

Correcting Course in Business Practices

Sarah Sawyer: Welcome to you this week's OK at Work with myself Sarah Sawyer, my colleague Russell Berger both attorneys at Offit Kurman.

And today we are talking about when maybe a business owner doesn't get it exactly right the first time and they're having to figure out a way to fix a legal mistake they might have made, correct course. We see this a lot with employment policies, for instance, and, different things they might have put in place.

Maybe put something in place that's not enforceable. Maybe you haven't accounted for the law and so you're already off and running, doing things, making mistakes, and then you find out that it's a mistake and it's a problem. And you've Got to unwind it and it's a little bit challenging sometimes to do that and can be quite intimidating.

I know I've had clients sometimes who feel pretty intimidated by that fact because there's a little bit of an emotional component, I think, as well to realizing you didn't do [00:01:00] something correctly and that you need to fix it. So what are some things that business owners should be thinking about when that moment of realization happens either through talking to counsel, reading an article, something playing out?

Where do business owners begin, Russell?

Russell Berger: Yeah. And to piggyback on what you said, I think a lot of the times business owners learn about mistakes by getting sued for them. And maybe being sued by one employer or one instance, but realizing, oh no, this is a much broader problem.

I'm dealing with a very narrow aspect of it right now. So, there's lots of ways it can come to light. And, generally speaking, the first thing you should do is recognize it and figure out a plan to correct it, particularly in employment space where, exposure continues.

If you don't fix it, the problem persists. When you fix it, you can at least put a finite time on your statute of limitations, your period of exposure. But, really, I think the rubber really meets the road here. You come up with a plan to fix it, but how do you implement it?

How do you message it? How do you do that in a way that [00:02:00] doesn't result in the other 100 employees saying, "Huh, I think you were doing it wrong before. I'm going to sue you. " And so there's different strategies that can be implemented for doing that. And, one of the things that I often recommend is, and I think this is very natural, but like, make a bunch of changes at the same time.

Because usually when you realize something is off, there's more than one thing that's off. And not necessarily one that carries, they all carry legal risk, but there's things you wanna change, there's things you wanna update. You might be reclassifying a position from, exempt to non-exempt and ending any potential exposure for misclassification there, but you also might be redoing your handbook.

You might be rolling out new employment agreements. You might be ruling out new restrictive covenants, whatever it might be. But if you do all those things at once and you message it as, look, we're updating our employment policies, I think that gives employers a lot of cover as opposed to just saying, "Well, we were doing this one thing wrong, so we have to change it now because the law says we gotta change it."

Sarah Sawyer: Yeah. And Also a part of following the process you just described [00:03:00] means you're gonna probably keep doing things the wrong way for some additional period of time while you're figuring it out. And I think it is important to be comfortable with that because if you've already been doing it wrong, there is, sometimes a knee-jerk reaction feeling to feel like, "I've gotta fix this right now. I'm exposing myself to additional risk." And yes, that's true, but by trying to react almost too quickly and fix it and try to make it on something right away, you might actually be exposing yourself to more risk than if you just take the risk you've already been taking. So it can be a little counterintuitive and a little bit painful.

And obviously you wanna act expeditiously with these things once you have an understanding there are areas of the law where it's important that you do so also because there might be a component of, knowledge or intentionally doing things. And so there is some nuance there around having to manage that risk.

And we talk a lot about managing risk on here, right? So it's like this is just one of those situations where, you can't go back in time, you can't get in a [00:04:00] time machine and say, "Oh, I wish I would've done that better." Yeah, it's natural to feel that way and wish you could go back and change it but you're where you are and the most important thing is to assess the situation, figure out the best way forward.

And for a lot of these things, it's not an easy answer, easy switch to just turn off or on. Like PTO is a good example where maybe if you're not complying with sick leave laws or other types of laws that you might have in your jurisdiction and you wanna change your PTO policy that's not always a quick fix.

A lot of times you've created certain obligations around the policy you already have, you've gotta unwind or resolve those obligations that you might have and then start layering in the compliance piece with whatever you might not be complying with. So it's unfortunately, often not an easy fix and just a light switch.

Russell Berger: Well, and I think, you wanna rush to come up with a solution, but you don't wanna rush to implement the solution. You wanna be strategic about how you implement a fix, but once you realize, huh, something doesn't feel right, you wanna figure out what you need to do and what the best [00:05:00] path is to get on the right side of compliance.

And look, sometimes that answer might involve back pay or, but, sometimes that's the right answer. And sometimes, it might be changing a policy or changing, or, you know what, we have this policy, but maybe we should just interpret it a little bit differently until we can get this, what's in writing changed.

We should grant some leeway here. There's all sorts of different ways to manage through it, and when something feels amiss, the right thing to do is to figure out how you're going to manage

through it and what you're going to do, and then be, very strategic about how you move forward in that.

Sarah Sawyer: Yeah. And the last thing I'll say on the topic is just also getting your arms around the full scope of the issue, because you don't wanna have to make multiple fixes, right? So you wanna make sure that you've got the full ... Exactly, I think that you stated it well, get your arms around it, make sure that you find a solution and before implementing, make sure you've thought of everything because you don't want it to be half hazard, that's for sure so.

Russell Berger: Yeah.

Sarah Sawyer: Well, thanks, Russell. We'll see you next time.

Russell Berger: Thanks, Sarah.

[00:06:00]