



THE 6 BIGGEST MISTAKES MADE BY EMPLOYERS

AND HOW TO AVOID THEM

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INTRODUCTION

- Tribal employers throughout the United States are faced with rapid and increasing changes and developments in the area of employment law.
- Once well established concepts of tribal sovereign immunity have been eroded in recent years.



INTRODUCTION

(continued)

- Because of the current litigious society in which tribal employers operate, it is impossible to eliminate all potential employment litigation.
- However, the risk can be reduced by avoiding the “Six Biggest Mistakes Made By Employers”.

THE SIX BIGGEST MISTAKES MADE BY EMPLOYERS

1. Insufficient Evaluation & Screening of Applicants
 2. Poor Employment Documentation
 3. Incomplete or Inaccurate Employee Evaluations
 4. Mishandling of Employee Problems
 5. Failure to Properly Investigate and Evaluate Employee Terminations
 6. Misclassification of Employees
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THE SIX BIGGEST MISTAKES

- These mistakes are chosen based upon over forty years of representing employees (including tribal employers) in all aspects of labor relations and employment law.
- This presentation is not considered to be a “final authority” on the topics referenced. Obviously there are numerous situations that arise case by case beyond the scope of this presentation. However, these are common issues facing all employers (tribal and non-tribal) that should be considered.



Insufficient Evaluation & Screening of Applicants

MISTAKE NUMBER ONE

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MISTAKE NO. ONE

- In the current full employment economy, tribal employers need to find sufficient qualified applicants.
- However, employers should not relax normal background screening simply to fill positions.



BACKGROUND CHECKS

- Potential liability for negligent hiring if insufficient background checks are conducted
- Utilize your gaming commission for gaming-related jobs
- Differing background checks for different jobs as long as based upon legitimate non-discriminatory business interests



BACKGROUND CHECKS

(continued)

- Obtain basic necessary employment information
- Obtain employee consent
- Criminal background check
- Talking to friends, neighbors, former teachers, former employers or relatives of the applicant



BACKGROUND CHECKS

(continued)

- Contact all references listed by employees
 - Former employers, neutral references, etc.
- Anecdotal information from other sources
 - i.e. friends, neighbors, teachers, supervisors, etc.
- Privacy Concerns

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POST-HIRE DETERMINATIONS OF INELIGIBILITY

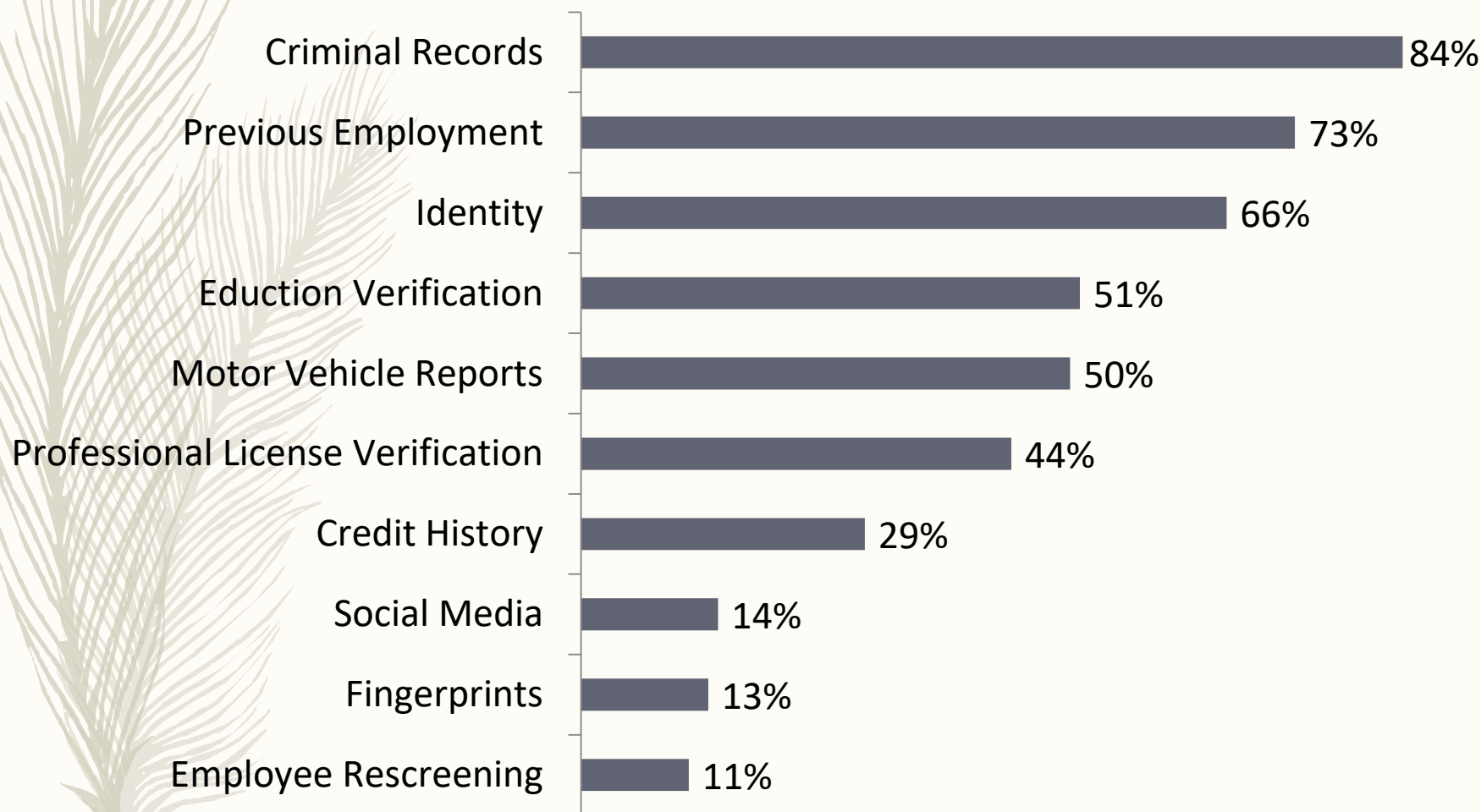
- Omissions / misstatements on application
- After Acquired Evidence Doctrine
- If involved in employment litigation, this approach can mitigate potential damages.



CONTINUOUS BACKGROUND SCREENING

- More employers are showing interest in continuous real time screening of employees.
- Companies screen for “red flags” prior to hiring employees, but unfortunately these can be a moment in time.
- If an employee commits a crime, has a license revoked, or loses work authorization after being fired, the employer may never find out.

MOST POPULAR TYPES OF EMPLOYMENT SCREENING



Source: 2018 HireRight Employment Screening Benchmark Survey; conducted August-September 2017 among nearly 6,000 HR professionals.



METHODS OF CONTINUOUS BACKGROUND SCREENING

- Uber is an example of a company screening its workers on a continuous basis.
- Uber uses services of an outside vendor to get continuous updates about driving records, criminal violations, license suspensions, etc.
- This procedure is especially effective to the extent a company employs transportation workers who need a valid drivers license.
- Continuous background screening is becoming more popular as police departments and entities that collect such data have moved their records online, making the process easier.



LIMITATIONS

- Such continuous background screening can be very expensive.
- Employers must consider cost/benefit analysis.
- Ensure pre-employment background check waivers contain language about employer's right for continuous background checks – avoid subsequent employee objections.
- This concept is worth considering, especially with developments in technology.

Poor Employment Documentation



MISTAKE NUMBER TWO



PAPER TRAIL

- The most effective way to defend against employment related claims is to have a clearly established “paper trail”.
- Documentary evidence can support employment related decisions which may be the source of litigation.
- Analyze from standpoint of “employment cycle” what documentation exists from hiring to termination to support employment related decisions.



ROLE OF EMPLOYEE HANDBOOKS IN EMPLOYMENT DOCUMENTATION

- An employee handbook is an excellent method of documenting a company's rules, policies and procedures and informing employees with the way an employer conducts its business.
- Handbooks provide instruction and guidance for supervisors and personnel administrators regarding the implementation and enforcement of company policies.
- Employee handbooks can limit employment related claims by establishing uniform policies for managers to be fair and consistent with the application of personnel policies.



DOCUMENTATION OF EMPLOYMENT CYCLE

- Recruitment & Hiring
 - What are processes used for recruitment selection?
 - Are they fair and non-discriminatory?
- Orientation Training & Development
 - Can an employer document proper orientation and training for its employees?
- Promotions & Transfers
 - Can an employer document that promotions and transfers are fair, consistent and non-discriminatory?



EMPLOYMENT CYCLE

(continued)

- Terminations
 - Is the termination policy uniform across departments?
- Fair Employment Practices
 - Can an employer document that its employees are treated in a non-discriminatory manner as it relates to all employment related decisions?



EMPLOYMENT CYCLE

(continued)

- Wage & Hour Practices
 - Can an employer document wage & hour practices that ensure appropriate pay (i.e. minimum wage and overtime) and avoid common wage & hour problems (i.e. working off the clock, misclassification of employees, etc.)?
- Leaves of Absence
 - FMLA compliance, how is it documented?
 - Non-FMLA leaves?



Incomplete or Inaccurate Employee Evaluations

MISTAKE NUMBER THREE



MISTAKE NO. THREE

- Employers often find themselves faced with employment related claims (i.e. discrimination, wrongful termination, etc.) as it relates to employees who were the subject of adverse employment actions for legitimate reasons.
- To defend such claims, an employer must have adequate documentation of employee performance.



DOCUMENTATION OF EMPLOYEE PERFORMANCE

- Does employer have an appropriate employee evaluation process? Is it uniform throughout the facility?
- Performance evaluations are also important from a personnel administration standpoint as it relates to promotion and retention of employees.
- Employers must avoid “grade inflation”
- Evaluations must be fact oriented
 - i.e. referencing a “bad employee” vs. employee who fails to arrive at work on time



EVALUATIONS / PERFORMANCE REVIEWS

- Does employer conduct employee performance reviews? If so,
 - Which employees?
 - How frequently?
 - Who performs the review?
 - Are supervisors trained in reviewing performance?



RECOMMENDATIONS FOR PROPER REVIEWS

- Keep your promises
- Periodic reviews
- Potential problems
- Be truthful, do not be afraid to give negative evaluations
- Develop a form and follow it



RECOMMENDATIONS

(continued)

- Train supervisors on how to review employees so they are objective, specific and consistent
- Results of employee evaluations should not be a surprise
- Review performance evaluations before providing them to employee
- Include handbook language explaining evaluation process



Mishandling of Employee Problems

MISTAKE NUMBER FOUR

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MISTAKE NO. FOUR

- As is obvious from recent high profile sexual harassment cases, mishandling of employee problems, complaints, etc. can have a devastating impact on an employer.

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EMPLOYER'S OBLIGATION TO INVESTIGATE

- While tribal employers, as a tribal entity, are exempt from a number of equal employment federal statutes, i.e. Title VII 1964 Civil Rights Act, Americans with Disabilities Act, etc. with the increasing trend of individual liability for supervisory employees, it is important to follow the guidelines established under such federal statutes, even if not applicable.
- Any employment related claim should be investigated.
- Plan for investigations



EMPLOYER'S OBLIGATIONS

(continued)

- Employers have an obligation to provide a safe workplace for employees.
- Employers have a duty to customers and other third parties to provide a secure environment.
- Employers must adequately investigate all claims of harassment, including sexual harassment. This should include proper reporting, investigation and procedure for resolution.
- Internal investigation vs use of outside investigators
- Game plan for investigation



ALTERNATE DISPUTE RESOLUTION

- Tribal employers can establish their own alternate dispute resolution procedures to deal with employee complaints.
 - Internal Grievance Procedures
 - What type of cases? All cases or limited?
 - Who hears the grievances?
 - Employee/co-worker committee?
 - Human Resources?
 - Outside party?



ALTERNATE DISPUTE RESOLUTION (CONTINUED)

- Tribal Court can be established to deal with employee grievances/claims
- Newer California compacts have ordinances dealing with discrimination, subject to internal tribal review, arbitration procedure if complaint not resolved



Failure to Properly Investigate & Evaluate Employee Terminations

MISTAKE NUMBER FIVE



MISTAKE NO. FIVE

- The proceeding four sections all, to some degree, address employer mistake number 5.
- If there has been proper documentation, sufficient evaluations, and company policies/rules established in an employee handbook the odds of mistake number 5 are greatly reduced.
- If the steps taken in the proceeding sections have been followed, an employer should be in a position to avoid failure to properly investigation and/or evaluate employee terminations.



CONSIDERATIONS

- When the information supplied in the previous sections is taken into account, and the employer is faced with the decision to terminate a particular employee, the employer should still consider the following:
 - Is the termination decision based solely on the employee's individual performance, or have general assumptions been made about ethnic minorities, women, persons forty years or older, persons with disabilities, etc.?
 - Does the employer have a business-related reason for its decision?



CONSIDERATIONS

(continued)

- Are there documented reasons for the decision to terminate? What examples exist as to the documentation?
- Is the decision to terminate consistent with company policy? And, has a review been made through the human resources department to ensure such consistency?
- If there is a performance problem, can the employer establish documented efforts to help the employee improve? If the employee has not responded to such efforts, is this established by the documentation?



CONSIDERATIONS

(continued)

- Has the employer been accurate and straightforward in evaluating employees, in both praising and criticizing when warranted?
- Are the actions taken against this employee consistent with treatment accorded other employees?
- Has the employer been accurate in telling the employee the reason for the termination?
- Can discrimination or differential treatment be claimed by the employee?
- Are there any mitigating circumstances?
- Can this employee claim retaliation?



An employer who can sufficiently provide answers to these questions will be able to avoid employment related litigation, or at the very least, significantly minimize its exposure.

Misclassification of Employees



MISTAKE NUMBER SIX



MISTAKE NO. SIX

- Misclassification of employees:
 - Exempt vs. Non-Exempt
 - Independent Contractors vs. Employees
- These are challenges facing employers throughout the United States, including tribal employers.



SOVEREIGN IMMUNITY

Misclassification can create major employer liability. And even if as a tribal employer there is sovereign immunity from lawsuits by individual employees, there is no such sovereign immunity defense from agencies of the federal government such as the U.S. Department of Labor (DOL), Internal Revenue Service (IRS), etc.



EXEMPT VS. NON-EXEMPT

- The exempt vs. non-exempt question arises under the Fair Labor Standards Act (FLSA), the primary federal wage and hour law in the United States.
- The U.S. Department of Labor takes the position that the FLSA applies to commercial (non-governmental) operations of an Indian Tribe.
 - *Solis v. Mathenson*, (9th Cir. 2009) 563 F.3d 425



“WHITE COLLAR” EXEMPTIONS

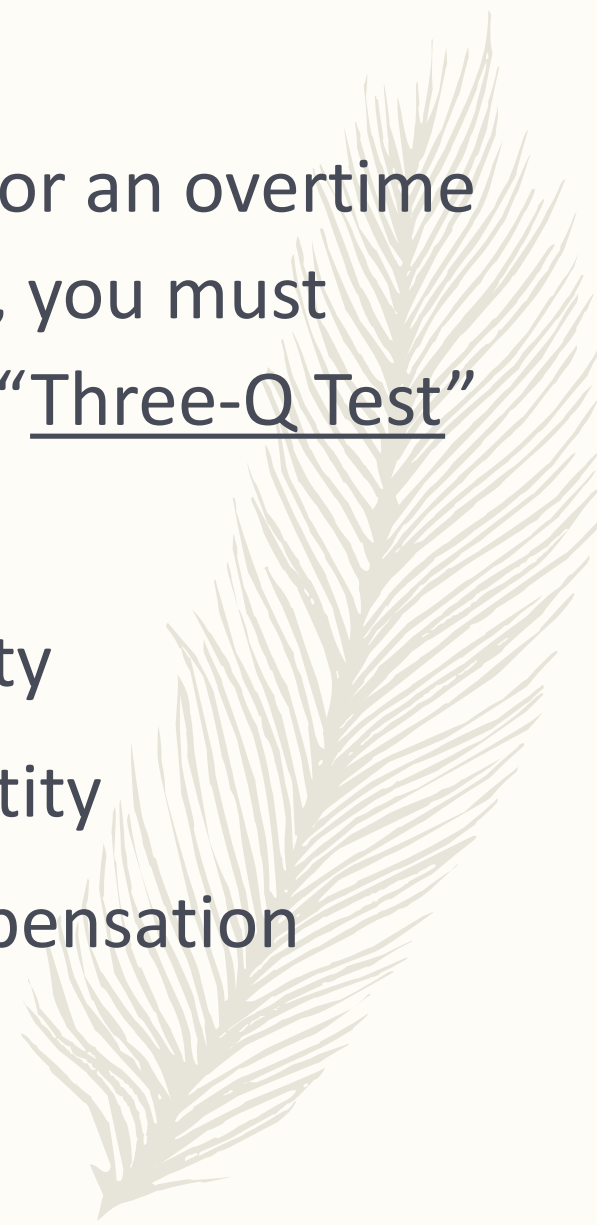
- The most common FLSA minimum wage and overtime exemption, often called the 541 or “white collar” exemption, applies to certain:
 - Executive employees
 - Administrative employees
 - Professional employees
 - Outside sales employees
 - Computer employees
 - Education employees

3

TESTS FOR EXEMPTION

To qualify for an overtime exemption, you must satisfy the “Three-Q Test”

1. Quality
2. Quantity
3. Qompensation





COMMON QUESTIONS

“Pigeonhole” each exempt employee

Where do they fit?



INDEPENDENT CONTRACTORS



CONTINGENT WORKFORCE

- Workers who are not directly engaged as full-time employees by the employer for whom they perform services
- Allows employer flexibility to react to market demands and to resolve problems quickly
- Classification of workers present different issues:
 - difficult determination, inconsistent application
 - Independent Contractor vs. Employee



LAWS RE CONTINGENT WORKFORCE

- Federal “Fair Labor Standards Act” (FLSA)
- OSHA – Health & Safety Policies
- Title VII of Civil Rights Act of 1964
 - Discrimination/ Harassment
- ADA – Disability
- NLRA – Labor Rights (Unionizing)
- Employment Taxes



TESTS TO DETERMINE A WORKER'S STATUS

1. Common Law “Control” Test
2. Economic Reality Test
3. IRS 20 Factor Test



CONCLUSION

- In reviewing these mistakes, employers should consider the “big picture”, focusing in detail on each of the six mistakes.

Questions and Answers



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