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Top Ten Employment Law Headaches for Legal Counsel and how to Avoid Them

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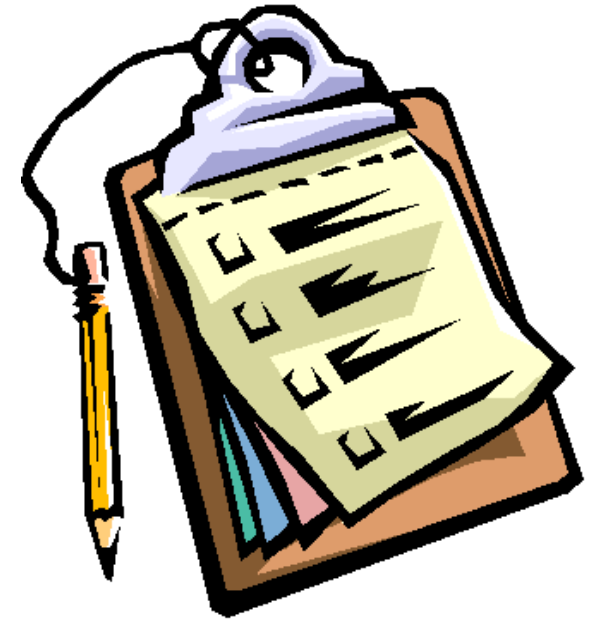
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AGENDA

- Bad Hiring Practices
- Bad Documents
- Mismanagement of Stock Grant Process and Documentation
- Misclassification (Exempt/Non-exempt and Independent Contractors)
- Mismanagement of Benefit Plan Compliance
- Managers Who Don't Manage or Don't Manage Well
- Difficult Employees
- Mishandling Complaints
- Mishandling Termination Decisions
- Mishandling Termination Process



Bad Hiring Practices



Key Concepts

- Test all inquiries in the hiring and interview process with this question:
 - Is the inquiry legitimately job related?
- Don't ask prohibited questions
- Exercise caution when an applicant “opens the door” to a potentially off-limits topic

Bad Hiring Practices

Recommendation

- Be sure you have an accurate, complete, written job description before you begin the hiring process.
 - Define the skills and behaviors required for success in the job
 - Skills: communication skills, technical skills, previous relevant experience
 - Behaviors: enthusiastic, confident, patient/calm under stress



Bad Hiring Practices

Establish an Acceptance and Retention Policy

- Sets accurate applicant expectations.
- Establishes the applicant pool.



Bad Hiring Practices

Interviewing Tips

- The interviewer should not:
 - Ask questions that are unlawful or suspect.
 - Make promises or give guarantees. Interviewers may be found to have contractually bound the employer based on promises made in an interview.



Bad Hiring Practices

Unacceptable Interview Topics

- Maiden name
- Age, birth date, or dates of graduation
- Birthplace of candidate or any relatives
- Nationality
- Living arrangements, including whether they own or rent
- Sex, marital status, number or ages of children, pregnancy
- Child care issues
- Race, color, sexual orientation
- Height, weight or other physical attributes
- Medical condition or illnesses
- Religion
- Arrest record
- Military discharge



Bad Hiring Practices

Questions That Are PROHIBITED

- That's an unusual name – what nationality is it?
- I noticed you went to school in the south – where were you born?
- How did you become fluent in Spanish?
- What do your children do during the day?
- Are you married?
- Do you have trouble coping with work-related stress?
- When did you graduate from high school?
- Have you ever been to a Doors concert?
- Will your husband mind if you have to work nights and weekends?



Bad Hiring Practices

Questions That Could Lead to Trouble

- What organizations or clubs do you belong to?
- What books have you read recently?
- I noticed that you took a year off between jobs – what did you do with that time?
- Why did you decide to move to Philadelphia?
- I see that you do volunteer work for the American Cancer Society – how did you become involved with that?
- What websites do you visit?



Bad Hiring Practices

EEOC v. Wal-Mart Stores, Inc., D. New Mexico, 2/21/97

The Wal-Mart personnel director asked: “[W]hat current or past medical problems might limit your ability to do a job?” The applicant was not offered the job and filed suit under the ADA. The jury awarded \$100,000 in punitive damages for the unlawful inquiry, finding that the employer “acted with reckless indifference to federally protected rights.” The jury awarded another \$50,000 in punitive damages for discriminatory failure to hire and \$7,500 in compensatory damages. The verdict was the largest ever involving an unlawful pre-employment medical inquiry.



Bad Hiring Practices

What Do You Do When the Candidate Brings Up a Prohibited Topic?



- If appropriate, thank the candidate for sharing the information.
- Explain that the information is not something the Company will consider in the hiring process.
- Change the subject to a safe topic.
- Explain that you have limited interview time and need to move on to topics that are important to the selection process.
- After the interview, document this part of the conversation carefully and report it to Human Resources.

Bad Hiring Practices

Interview Tips

- Interviewers should generate and keep interview notes separate from the resume or other application material.
- Beware of shorthand remarks
 - Over qualified
 - Over specialized
 - Too aggressive
 - Not sufficiently assertive
 - Grandma Moses



Bad Hiring Practices

Recommendations

- Use a consistent approach for communicating offers and rejections.
- Proceed with caution if you need to rescind an offer.
- Manage references and other employee background checks with care.
- Exercise caution when dealing with potential red flags.



Bad Hiring Practices

Credit and Background Checks

- Must comply with the Fair Credit Reporting Act and State statutes governing background checks
 - Ban the Box: Some states prohibit inquiries into criminal convictions on an application.
 - Best Practice: Do not allow candidate to start before the Background check is completed.



Competing Considerations

- An employer's failure to adequately investigate a prospective employee may lead to liability under the tort of negligent hiring.
- An overreaching background investigation or misuse of information may lead to employer liability for invasion of privacy or other federal or state violations

Bad Hiring Practices

Credit and Background Checks



- Background checks must also be conducted equally for all applicants and employees. Conducting a more rigorous background check of certain employees may leave an employer open to a discrimination claim. See [Watson v. City of Salem](#), 934 F. Supp. 643 (D.N.J. 1995) (race discrimination claim based in part on allegation that employer subjected minority applicant to more intensive background investigation than non-minority applicants).

Bad Documents

Restrictive Covenant Drafting Traps

- “Girl Scout Cookie” Trap: a customer restriction provision without a product or services restriction; the agreement is overbroad if a software engineer is prohibited from selling Girl Scout cookies to a competitor.
- “Janitor at Xerox” Trap. a non-competition provision without a services/duties restriction may be overbroad; if, for example, the restriction would not permit a geologist from working as a janitor for a large competitor.
- “Little Fish/Big Pond” Trap: a nationwide restriction may be overbroad for a sales person with local contacts; a D.C. employee who moves to Los Angeles may not have the contacts in L.A. to harm the company.



Bad Documents

Restrictive Covenant Drafting Traps (Continued)

- “New Today/Old Tomorrow” Trap. In a fast paced industry information becomes outdated quickly; use reasonable time restrictions.
- “Better Mudpies” Trap: a provision which provides that everything the employee invents during the course of employment belongs to the company is likely overbroad; inventions discovered on the employee’s own time that are totally unrelated to the employer’s business are not inventions in which the employer had a legitimate interest.
- “Who’s on First” Trap: restrictions based on the Company’s customers, products, markets not further restricted to cover the Employee’s customers, products and markets.



Bad Documents

Restrictive Covenant Drafting Traps (Continued)



***NVR, Inc. v. Nelson*, Case No. 16-cv-1328, 2017 WL 631684 (E.D. Va. Feb. 14, 2017)**

- For 12 months post-employment Employee could not “render services” in the “Restricted Area” to a person or entity that competed with the company or an affiliate “in the residential homebuilding, mortgage financing, or settlement services business”.
- “Restricted Area” included both “counties and other units of local government” in which the company engaged in the enumerated, related homebuilding activities and regions “from which you received, as part of your work duties, Confidential Information regarding such business activity” .
- Holding: Scope was indefinite and therefore invalid. The restriction on functions was reasonable, but the geographic scope (i.e., regions “from which you received, as part of your work duties, Confidential Information regarding such business activity”) was overbroad.

Bad Documents



Offer Letter Drafting Traps

- Offer letters that are accepted by signature are contracts (offer + acceptance for consideration) so make sure you like the contract you created.
- Titles, supervisors, salaries, benefits and policies will all change so make sure your offer letter does not lock them in.
- Only the Board can grant stock options so make sure to qualify grant language
- If you introduce the concept of “cause” define the term, otherwise a Judge or Jury gets to do it for you
- Be clear about any contingencies: e.g. eligibility to work in the US; execution of confidentiality/non-compete/invention assignment agreement; background check, drug test
- Best practice to get assurance from employee that he/she is free to accept the position and will honor obligations to former employers.

Bad Documents

Employment Agreement Drafting Traps

- Archaic language
- Inconsistent provisions
- Failure to coordinate related provisions
- Failure to anticipate change
- Cause definition: notice and cure; use of “willful”; “conviction” of a crime
- Good reason definition – not 409A compliant
- Change in Control – single trigger vesting; no 280g provision
- Lack of release requirement
- Poorly drafted or considered notice provisions
- Failure to include, or consider including, Arbitration



Bad Documents

Handbook Drafting Traps

- Making promises on behalf of the Employer
- Including instructions to Supervisors
- Failure to include mandatory policies
- Vague, unclear language
- Inconsistent policies
- Too much information
- Policies that are not legally compliant
- Failure to update



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Mismanagement of Stock Option Grant Practices: Valuation Issues

- The exercise price of a stock option must be at least equal to the fair market value (fmv) of the Company's common stock on the date of grant
- Most common way to determine fmv is to obtain an independent valuation report
 - Valuation is good for 12 months, or until there is a material change
 - Material change includes a financing
 - Questions arise as to when a material change occurs. For example, is there a material change when the company begins talking to investors, receives a term sheet, or commences the sale process
 - You should work closely with counsel to determine whether a material change has occurred and you can no longer rely on the valuation report
- Key Takeaway: Stock options granted with an exercise price below fmv are subject to Section 409A, including a 20% excise tax

Mismanagement of Stock Option Grant Practices: Board Consent

- In general, the Board can grant stock options
- To have a valid stock option grant, the Board consent must include:
 - Optionholder's name
 - Exercise price
 - Number of shares
- Additional detail typically included:
 - Vesting schedule
 - Change of control acceleration, if appropriate
- Key Takeaway: If there is no valid Board consent, then the option was not legally granted
 - Company cannot go back in time and grant an option with a lower exercise price if valid Board consent is not obtained

Mismanagement of Stock Option Grant Practices: Forgetting to Grant an Option

- Many employment agreements contain promises to grant stock options
 - Practice tip: Do not list the exercise price in the employment agreement
- Remember, exercise price must equal fmV on the date of grant
- If the company forgets to grant the stock option, and the valuation report has expired or a material change has occurred, the option must be granted at the new fmV
 - Company cannot grant the stock option at an old lower price, regardless of what the employment agreement says
- Key Takeaway: Employees are not happy if they are promised an exercise price and the actual exercise price is higher

Mismanagement of Stock Option Grant Practices: Missing Paperwork

- Typically, stock option grants require the following paperwork:
 - Plan document
 - Stock Option Grant Notice
 - Contains all of the material individual terms (e.g., exercise price, vesting schedule)
 - Stock Option Agreement
 - Exercise Price
 - The stock option documents contain all terms applicable to the stock option.
- Key Takeaway: Employers want optionholders to acknowledge the terms, including an repurchase rights, drag rights, waiver of inspection rights, etc.

Misclassification (Exempt/Non-Exempt and Independent Contractors)

Independent Contractors – The Legal Rules Are Vague and General



- There is **no one single legal test** for distinguishing independent contractors from employees – each agency and different courts use different legal tests
- Each legal test consists of a series of factors to consider and **no one factor is dispositive**
- The factors are necessarily vague and general since they are used for all jobs in the entire country – an inference must be drawn
- The factors were developed many years ago for a very different U.S. workforce
- The agreement between the employer and the service-provider is not dispositive
- **The employer carries the burden to prove contractor status;** the worker and/or the government may challenge contractor status even after the relationship has ended. (Generally, a three year “look back”)

Misclassification (Exempt/Non-Exempt and Independent Contractors)

Independent Contractor – Key Factors

- Behavioral Control
 - Right to ***direct or control*** how the work is done:
 - Type of instructions given
 - Degree of instruction
 - Degree of monitoring of the work in progress
 - Evaluation systems
 - Training



Misclassification (Exempt/Non-Exempt and Independent Contractors)

Independent Contractor – Key Factors

- Financial Control
 - Method of payment
- Right to control ***economic aspects*** of worker's job:
 - Significant investment (tools, equipment)
 - Unreimbursed expenses
 - Opportunity for profit or loss
 - Services available to others in the market



Misclassification (Exempt/Non-Exempt and Independent Contractors)

Independent Contractor – Key Factors

Nature of the Relationship

- Express intent of parties (not determinative)
- Expected duration of relationship (fixed term or indefinite duration)
 - The 6 month “guideline”?
- Right to terminate relationship
- Independent business (e.g., LLC)
- Integrated into Company’s operations (business card with title, management of people or work)
- Performing an executive role (e.g., CFO)
 - Corporate officers presumed to be “employees,” and not independent contractors



Misclassification (Exempt/Non-Exempt and Independent Contractors)

***Razak v. Uber Technologies Inc.*, Case No. 16-cv-573, 2018 WL 1744467 (E.D. Pa. Apr. 11, 2018)**

- Claim by Uber drivers' they were under FLSA and Pennsylvania wage hour laws dismissed - Uber drivers had total economic independence, effectively operating as their own business organization
- The court emphasized the unique nature of the relationship between Uber and its drivers
 - Driver freedom to determine working hours, work locations, how much to work
 - No restriction on working for other employers, including competitors
 - Driver freedom to accept or reject any requested rider
 - Significant expenses of a vehicle not reimbursed



Misclassification (Exempt/Non-Exempt and Independent Contractors)

Managing the Risk Going Forward for New Independent Contractors

- Rigorous classification process when establishing relationships – not just a matter of manager (or worker) preference
- Central review and approval process:
 - All requests for Independent Contractors) go through HR
 - Use of the Contingent Worker Request for initial screening
 - Trained HR personnel or Legal to review Request and, if necessary, to follow-up with management for additional information
 - HR to work with legal on the close calls and gray areas
 - Use temporary employee categories and agencies to reduce risk
- Legal review of Independent Contractor agreements as the relationship approaches six months from inception; follow-up with management



Misclassification (Exempt/Non-Exempt and Independent Contractors)

Managing the Risk for Existing Independent Contractors



- **Identify the universe** of existing Independent Contractors
- **Managers and HR to gather additional information on highest risk cases** through Independent Contractor Questionnaires
- **HR/Legal to determine whether any reclassification should take place** and, if so, how it should be communicated
- **HR/Legal to recommend whether to provide any compensation or benefits the individuals would have earned had they been classified differently from the start**
- **Work with Managers to address business needs for Independent Contractors** (change management; training; prepared communication)

Misclassification (Exempt/Non-Exempt and Independent Contractors)

Who is Entitled to Overtime?

- Employee defined broadly – suffered or permitted to work
- Includes most “trainees” and “volunteers”
- Certain industry coverage exemptions
- Five categories of overtime exemption:
 - Professional
 - Executive
 - Administrative
 - Outside Sales
 - Computer Professional



Misclassification (Exempt/Non-Exempt and Independent Contractors)

Who is Exempt from Overtime?

- Executive, Administrative and Professional Employees must be paid on a “salary basis”
- “Salary Basis”
 - Full pay for any week employee performs any work
- EXCEPT:
 - 1 week rule: any reason
lack of work, suspension
 - 1 day rule: employee reason
personal, sickness and disability (not jury duty)
 - initial/terminal week of employment



Misclassification (Exempt/Non-Exempt and Independent Contractors)

Who is Exempt From Overtime?

- “Salary Basis”
 - Predetermined amount each pay period
 - Constitutes all or part of compensation
 - Not subject to reduction based on quality or quantity of work
- Rule of Thumb:

Don't treat employee as salaried for hours over 40 but hourly for hours under 40



Misclassification (Exempt/Non-Exempt and Independent Contractors)

Who is Exempt From Overtime?

- “Salary Basis”
 - Special problems:
 - Partial day docking
 - Bonuses and time off based on hours worked
 - Key Concept:
 - Failure to pay on a “salary basis” defeats the exemption regardless of the employee’s job duties.
 - Management Tool: Distinguished discipline from docking



Misclassification (Exempt/Non-Exempt and Independent Contractors)

Who is Exempt From Overtime?

- Professional Exemption
 - Advanced degree or specialized study
 - Employee's primary duty is Professional work, *i.e.*,
 - Intellectual and varied
 - Requires discretion and independent judgment



Misclassification (Exempt/Non-Exempt and Independent Contractors)

Who is Exempt From Overtime?

Professional Exemption

Example:

- A teacher or professor who is engaged primarily in teaching and scholarship is EXEMPT

Example:

- A teacher who becomes the Assistant to the Dean and is not teaching is no longer exempt as a professional. May be exempt as an administrative employee, depending on type of work performed, and in particular, the amount of direction utilized



Misclassification (Exempt/Non-Exempt and Independent Contractors)

Who is Exempt From Overtime?

Computer Professionals

- If paid hourly, rate is at least \$27.63 per hour
- Highly skilled: *e.g.*, systems analysts and engineers
 - Work requires theoretical and practical application of highly specialized knowledge
- Not performing routine work: *e.g.*, computer technicians and keypunch operators



Misclassification (Exempt/Non-Exempt and Independent Contractors)

Who is Exempt From Overtime?

Computer Professional

- Problems with this Exemption
 - Rate of pay is high
 - Text of exemption is pre-internet
- Solutions
 - Legislation
 - Administrative Exemption



Misclassification (Exempt/Non-Exempt and Independent Contractors)

Who is Exempt From Overtime?

Executive Exemption



- Most of time spent in supervisory or management activities
- Supervisory: 2 or more employees, power to hire and fire
- Management: planning, directing, organizing work of business or recognized unit

Misclassification (Exempt/Non-Exempt and Independent Contractors)

Who is Exempt From Overtime?

Executive Exemption

- Distinguish “working foreman” or “team leader”
- Spends most of time doing same work as others in the group



Example:

Parking Manager – Supervises 8 Parking Attendants

If manager spends majority of time managing the employees and the operation: e.g., setting schedules, giving training, doing paperwork related to management, etc. = EXEMPT

But

If spends majority of time parking cars and collecting money (work also performed by the attendants) and does not supervise work less than 50% of time – NON-EXEMPT

Misclassification (Exempt/Non-Exempt and Independent Contractors)



Who is Exempt From Overtime?

***Smith v. BLD Services, LLC*, Case No. 17-cv-167, 2018 WL 999962 (D. Md. Feb. 21, 2018)**

- Although the precise nature of plaintiff's superintendent job duties were disputed, plaintiff worked with a crew of three to four employees in repairing, cleaning and lining sewers in the Baltimore area
- Plaintiff claimed that he typically worked between 55 and 60 hours per week and defendant unlawfully denied him overtime under FLSA, Maryland Wage and Hour Law and Maryland Wage Payment and Collection Law
- Court denied defendant's motion for summary judgment because a genuine dispute of material fact existed as to whether management was plaintiff's primary duty as superintendent

Misclassification (Exempt/Non-Exempt and Independent Contractors)

Who is Exempt From Overtime?

Administrative Exemption

- Non-manual or office work
- Directly related to management policies or business operations
 - of employer
 - of clients or customers
- Uses discretion and independent judgment
- Over matters of substantial importance
- Not closely supervised



Misclassification (Exempt/Non-Exempt and Independent Contractors)

Who is Exempt From Overtime?

Administrative Exemption

- Not “Production” workers
 - Doing the primary work of the business
- Not Applying knowledge or skill
 - Following prescribed procedures
 - Determining whether standards are met
- Not Clerical/Administrative Employees



Misclassification (Exempt/Non-Exempt and Independent Contractors)

Who is Exempt From Overtime?

Administrative Exemption

Example

- Director of Safety who makes decisions about what safety procedures to implement and how to implement them is probably EXEMPT.
- A Safety Inspector who determines whether safety procedures have been followed and safety standards met is probably NON-EXEMPT.



Misclassification (Exempt/Non-Exempt and Independent Contractors)

Who is Exempt From Overtime?

Blended Exemption

- Employee spends majority of time on exempt work
- Time is spent on some combination of professional, administrative and/or executive duties



Misclassification (Exempt/Non-Exempt and Independent Contractors)

Who is Exempt From Overtime?

Highly Compensated Employees

- Total compensation at least the amount of the 90th percentile of all non-hourly workers (\$134,004 set as of 12/1/16; next reset effective 1/1/2020)
- Performs one or more of the duties of an executive, professional or administrative employee
- Compensation includes commissions, bonuses and other non-discretionary compensation but not benefits



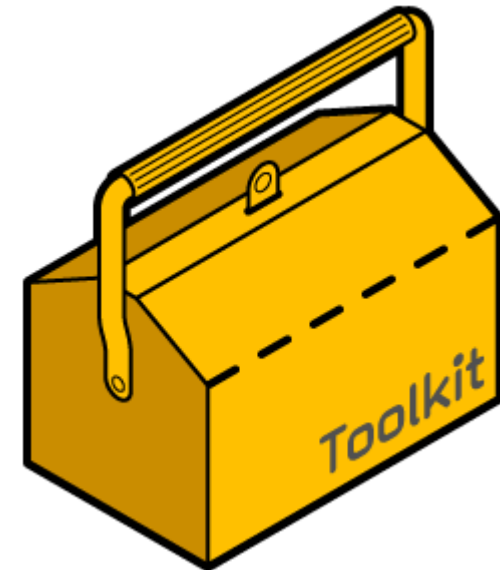
Misclassification (Exempt/Non-Exempt and Independent Contractors)

Who is Exempt From Overtime?

Management Tool: Job Descriptions

Management Tool: Procedure for Classifying Employees

- start with the easy cases
- if uncertain:
 - get an accurate job description
 - determine which exemption(s) may apply
 - use time estimates
 - consult legal counsel



Misclassification (Exempt/Non-Exempt and Independent Contractors)

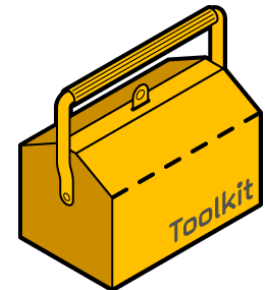
Who is Exempt From Overtime?

Management Tools:

- No liability where employee treated as non-exempt
- No liability where employee works 40 hours or less in a work week

Management Tool: Belo Agreements:

- Employees who work irregular hours
- Neither employee nor employer can predict or control hours
 - Hours vary above and below 40
- Guaranteed pay up to 60 hours
 - Hours over 40 at time and 1/2



Misclassification (Exempt/Non-Exempt and Independent Contractors)

Who is Exempt From Overtime?

Outside Sales

- Time is spent visiting customers and prospects at their place of business
- Time not spent in office, including home office
- Time not spent on the phone
- Sometime on support activities is okay



Mismanagement of Benefit Plan Compliance: 401(k) Plans: Late Contributions

- Employers must deposit employee contributions into 401(k) accounts as soon as the contributions can be segregated from company assets
 - Contributions made after the 15th day are late
 - This is a deadline, but not a safe harbor
 - If employer establishes a pattern of faster deposits (1-3 business days), then amounts deposited after the pattern period are generally deemed late
 - DOL provides a 7-day safe harbor for employers with less than 100 participants
- If employer deposits contributions late:
 - Employer generally must contribute lost earnings due to late contributions
 - Employer must report late contributions on Form 5500

Mismanagement of Benefit Plan Compliance: 401(k) Plans: Definition of Compensation

- Compensation definitions are long and detailed
- Common compensation items that are excluded or included:
 - Post-termination payments
 - Leave cashouts
 - Compensation related to equity grants
 - Bonuses
 - Gift cards (if treated as compensation)
- Key Takeaway: Employers should regularly review the 401(k) compensation definition with the payroll department
 - If errors occur, IRS correction procedure requires employer make-whole contributions *plus* earnings

Mismanagement of Benefit Plan Compliance: 401(k) Plans: Matching Contribution Formula

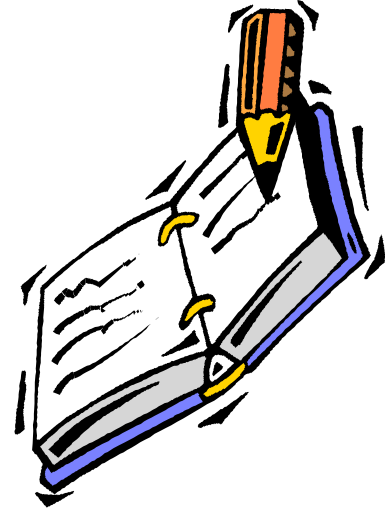
- Review matching contributions to determine the following:
 - Is the matching contribution made payroll by payroll period?
 - Is there a true-up matching contribution at year end?
 - Confirm IRS limits are applied correctly
- Key Takeaway: Employers must correct failure to match contributions
 - Often includes additional contribution *plus* earnings

Mismanagement of Benefit Plan Compliance: Bonus Plan Payment Timing

- Bonus plans may be considered deferred compensation subject 409A timing restrictions
- Two alternative timing methods to comply with 409A:
 - Require continuous employment through the payment date, *or*
 - Require payment no later than March 15th
- If employer does not require continuous employment, employer may lose the flexibility to tie bonus payment to company financials
 - Company financials often are not ready before March 15
- Key Takeaway: Review bonus plan payment terms to ensure payment timing complies with 409A and meets business needs/objectives

Managers Who Don't Manage or Don't Manage Well

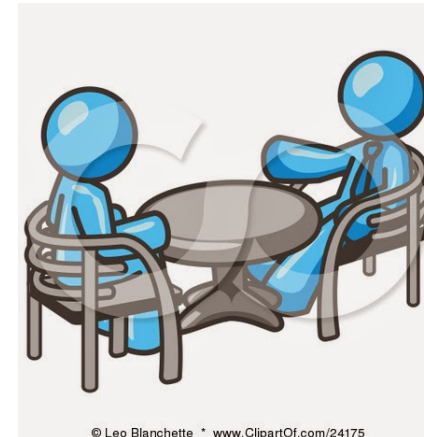
Regardless of the legal theory, when a wrongful termination case goes to court a jury will look to the Employer to demonstrate that it acted reasonably



Managers Who Don't Manage or Don't Manage Well

Counseling Poor Performers

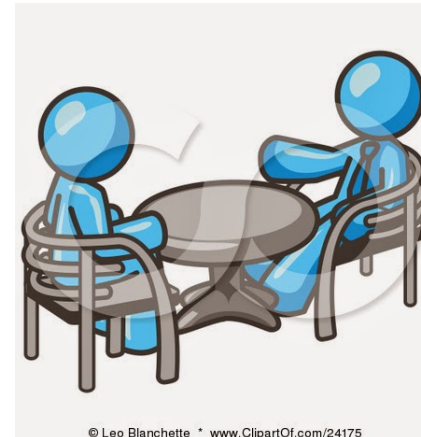
- Remember that the purpose of counseling is to change the behavior and rehabilitate the employee
- Showing anger or berating an employee is counter-productive
- Demonstrating that the supervisor or co-workers can do a better job than the employee will not produce improvement



Managers Who Don't Manage or Don't Manage Well

Counseling Poor Performers (Continued)

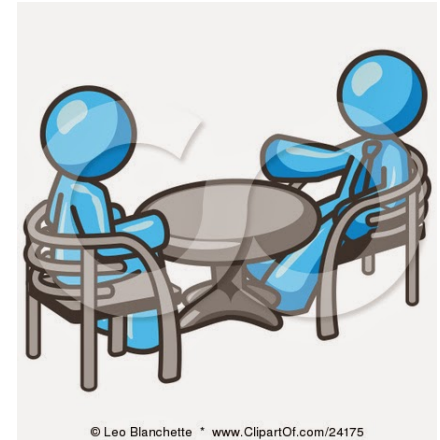
- Be factual and specific: tell the employee what he or she did or said or failed to do or say that caused a problem
- Do not label the employee or his or her behavior
- Do not try to tell the employee why you think he or she is not performing well



Managers Who Don't Manage or Don't Manage Well

Counseling Poor Performers (continued)

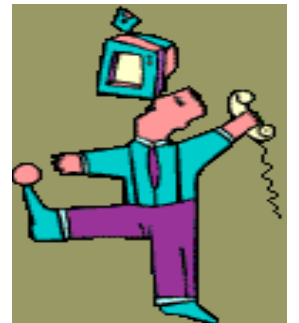
- Give the employee specific goals
- Set a timetable for improvement
- Tell the employee the consequences of continued failure to perform
- Document the interview
- Follow up and follow through
- Use a performance improvement plan when appropriate



Managers Who Don't Manage or Don't Manage Well

Problems with Performance Appraisals

- Too often managers want to terminate an employee with good reviews for poor performance
- Review forms often use general categories that mask true strengths and weaknesses
- In delivering reviews managers do not help employees understand where they stand



Managers Who Don't Manage or Don't Manage Well

Determining Appropriate Discipline

- The Discipline Balancing Act
 - Need for consistency
 - Need to consider extenuating/mitigating factors



Managers Who Don't Manage or Don't Manage Well

MANAGER'S MISTAKE:

- Reduces hours or duties because the employee is not performing

CONSEQUENCE:

- Employee claims differential treatment; manager prevented performance



Managers Who Don't Manage or Don't Manage Well

MANAGER'S MISTAKE:

- Transfers employee to another supervisor

CONSEQUENCE:

- Employee continues to fail but transfer looks like a reward for good performance



Managers Who Don't Manage or Don't Manage Well

MANAGER'S MISTAKE:

- Avoids giving employee bad news (may use negative behavior to “demonstrate” dissatisfaction)

CONSEQUENCE:

- Employee has no clue manager is dissatisfied (and may think manager is moody or biased)



Managers Who Don't Manage or Don't Manage Well

MANAGER'S MISTAKE:

- Waits until the situation is a “crisis,” then tells HR the employee needs to be fired immediately

CONSEQUENCE:

- Employee is surprised by the termination and considers it unfair so is a high litigation risk



Difficult Employees

Dealing With Difficult Employees



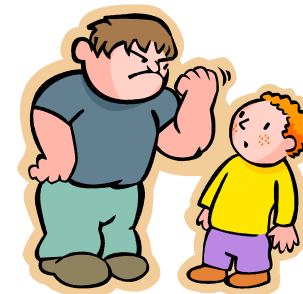
High Self-Esteem and Low Ability



The Get Out of Jail Free Card



The Tyrannical Manager





Difficult Employees

The Troublemaker

- **Identifying characteristics:**
 - Complains constantly –attempts to involve other employees
 - Often very good at job
 - Often misuses confidential information
- **Understanding The Troublemaker:**
 - What s/he wants – power
 - Threat posed – disruption/lowered morale
 - Shows his/her stripes early and usually does not change
- **Dealing with the Troublemaker:**
 - Recognize and address behavioral problems directly and immediately
 - Terminate early and often – severance worth the cost



Difficult Employees

High Self Esteem-Low Ability

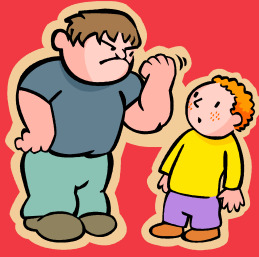
- **Identifying characteristics:**
 - Never accepts criticism or takes responsibility
 - May claim person providing negative feedback is biased
 - Already unqualified for current job but asking for raises and promotions
- **Understanding The HSE/LA Employee:**
 - What s/he wants – the world to reflect own perceptions
 - Threat posed – weak performance; disruptive presence; litigation risk
 - Really does view the world differently
- **Dealing with the HSE/LA employee**
 - Communication must be direct and specific, supported by examples
 - Performance counseling must be memorialized in writing to overcome selective hearing
 - Deliver messages in a manner that gets the point across but respects the individual



Difficult Employees

The Get Out of Jail Free Card

- **Identifying characteristics:**
 - Makes a complaint on the eve of performance counseling or termination
 - Sees self as victim
 - Desperate to keep job
- **Understanding The GOJF Cardholder:**
 - What s/he wants – power/leverage from being the victim
 - Threat posed – serious litigation risk; time and energy drain
 - Will always pose litigation threat
- **Dealing with the GOJF Cardholder:**
 - Performance problems and counseling steps must be well-documented, compelling and defensible
 - Time and patience required to mitigate risk



Difficult Employees

The Tyrannical Manager

- **Identifying characteristics:**

- Manages up well
- Manages down poorly – often with intimidation
- Expects loyalty from subordinates

- **Understanding The Tyrannical Manager:**

- What s/he wants – to please the boss at any cost
- Threat posed – serious morale and litigation risk
- “Success” usually outweighed by harm/risk

- **Dealing With The Tyrannical Manager:**

- This behavior is a performance problem and a liability risk – active management is required
- Litigation risk reduced by removing direct hire/fire authority



Difficult Employees

NLRB v. Pier Sixty, LLC, 855 F.3d 115 (2d Cir. 2017)

- Employee posted on Facebook: “[My supervisor] is such a NASTY MOTHER F***ER don’t know how to talk to people!!!!!! F*** his mother and his entire f***ing family!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!!”
- Holding: NLRA **protected speech** despite vulgar attacks on the supervisor and his family because the subject matter of the **message included workplace concerns** such as the company’s allegedly disrespectful treatment of employees and the upcoming union election
- The court explained that “this case seems to us to sit at the **outer-bounds of protected, union-related comments**”:
 - Profanity was posted on social media, in the context of workplace issues and the **union campaign**
 - Profanity was **not delivered in the presence of customers** and **did not disrupt company operations**
 - Employer had tolerated (and helped foster) an **environment where profanity flowed freely**
 - Employer was aware that plaintiff was involved in the union campaign, and the **company reacted very negatively to the union campaign**

Mishandling Complaints

Changing workplace places **more demands** on managers

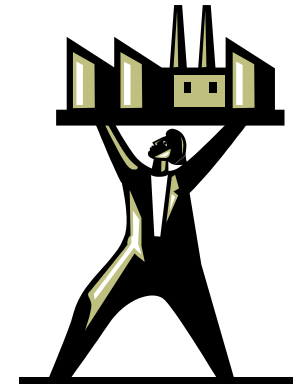
- Greater workplace **diversity**
- More frequent “**cultural**” collisions
- More frequent **collisions of work and non-work** activities
 - Example: use of social networking
- **Increasingly complex**, nuanced harassment and discrimination claims
- Increased complexities make effective, **early intervention** by managers even more **important**



Mishandling Complaints

Managers have **special obligations**.

- First Line of Defense.
- **Duty to report.**
 - Actions, or inactions, may create **liability** for the Company.
 - Poor response could lead to **disciplinary action**, including termination.
- Likely to be a **defendant** and/or **witness** in any lawsuit.
- Statements can be **deemed admissions** by the Company.
- Actions subject to **heightened scrutiny**.
- Employer is **strictly liable** for Quid Pro Quo Harassment by managers.



Mishandling Complaints

Avoid Mistakes

- **No. 1: Failing to “register” the complaint**
 - *Requiring legal language or formal process before reporting it*
- **No. 2: Inappropriate initial response**
 - *Comments or conduct discouraging complaint*
 - *Knee-jerk judgments (“Hey, that sounds like harassment to me!”; “Bill would never do that!”)*
 - *Avoid statements about whether legal harassment standard has been met -- as opposed to “raises serious concerns”*
- **No. 3: Not knowing/following Company policy**
 - *Not reporting: Promising to keep complaint “confidential” (legal “hot potato”)*
 - *“Selective” reporting; or selective investigation*
- **No. 4: Failing to act promptly**



Mishandling Complaints

Hernandez v. Fairfax County, 719 F. App'x 184 (4th Cir. 2018)

- Station manager at fire department engaged in inappropriate conduct toward plaintiff, including:
 - blocking her path in the hallway, placing his chin on her shoulder and positioning his body “right up against” her
 - Statements to plaintiff indicating his desire to see her in a bathing suit
 - Asked plaintiff whether she would “be able to handle that big hose,” a comment that plaintiff construed as being sexual in nature
 - tracked and recorded in binders plaintiff’s activity at the station
- The station manager’s conduct was imputable to defendant because **defendant’s responses** to the station manager’s continued inappropriate conduct **were inadequate**
 - Supervisors told him to “focus on his work”
 - Supervisors did not direct him to cease tracking plaintiff and did not review his notes regarding plaintiff’s activities



Mishandling Complaints

Avoid Mistakes (continued)



- **No. 5: Failing to act because a valued or productive employee is the accused.**
- **Example: *Weeks v. Baker & McKenzie***, affirming a \$ 3.5 million punitive damages award (reduced by the Judge from the \$ 7 million awarded by the jury) to a temporary secretary against the Baker & McKenzie law firm. Firm was “well aware” harassing partner’s “playful” behavior was likely to create hostile work environment for women; however, firm consistently failed to take remedial measures reasonably designed to protect women from rainmaking partner’s abuse.

Mishandling Complaints

No Retaliation

- Reduction in staff or job functions
- Denial or delay of promotions
- Transfer to another department or job site
- Reduction in wages or salary
- Unreasonable job assignments or overtime
- Abrupt change in schedule



Mishandling Complaints

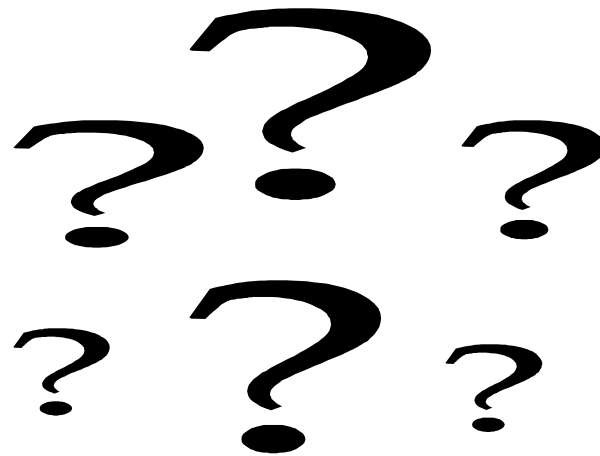
No Retaliation

- Discipline which seems out of line with the offense
- Over-managing employee (more performance evaluations, discipline than normal)
- Changes in vacation or other leave policy as to that employee
- Ostracism, teasing, gossip, bad-mouthing



Mishandling Termination Decisions

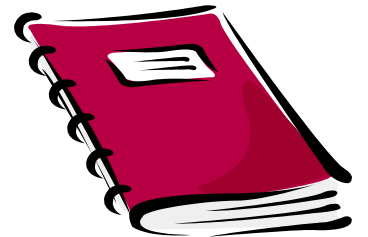
TERMINATION:
THE FIVE MOST IMPORTANT QUESTIONS
MANAGERS SHOULD ASK



Mishandling Termination Decisions

Did I Follow Company Policy?

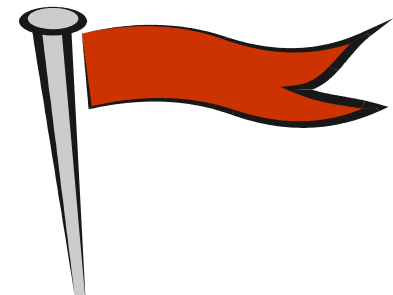
- Disciplinary procedures in policy manuals were followed
- Employee had fair advanced notice of the standards by which performance would be judged
- Similarly situated employees have been terminated
- Reasons for discharge match termination standard



Mishandling Termination Decisions

Is This a Red-Flag Employee?

- length of service
- member of minority group
- recently complained about safety or integrity of company
- recently exercised a legal right or communicated with a manager about personal problems
- Benefits about to vest



Mishandling Termination Decisions

Do I Have Proper Documentation?

- Improper conduct or failure to respond to corrective suggestions documented
- Prior disciplinary record supports termination
- Both documentation and decision to terminate are timely



Mishandling Termination Decisions

Have I Considered All Other Options?

- Should there be a final warning?
- Is there a reasonable alternative?



Mishandling Termination Decisions

***Jones v. Gulf Coast Health Care*, 854 F.3d 1261 (11th Cir. 2017)**

- FMLA retaliation claim survived summary judgment despite photos of plaintiff at an amusement park and at a beach in the Caribbean Islands, which were taken when plaintiff was supposed to be recovering on FMLA leave
- Employer claimed that plaintiff was terminated for putting photos on Facebook that violated the company's social media policy prohibiting postings that would harm co-workers' morale
- Employer did not conduct an internal investigation regarding plaintiff's Facebook posts and could not show that the social media policy was the reason for the firing, as plaintiff maintained it was not mentioned during his discharge meeting and there were contradictory reasons for his firing



Mishandling Termination Process

Conducting the Termination Meeting

- Time the interview carefully with respect to the employee's schedule and personal needs.
- Tell the employee in the first sentence that he or she has been terminated.
- Keep the discussion short (15 minutes maximum).
- Give complete, truthful reasons for termination.
- Do not make personal comments or small talk.



Mishandling Termination Process

Conducting the Termination Meeting (continued)

- Do not argue with the employee but allow the employee to make a statement.
- If the employee provides information which might change the decision, put the employee on leave status while you consider.
- When appropriate, thank the employee for what he or she has contributed.



Mishandling Termination Process

Risks to Avoid in the Exit Process

- Defamation
- Intentional Infliction of Emotional Distress
- False Imprisonment
- Invasion of Privacy

Claims Based on Employer's Post Termination Conduct

- References
- COBRA
- ERISA



Mishandling Termination Process

- ***Galarpe v. United Airlines, Inc.*, Case No. 17-cv-06514, 2018 WL 1586202 (N.D. Cal. Apr. 2, 2018)**
- Employer terminated plaintiff for committing a hate crime and/or engaging in hate speech when plaintiff tied two knots known as hangman's knots or nooses
- Plaintiff claimed that he was not aware of the negative connotation of the noose in the context of racism in America because he was born in the Philippines and came to the US at the age of 10
- Plaintiff alleged he was wrongfully terminated by defendant and that the termination caused him severe emotional distress after defendant defamed him by making false statements in a termination notice that branded him a racist to his colleagues



Avoid Termination Lawsuits

Reasons Employees File Lawsuits

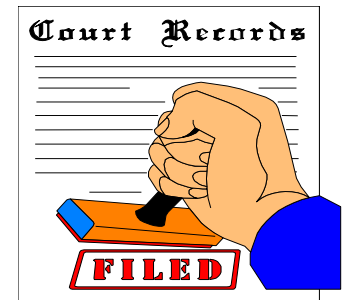
- Surprised by the termination
- Believe others have been treated differently under similar circumstances
- Believe the Company or their supervisor is biased and incapable of treating them fairly



Avoid Termination Lawsuits

Reasons Employees File Lawsuits

- Trouble-makers
- Upset by the termination process
- Unable to accept criticism
- Recently made a complaint (harassment, safety, whistleblowing. etc.), requested or used leave, notified the Company of a medical condition or requested an accommodation.



Avoid Termination Lawsuits

Reasons Employees File Lawsuits (continued)

- Believe their conduct not bad enough to justify termination
- Not asked to give their side of the story, not provided with complete explanation
- Company has failed to follow its own procedures in handling the employee's discipline and termination



Top Ten Employment Law Headaches for Legal Counsel and how to Avoid Them

Key Takeaways

- **Bad Hiring Practices**

Most claims are based on something said in an interview-training and coaching of interviews is required.

- **Bad Documents**

Rogue documents created or modified by non-lawyers always have problems – establish legal review protocols.

- **Mismanagement of Stock Grant Process and Documentation**

Most issues arise from using stale valuation reports or failing to document the determination of fair market value in setting the exercise price of a stock option.



Top Ten Employment Law Headaches for Legal Counsel and how to Avoid Them Key Takeaways

- **Misclassification (Exempt/Non-exempt and Independent Contractors)**

Common sense and good business judgment lead to wrong answers in this space –establish legal review protocols.

- **Mismanagement of Benefit Plan Compliance**

The overwhelming majority of issues result from payroll errors. Work closely with your payroll department.

- **Managers Who Don't Manage or Don't Manage Well**

Managers who have no training and are rewarded for getting work done and not for managing people = lawsuits waiting to happen – provide good training and coaching.

- **Difficult Employees**

Five percent of the employee population cause 95% of the problems – identify and actively manage or manage out the problems



Top Ten Employment Law Headaches for Legal Counsel and how to Avoid Them

Key Takeaways

- **Mishandling Complaints**

Problems here are most often related to either poor intake or inadequate response – encourage managers to report complaints immediately and work together with HR/Legal every step of the way.

- **Mishandling Termination Decisions**

If managers are not penalized for asking HR to fire an employee who has no reason to suspect his/her job is at risk, this practice will continue – create incentives and processes to avoid this.

- **Mishandling Termination Process**

How a termination is handled can determine whether a lawsuit results – pay careful attention to logistics and messaging.

