing. Dealerships seem to have more than their fair share of these problems. Fortunately, over the last several years, the courts have spelled out exactly what steps an employer must take in order to protect itself from harassment claims.

Make sure that your policies and procedures include all of the steps that the courts expect. You should also ensure that your managers understand what is expected of them as members of

management, as well as the importance of responding promptly and properly to all harassment claims. In most cases, harassment claims at dealerships should be reported directly to HR or the Controller for investigation.

7. Audit Your Hiring Procedures

The best way to avoid an expensive lawsuit over firing a poor employee is simple: don't hire poor employees. Adopting – and strictly adhering to – a structured hiring procedure will help a dealer screen out many of these problem employees.

We recommend that dealers develop a structured hiring procedure, ensure that their managers understand the reasons for adopting the procedures, and then hold managers accountable for their compliance with them.

8. Consider Adopting An Arbitration Policy For Employee Disputes

Arbitration gives a dealer an alternative to going before a jury of the employee's peers. While it is not a substitute for good management practices nor a solution to every employment problem, it does provide an effective alternative to our slow and expensive court system.

9. Understand Religious Discrimination

Religious discrimination is unlike other forms of discrimination in that it requires employers to "reasonably accommodate" their employees' religious beliefs unless it would impose "an undue hardship" on the employer. What this actually means, in plain language, is that you must allow your employees to practice their religion at work unless you can prove that the conduct is damaging to your business or imposing a hardship on coworkers.

When faced with an employee request for special treatment, determine if the request is religious-based, examine the *actual* (not hypothetical) impact on the business and coworkers, and then either grant the requested accommodation or consider possible alternatives.

Employers continue to pay large amounts to settle failure to accommodate claims because their managers thought that they were acting properly by treating everyone exactly the same. Most now understand that religious accommodation may often mean treating some employees *better* than others just because of their religion.

10. Train Your Managers

Many discrimination charges and lawsuits are the direct result of untrained managers acting inappropriately or failing to act when they should have acted. Dealers can be held legally liable for the conduct of any individual they place in a supervisory position, even if the individual acts contrary to your policies.

In addition, it is likely that the new Congress will pass the so-called "Employee Free Choice Act" which will make it much easier for a union to organize a dealership's technicians. The best way to avoid unions is to ensure that your managers are well-trained to treat every employee fairly and consistently. As a result, more and more dealers are realizing that the first – and probably most important – step in avoiding employment-related claims and union problems is to make sure that all of their managers receive some training in employment law.

In this difficult economy, managers need to be part of the solution, not a part of the problem. Serious management training is the first step in accomplishing this.

If you would like assistance in addressing one of more of these priorities or just more information on the steps we recommend, give us a call.

For more information email the author at jdonovan@laborlawyers.com or call 404.231.1400.

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