TEN TIPS FROM THE FRONT LINES: PRACTICAL GUIDANCE FOR AVOIDING EMPLOYMENT LAWSUITS

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Given the prevalence of employment lawsuits, many employers resign themselves to the belief that employment litigation is a cost of doing business or that they just cannot win when it comes to managing employees. Jury verdicts, court decisions, and experience, however, all tell a different story: using the ten tips described in this article can reduce potential exposure to employment lawsuits. Indeed, employers who adopt a proactive approach to employee relations can and should expect to see a substantial reduction in employment lawsuits as well as positive impact on morale, productivity, and, ultimately, the bottom line.

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1. EMPHASIZE DOING IT RIGHT OVER DOING IT QUICKLY

Whether the issue is hiring, promotion, discipline, or employment termination, employers sometimes emphasize speed and decisiveness over substance and accuracy. There is never a good reason to rush to judgment about any employment-related issue. After all, an employer generally only has one chance to get the decision right.

For this reason, employers must emphasize making good decisions over making quick decisions. Employers should take the time and steps best calculated to lead to a measured, thoughtful decision, even if this means temporarily suspending an employee (with or without pay) while the decision (or perhaps a further investigation) is being considered. In the end, making an objective, cool-headed decision is critical to limiting liability, particularly as taking the time necessary to get it right will leave an impression with a jury that the employer was trying to be fair.

2. REVIEW AND COMPLY WITH POLICIES AND PROCEDURES

Written policies can help employers of all sizes apply some measure of consistency and order to a wide variety of employment issues. They are a double-edged sword, however. Many lawsuits begin and may be lost because employers fail to follow their own policies.

For this reason, employers should review and update their employment policies on a regular basis. By routinely reviewing policies, employers can make sure their policies remain consistent with the law (which, through either court decisions or changes in statutes and regulations, appears to change almost every year). More important, by routinely reviewing policies, employers can make sure they want to continue implementing policies they have to live with—and follow—all the time. For example, providing an employee with the right to have an appeal of a harassment investigation finding heard within five days may seem great on paper, but may turn out simply impractical in reality or, worse, simply not followed.

But care in the creation of policies is just one step. Before taking adverse action against an employee, an employer should consult all applicable policies to ensure that the employer has followed its policies and has treated the employee in a manner consistent with how other employees were treated under the same policy.

3. IMPLEMENT AND FOLLOW A REALISTIC AND EFFECTIVE POLICY CONCERNING HARASSMENT AND DISCRIMINATION

Given the United States Supreme Court's seminal rulings in *Faragher v. City of Boca Raton*[1] and *Kolstad v. American Dental Association*,[2] all employers should have and follow a realistic and effective anti-harassment and anti-discrimination policy. The policy should be included in any employee handbook or policy manual and otherwise distributed with other important policies. Further, employers should consider periodic training for all employees, and at a minimum, mandatory training of all new employees about the company's policy.

However, implementing and distributing a policy is not enough. Employers must promptly investigate and take steps to resolve all harassment and discrimination complaints. While employers may have a strong chance of winning a lawsuit where the employee fails to use the policy, the reverse often can be true too. Employers may have little chance of winning a lawsuit where the employee uses the policy, but the employer either ignores or mishandles the complaint.

4. HIRE AND RETAIN EMPLOYEES THOUGHTFULLY AND LEGALLY

Many employment lawsuits are traceable to a poor hiring decision or a poor decision to retain someone after he or she should have been dismissed. By training, verifying, and documenting, employers can avoid these decisions, which too often lead to litigation.

With regard to the hiring process, employers should train supervisors in interviewing skills—particularly how to look and listen for potential red flags. For example, interviewers too often fail to notice information on applications or hear answers to questions that reveal unexplained gaps in employment history or departures from other companies. Training supervisors to look for these issues and to listen to an applicant's answers to questions will help identify these potential red flags.

Further, employers should make sure they are actually conducting background checks and verifying employment application information. While many employers obtain the necessary consent to conduct such checks, they also fail to actually perform the checks. Given that studies show that anywhere between 30% and 50% of applicants lie on their resumes, these checks and verifications may prove invaluable in making the difference between the right and wrong hiring decision.

Once employees are hired, employers should take care to regularly and thoroughly review employee performance and conduct. When the employee is not meeting performance standards, employers must take the appropriate action. Retaining an underperforming employee—especially one whose conduct is illegal or dangerous—poses a variety of legal and business risks that all responsible employers should endeavor to limit or avoid.

5. AVOID DOCUMENTATION LANDMINES

Enough could never be written about the importance of adequate documentation. All employment lawsuits involve a review of the employee's personnel file with the employee, the employee's attorney, and most important, the jury looking for some form of written documentation (i.e., reviews, notes, e-mails) of the employee's poor performance or misconduct. Employers must carefully consider how such documents are created, what they say, and how they are organized and retained.

With respect to document creation, employers should train supervisors how to document employee performance. However, creation of thorough documentation is not enough. In order for employee-related documentation to have any utility, the employer must be able to put its hands on these records in the future. Putting aside statutory record retention obligations, employers should remember that, in many circumstances, records of employee interactions are the only evidence that an employer has to defend an employment-related claim. Because some employment-related claims can be brought as long as four years following an employee's discharge, employers should implement a systematic way of collecting and preserving for at least that long all records relating to the discharged employees, including relevant e-mail messages and "unofficial" supervisor notes and side-files, which all too often are not forwarded to the person or department responsible for the "official" personnel file.

6. GIVE REGULAR AND HONEST PERFORMANCE REVIEWS

A prerequisite for successful employee relations is effective communication. For this reason, regular and accurate performance appraisals are invaluable in both improving performance and documenting deficiencies. Irregular or inflated reviews serve neither objective and can be dangerous in litigation.

In fact, lack of honesty in the performance review process sometimes can be fatal in litigation. One unpublished survey of the attitudes of prospective jurors concluded that more than 55% of respondents to the survey either agreed or strongly agreed with the following statement: "The best evidence of an employee's work performance is that employee's performance appraisals." That data, of course, belies the conventional wisdom that "everyone" knows that supervisors habitually inflate performance evaluations.

Put another way, jurors believe written performance appraisals—even if the employer presented testimony or other evidence suggesting that an employee was not as good as the written performance appraisals made him or her look. For that reason, inaccurate reviews often add monetary injury to the insult of being sued by an employee discharged for poor performance because those very reviews often are cited as key evidence supporting a jury verdict in the employee's favor.

7. FORMALIZE THE DISCHARGE PROCESS

Both voluntary and involuntary employment terminations give rise to a number of substantive and procedural questions and issues, including: (a) whether the separation violated (or might be claimed to violate) applicable law; (b) whether the circumstances of a particular separation give rise to any inference of retaliation; (c) whether the circumstances of a particular separation comply with the employer's policy or any applicable employment or collective bargaining agreement; (d) how and when the final paycheck is prepared and delivered; (e) whether and how the employee must be paid for unused sick or vacation time; (f) how the employee is notified of his or her rights under COBRA; (g) how the employer will handle references; and (h) whether the separation poses risks to the employer's business or competitive interests or intellectual property, and if so, how to minimize those risks. Every employer should develop and follow a protocol for handling these issues, to both simplify the administrative process and limit legal exposure.

8. TRAIN SUPERVISORS IN "EMPLOYMENT LAW 101"

Supervisors are in the middle of virtually every employment dispute. For this reason, supervisors must be trained, at a minimum, in good hiring practices, performance management, discipline, being alert for health-related issues, and avoiding retaliation and the appearance of retaliation. Further, supervisors must know the risks associated with casual or improper use of e-mail, voicemail, and other modes of communication. Finally, supervisors must be well-versed on how the employer's policies and practices work, so that supervisors are adhering to these policies and practices and are applying them in a consistent manner.

9. PARTNERING WITH HUMAN RESOURCES

While training supervisors is a critical tool to limit lawsuits, supervisors cannot and should not be expected to know everything about employment law or an employer's policies. Indeed, questions relating to disabilities under the ADA, leaves of absences under the FMLA, and eligibility for employer benefits require substantial training.

That is why the most critical piece of training is that supervisors understand they must partner-up with HR early and often. For example, supervisors should not be trained to determine whether an employee's absence qualifies as a serious health condition under the FMLA. Rather, supervisors should be trained to watch for absences and listen for health-related comments made by employees and then relay that information to HR, who has the specialized training and knowledge to analyze these complicated issues.

In the end, supervisors must understand the importance of including HR in every employment-related decision. Many times, issues and problems that are obvious to HR professionals are not always apparent to supervisors, who may be emotionally tied up in the situation or do not have a full understanding of the legal ramifications of their actions. Partnering with HR not only serves the interests of employers by limiting a company's potential legal exposure, but also serves the interests of the supervisors, by protecting them from potential individual legal exposure.

10. AVOID RETALIATION AND THE APPEARANCE OF RETALIATION OR UNFAIRNESS

Often, there is no causal connection between an employee's work-

place complaint (i.e., discrimination, harassment) and a subsequent adverse decision (i.e., demotion, employment termination). But disappointed employees sometimes allege such a connection, and juries sometimes agree with them. This is especially true where little time passes between an employee's protected activity and an adverse action. In such circumstances, the close temporal proximity alone may lead a jury to believe the adverse action was retaliatory. That fact is doubly problematic for employers because an employer can be liable for retaliating against an employee who complains about harassment, for example, even if the alleged harassment never occurred or otherwise is not actionable.

Given these problems, supervisors and HR not only must avoid retaliation, but also must be mindful that things easily can appear to be other than they really are and take steps to avoid creating an inaccurate impression that some protected activity caused a later adverse action. This is not to say that employers should avoid disciplinary action when an employee complains. But when an employee recently has complained (or perhaps suffered a workplace injury or been absent from work), an employer must ensure that a planned disciplinary action is amply supported by objective written evidence of prior poor performance or misconduct and that the employer is not overreacting to conduct in which other employees have engaged without repercussion.

CONCLUSION

While the principles discussed in this article touch on many things, employers need to ask themselves one simple question before they decide to take disciplinary action: "Will this come as a surprise to the employee?" By following the tips outlined above, employees cannot fairly be heard to complain that they did not know what was expected of them, they did not know how to correct their performance or behavior, and they did not understand the consequences of refusing to change their ways.

Although workplace relationships are governed by what would appear to be a complex and intertwined set of laws, regulations, and policies, avoiding employment lawsuits really boils down to two key concepts—communicate openly and honestly with employees, and take action only after giving careful thought to the consequences of the proposed action.

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NOTES

1. Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662, 77 Fair Empl. Prac. Cas. (BNA) 14, 73 Empl. Prac. Dec. (CCH) P 45341, 157 A.L.R. Fed. 663 (1998).
2. Kolstad v. American Dental Ass'n, 527 U.S. 526, 119 S. Ct. 2118, 144 L. Ed. 2d 494, 79 Fair Empl. Prac. Cas. (BNA) 1697 (1999).