

A Stitch in Time: How Human Resources Manager Training Can Reduce Employment Litigation Risk



Presented by:

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Hiring

Hot Button Issues

- Interviewing and Hiring in the Age of COVID-19
- Social media
- Salary history
- Recruiting practices – disparate impact



COVID-19 and Job Interviews

- Virtual interviews – phone or Zoom if possible
- Prepare hiring managers with guidelines on best practices for conducting remote interviews
- Recording job interviews – consent required
- If in person, check social distancing requirements and provide clear instructions to candidates – parking, social distancing, telephone health screening prior to interview (day of), on-site health screen – can you do temperature checks of candidates?
- I-9 forms – DHS has relaxed physical presence requirements



Other COVID-19 Hiring Issues

You recently offered a front desk position to Carol which is public facing. Before she starts work, Carol informs you that she has tested positive for COVID-19? Can or should you:

- (1) delay her start date?
- (2) withdraw the job offer if you need her to start immediately?

What if Carol informs you before she starts that she is pregnant? Can you withdraw the offer because she is at higher risk if she contracts COVID-19?

EEOC Guidance: What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws



Social Media

- Almost half (45%) of employers report using social networking sites to dig up information about job candidates
- Some employers search Google as part of their regular background checks for applicants

Google

Google Search

I'm Feeling Lucky

Social Media

- Social media profiles can indicate an applicant's:
 - Age
 - Disability
 - Race
 - Religion
 - Sexual Orientation
- An important defense for a failure to hire claim is ignorance of the protected characteristic
- HR should coordinate use of social media with hiring managers – have a plan/process and stick with it!



Salary History



- Goals:
 - Eliminate cycle of pay discrimination
 - Avoid relying on pay history to set compensation
- Currently 18 statewide bans and 21 local bans prohibiting employers from requesting salary history information from job applicants, including DC (District gov agencies only), Maryland (effective 10/1/20), Virginia (state agencies effective July 1 – Qs removed from job application), and Montgomery County, MD (county jobs)
- Practice tip: Avoid asking what salary applicant is seeking. If prefer to ask, check the law in your jurisdiction.

Recruiting Practices and Disparate Impact

Review recruiting practices to ensure they do not have a disparate impact on protected classes

Hot button issue: age discrimination

Recruiting practices that might be problematic include: questions about college graduation date, focus on college campus recruiting, ads that encourage recent college grads or “digital natives” to apply, job experience caps

Targeted ads are under fire – Facebook claims

Open question: does ADEA protect job applicants under disparate impact theory?



Effective Investigations Produce Results



Avoid or
Minimize
Legal
Liability



Improve
Morale



Improve
Factual
Basis for
Decisions



Set
Example



Demonstrate
Company
Commitment
to Enforce
Policies

Investigation Process

- Receiving initial complaint
- Conducting preliminary interview of complainant
- Taking emergency interim steps, if necessary
- Deciding to conduct formal investigation
- Planning the investigation
- Conducting interviews
- Reaching a conclusion
- Creating a written report
- Making a recommendation to management
- Implementing investigation results
- Following up



Key Items for HR Managers



- Make sure managers know to alert HR of complaints
- Make sure managers know to alert HR even if employee reports potential misconduct but says he or she doesn't want an investigation
- Make sure to alert Legal department of complaints and ask counsel for advice
 - “Thelma alleges that Louise said she would bring a gun to work. Please advise as to how you would like me to proceed.”
- Documentation of investigation – from beginning to end – is critical.

Planning The Investigation

- **Logistics Checklist:**

- Who “owns” the investigation?
- What is the “scope”?
- Who should be interviewed?
- Time, date, location, order of interviews?



- **Develop Strategy for Obtaining Information:**

- Collect as much information as you can before interviews
- Search electronically stored information (e.g., emails, video)
- Consider suspensions/LOA for affected employees

Note on Privilege

- To preserve privilege, have HR contact legal and ask for advice.
- Legal should then direct that HR (or other appropriate personnel) conduct an investigation into the alleged misconduct.
- Don't just copy counsel on everything - that won't create the privilege.
- Do not assume that the investigation is privileged – take notes and draft the report as if they will be seen in court.
 - Mental impressions of counsel may be protected.
 - Underlying facts, however, are not protected.



Note on Privilege

“The Legal Department is directing your team to investigate recent allegations of XXX made by Y, to determine whether those allegations have any merit. The investigation is being requested by the Legal Department in anticipation of litigation, and the Legal Department will provide direction and guidance as to the appropriate steps in the investigation. Because the investigation is being conducted at the direction of the Legal Department, your investigation and communications with the Legal Department are privileged and confidential. To ensure this privilege is maintained, you and you team should not discuss the investigation or legal advice with anyone other than the Legal Department or counsel that the Legal Department may later retain. Further, all documents you create as part of the investigation (including interview notes), should be marked on each page “Privileged and Confidential: Prepared at the Direction of Counsel.” The Legal Department is available anytime to answer your questions and provide further guidance during the investigation. Please contact me with questions or if you need assistance.”

Interviews

- **Open and Close All Interviews**
- **Stay on Course – be objective**
- **Ask the W questions**
- **Take Notes:**
 - Date, time, place, who is present
 - Record facts, not conclusions
 - Document important quotes precisely
 - Distinguish between “I don’t know” and “I don’t recall”
 - Ok to note credibility – but factually (“John wouldn’t look me in the eye” NOT “John looked like a liar”)



Reaching A Conclusion

- Decision Based On Evidence Gathered
- Consider Company Policies, Past Practice
- Consider Whether Corrective Action is Recommended



Creating A Written Report

- **What Makes a Good Report?**
“The 3 C’s”
 - **Clear**
 - Language
 - Logic
 - **Complete**
 - Documents all aspects of investigation
 - Addresses/resolves all issues
 - **Concise**
 - Direct, succinct
 - In “plain English” and easy to read



Communicating The Written Report

- **Letters to both complainant and accused**
 - Summarize basis for complaint (high-level description)
 - Discuss relevant policies and procedure to conduct fair and prompt investigations
 - To complaining party, if corrective action taken, indicate generally that “corrective action has been taken;” be more specific with accused
 - Discuss employer’s anti-retaliation, confidentiality, and open door policies





Performance Management

Case Study

- Frank, a customer service operations analyst with a history of performance problems, received a mixed review in his last evaluation. His supervisors noted excessive Internet usage, lack of respect for personal boundaries in the workplace, and that Frank was sometimes argumentative with co-workers. Significantly, there was an incident during which Frank was belligerent toward a customer, and on another occasion, he failed to complete a critical project on time.
- Frank's performance did not improve during the months following his evaluation, although his supervisor continued to document performance deficiencies.
- Four months later, when the company was thinking about firing Frank, he asked for FMLA leave.

So... would it be lawful to fire Frank?

How would you analyze this situation before making a decision?

- What factors would you consider?
- What documents would support your decision?



Here's What the Court Decided About Frank's Case

- *Brown v. ScriptPro*, 700 F.3d 1222 (10th Cir. 2012)
- The Court found that Frank's discharge was not FMLA retaliation. The Court focused on the fact that Frank had previously received mixed performance reviews, and that his performance problems continued in the months leading up to his FMLA request.
- Key takeaways:
 - **Documentation**
 - **Performance Management**
 - **Consistency**



What Should You Document?

- Performance deficiencies (don't wait!)
- All employee discipline and reasons (don't wait!)
 - Ensure there are non-privileged communications to support discipline
- Requests for accommodation
- All employee complaints, steps to address, steps to resolve, follow-up activities





Timely and Consistent Performance Documentation and Discipline Are Critical

- Improves morale when employees see how management deals with positive and negative behavior
- Removes poor performers from the workplace and gives those with potential a chance to correct/improve
- Creates boundaries
- Limits potential negligent retention and wrongful discharge claims
- Avoids discipline only occurring after a complaint or request from employee

Consistency is Critical, cont.

- PIPs often provide good evidence that an employer had legitimate performance concerns about an employee
- BUT, if you place an employee on a PIP, make sure:
 - The criteria are objective;
 - Management meets with employee as described in the PIP;
 - Changes to PIP are explained and documented.
- Crowley v. Perdue: 318 F. Supp.3d 277 (D.D.C. 2018): The court denied summary judgment and said expert could testify regarding whether failure to follow PIP was evidence that placement on a PIP was retaliation for employee's request for accommodation.

Employee Asks for Leave

No prior documentation?

- Don't start just after leave request
- Don't "play catch-up" during leave
- No "old" write-ups delivered first day back from leave

Address performance issues after leave is over

- "Pick up from where we were when leave began"

PIP in place?

- Consider extending deadline to give a chance to succeed after return
- NOT: "The deadline was going to expire while he was out, he wasn't meeting the PIP before he left, so we just went ahead with things."



Employee Raises Issue of Disability

- If presently issuing discipline for misconduct/poor performance, may proceed. No need to rescind/waive.
 - Don't play catch up though.
- **Explain performance expectations clearly and document.**
- **Ask “how can I help you?”**
 - Document that you asked, and employee's response.
- **PIP in place?**
 - Consider extending deadline to give a chance to succeed after interactive process.
 - Don't modify PIP to reference why extended.
 - NOT: “The deadline was going to expire when she told us, she wasn't meeting the PIP at the time, so we just went ahead with things.”



Rightful Termination

The “CLEAN” Doctrine

- **C**onsider the facts behind discipline
- **L**earn what managers, witnesses, and documents have to say
- **E**valuate what disciplinary action has been taken in the past
- **A**nalyze risk
- **N**arrow down potential options and decide



The “CLEAN” Doctrine

- **Consider the facts behind discipline**
 - What happened?
 - Policy violation?
 - Altercation?
 - Performance issue?
 - Who are the witnesses?
 - What is the documentation?
 - Timeliness?



The “CLEAN” Doctrine

- Learn what managers, witnesses, and documents have to say
 - First collect information from managers and review relevant documentation
 - If appropriate, talk to witnesses who may have seen the event or may have knowledge about the issue (other managers about employee’s performance)
 - Talk to the employee and get his/her side of the story
 - Document EVERYTHING

The “CLEAN” Doctrine

- **Evaluate** what disciplinary action has been taken in the past
 - Most commonly forgot part of the analysis
 - Must do department, facility and company wide analysis because that is what the trier of fact will look at
 - How has the manager reacted to similar situations in the past (differential treatment reasons)?
 - “Didn’t we only do “X” to Sally for this just last month?”
 - How is Sally’s situation different (new hire, different situation, etc.)?

The “CLEAN” Doctrine

- **Analyze risk**
 - Who is the manager (short-tempered)?
 - What is the support we have?
 - Protected Categories?
 - Recent medical leave?
 - Employee morale effect?
 - Will the employee challenge the termination?
 - Are there other issues he could raise only because we discipline him (wage/hour, safety, etc.)?



The “CLEAN” Doctrine

- **Narrow down potential options and decide**
 - Terminate and, if so, severance?
 - Training, policy acknowledgment?
 - Suspension, reduction in pay, change in schedule or position or office location?
 - How are we treating similarly situated individuals?



HR Review: Common Red Flags

- Layoffs vs. RIFs vs. Furloughs
- “Reduction of Force of 1”
- Termination for singular poor performance without analysis of similar treatment
- Usage of non-objective criteria
- Job not available upon return for leave
- Absenteeism/tardiness
- Performance evaluations/raises
- Protected categories
- Protected activity



RIFs – What Could Possibly Go Wrong?

Langley v. IBM (W.D. Texas)

- 59-year old IBM sales EE selected for termination in RIF
- IBM claimed RIF based on need to reduce costs, improve financial performance
- HR testimony – IBM trying to attract millennials – other executive statements about “need to refresh” workforce
- Discrepancies in reasons offered, who was actual decisionmaker, whether plaintiff selected based on performance, etc.
- HR emails also created problematic evidence



COVID-19: Can I terminate an employee who doesn't want to return to work?

Prepare a checklist:

- Communicate with employee – explore concerns and how you can address
- Consider ADA and FMLA, if applicable
- Consider FFCRA leave, if applicable
- Consider use of other paid or unpaid leave
- Unemployment benefits issues
- Other circumstances, including essential nature of position



COVID-19: Other HR Considerations as Employees Return to Work

- HR should be involved in advance training of managers and supervisors on all new policies and protocols (e.g., temperature testing, social distancing in common areas, permitted and prohibited activities, ranging from use of PPE to use of hallways)
- Establish a protocol for managing workplace should someone become ill, including cleaning workspace, closing location if necessary, and working with health officials to facilitate contact tracing and notification of possible exposure.
- See Fisher Phillips Comprehensive COVID-19 Resource Center for Employers:

<https://www.fisherphillips.com/fisher-phillips-comprehensive-covid-19-resource-center>



COVID-19: Emerging Trends in Litigation

- Employees with pre-existing conditions have filed FMLA claims relating to denied leave requests
- Employees have filed wage and hour claims related to pre- and post-shift activities, like washing PPE, now required to reduce risk of transmission of COVID-19
- For more information, visit fisherphillips.com and the COVID-19 Employment Litigation Tracker



Thank You



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