Avoiding Employment Law Pitfalls: The Dos and Don'ts of Personnel Actions

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In employment law and most other types of law there is no magic formula for success. It would be great to recommend a particular course of action and expect all employee issues and threats of lawsuits to disappear, but such is not the case. In the absence of an easy fix, an employer and employment attorneys must be pro-active, diligent, thorough, informed, and know who to call in a crisis. The following dos and don'ts provide an employer with general guidance and describe typical obstacles related to employment-law.

Do: Document appropriately.
Don't: Needlessly pad files.

The success or failure of personnel related actions and associated litigation is strongly tied to the quality of documentation accompanying employment decisions. Human Resources often has a formula for the content of an employee's file such as performance evaluations, commendations, and financial or medical information. Supervisors usually have full discretion to include additional items related to the employee, but they frequently include superfluous or even undesirable information.

A supervisor should not include every document that mentions an employee. This needlessly pads a file and creates potential open records issues. For example, an email that in passing mentions an employee may also include sensitive data such as the identities of undercover officers.[1] A string of emails containing an employee's name may also contain the names of others who could be called as witnesses in litigation. A document that mentions an employee without offering useful or evaluative information about that employee is unnecessary. A supervisor should only include items that reflect an employee's successes and short-comings. They should exercise restraint and use logic in deciding what to include.

A supervisor's file must follow an employee when the employee changes supervisors within a department. Gaps in a supervisor file lead to a more difficult time substantiating progressive discipline and make it harder to paint an overall picture of the employee's performance.

1 It should be noted that the law enforcement exception may apply to information. *See* TEX. GOV'T CODE ANN. § 552.108 (West 2010).

The EEOC reported that claims of discrimination are increasing, with a large upswing from FY 2007–FY 2008[2] and an increase to approximately 100,000 claims in FY 2010. The greatest number of charges allege discrimination based on race and sex.[3] Over 60% allege some sort of retaliation involved. What does this mean for employers? Employment decisions, from counseling reports to reductions in force must be well-substantiated to protect the employer.

Documentation must be factual and consistent. Is the employee performing in a sub-par manner? Specific examples of sub-par performance should be present in their employee file, performance evaluations, and discipline record. Supervisors must be impartial and clear in evaluations, reviews, and disciplines. A biased review is misleading and counterproductive; an employee file may contain memos that note poor performance in contrast to glowingly positive supervisor evaluations. This type of inconsistent or contradictory employee file makes disciplinary appeals harder and is more vulnerable to wrongful termination suits, creating frustration for attorneys representing the employer.

Documentation is also necessary to substantiate Reductions In Force (RIFs). A poor economy tends to bring an increased likelihood of employment litigation related to terminations. Employees may assume their termination was for an illegal reason like race, age, or gender. If an employer decides to pursue a RIF, it is crucial to document the basis for RIF, detailing the legitimate business reason. These reasons include cost savings, organizational efficiency, or the elimination of duplicate operations. A record should also be made documenting the benefits of RIF. A variety of legal issues arise with RIFs, not the least which are discrimination claims, FMLA implications,[4] Age Discrimination (ADEA) claims,[5] and USERRA claims.[6] These laws impose specific restrictions as to

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2 From 82,792 total claims in 2007, to 95,402 in 2008. Charge Statistics–FY 1997 through FY 2010, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited May 27, 2011).

3 It is interesting to note that FY 2010 was the first year the EEOC included reports under the Genetic Information Non-Discrimination Act (GINA), which took effect at the end of 2009. GINA forbids employers to make employment decisions based on an applicant's or employee's genetic information, or a believed predisposition to develop a medical condition. In FY 2010, 201charges of GINA violations were alleged; although a large percentage (67.9%) were found to have no reasonable cause. This is a new area of potential charges that should be monitored for developments.

4 FMLA is also invoked when RIFs are being enacted, as an employee on FMLA leave may be protected against a RIF unless it can be shown that they would have lost their position even if the FMLA leave hadn't been taken. 29 C.F.R. § 825.216(a)(1) (2011).

5 ADEA protects workers over 40 from disparate treatment because of a RIF. 29 U.S.C. § 623(a) (2011). Documentation is key in providing a basis for the RIF decision if it affects someone over 40, as a RIF is in violation of ADEA if age was a factor in the employer's decision to lay the employee off. 29 U.S.C. § 621-634 (2011).

6 USERRA requires employers to reemploy returning members of the military to their jobs unless the employer can show that "circumstances have so changed as to make such reemployment impossible or unreasonable…or such employment would impose an undue hardship on the employer." 38 U.S.C. § 4312(d)(1) (2011). Again, documentation must be present validating the employer's decision and justifying the RIF when USERRA comes into play.

when the position of an employee belonging to a protected class may be eliminated, so an employer must be aware of the criteria and provide sufficient documentation to address potential issues.

Documentation is useful in a wrongful termination case. The Fifth Circuit has held that "In tandem with the prima facie case, the evidence allowing rejection of the employer's proffered reasons [for an employment action] will often, perhaps usually, permit a finding of discrimination without additional information."[7] If an employer's nondiscriminatory explanation for an employment action fails there could be major negative repercussions for the employer. As with all employment actions, thorough and accurate documentation is required and will help an employer defend against a wrongful discharge case.

Do: Develop a working understanding of employment law issues (ADEA, ADA, FMLA, FLSA, ERISA, Title VII).
Don't: Make employment law decisions in-house if possible.

Many leave-related issues, such as FMLA leave determinations, may be outsourced to a third-party for consideration. By outsourcing, the employer gains the benefit of neutrality. Where available, a third party removes the employer from deciding issues, distributes information to employees, and tracks absences (this can be particularly helpful when intermittent leave comes into play). A barrier between the workplace and protected leave considerations reduces privacy concerns and the appearance of bias in the decision-making process. If out-sourcing is not an option, it is best to have a streamlined, consistent approach to managing leave, intermittent leave, balances, and medical documentation.

It is beneficial to know the basics of FMLA, USERRA, ADEA, and other common federal laws. Human Resources typically handles questions related to these issues, but the legal department should be notified when issues arise that are out of the norm as well as serving as a check and balance for personnel actions. Knowledge of FMLA and USERRA is particularly important due to the amount of military personnel currently deployed.

Do: Continue to update yourself on the law.
Don't: Forget to update your forms and practices.

Some notable federal laws affecting employment issues have been reworked in the last couple of years. The ADA is now the ADAAA, or the ADA Amendment Act of 2008, and it has a new definition of the term "disability." The change was the result of several Supreme Court decisions which narrowly tailored this definition to the detriment of employees[8]. Most significantly, FMLA has changed to be more representative of the

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7 *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) (*en banc*).

8 *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002)(holding that for an injury to be considered a "disability" under ADA, an injury must limit a major life activity, which includes seeing, walking, and hearing, and manual tasks.)

country's combat situation by allowing two new types of leave: qualified exigency and military caregiver. These new kinds of leave require their own certification forms and create new ways for employers to communicate with health care providers with the consent of the employee.[9]

Immigration is a prominent issue. As an employer, knowledge of immigration law will help you to recognize "hot button" issues, such as arrests and its effect on non-citizens and the proper use of I-9 forms.

Standard departmental forms and forms used by Human Resources are subject to change. Periodic audits of these forms for legal accuracy are advisable. It is recommended that Human Resources audit their federal employment law posters on display periodically to ensure that all the federally required posters are visible to employees and/or applicants.

Do: Cultivate relationships with Human Resources, Internal Affairs, and Professional Standards Investigators.
Don't: Assume everything is fine just because you haven't heard from anyone.

The Human Resources department is the first line of defense for employment attorneys. For example, they are the first to hear of an employee issue from the supervisor, and they are the first to know of a DWI arrest or failed drug test. The same can be said of Professional Standards Investigator or Internal Affairs departments in the Fire and Police Departments. Developing a good working relationship with these groups yields insight into another layer of the disciplinary process and employee relations within a city. Stay abreast of an investigation as it progresses. It is also helpful to converse with Human Resources regarding their interpretation of personnel policy for dealing with common employee issues.

Know if your City is a Civil Service City or not. If it is, disciplines related to police and fire departments are governed by Chapter 143 and 174 of the Texas Local Government Code. These chapters must be adopted to apply to a City.[10] Know if your city has adopted collective bargaining or meet-and-confer and become familiar with those processes. The insight provided into local associations may forecast future issues.

Keep in contact with these departments and make them aware of the legal department's interest in their current issues. Often these departments are used to functioning autonomously, and it is difficult for an attorney to "break through" and establish open lines of communication. Persistence and accessibility on the part of the attorney assists in creating an open exchange of information. Good rapport is highly worth-while. If possible, meet regularly or converse with members of these departments and ask for updates. Establish when and for what type of information you need to be contacted and updated. For example, the legal department does not need to know each time an

9 An excellent primer of the new types of FMLA leave is found at: http://www.dol.gov/whd/fmla/finalrule/MilitaryFAQs.pdf.
10 TEX. LOCAL GOV'T CODE ANN. §§ 143.002, 174.023 (West 2010).

employee shows up late for work, but they need to be informed of an ongoing investigation of sexual harassment.

Do: Continually train your supervisors.
Don't: "Train and Run."

Budget and time allowing, regular training for supervisors and employees is an excellent idea. Important topics include general supervisory training (overview of responsibilities and resources for newly-placed supervisors), discipline, and sexual harassment training. Consistent training lays a sound foundation for policy implementation, establishing contact with other departments, and puts a face to the legal department.

Discipline training is an opportunity to instill good habits in supervisors and set realistic expectations, and can be used to emphasize the importance of well-maintained supervisor documentation. Training should stress well-founded and consistent disciplines which are not emotional or knee-jerk reactions. Let your supervisors know that they should set realistic goals for their employees and hold them accountable to those expectations.

Supervisor training is also an opportunity to stress the importance of workplace decorum. Supervisors sometimes fraternize inappropriately their subordinates in the form of nicknames and crass jokes. Remind supervisors that they must set expectations, enforce policies, and lead by example. A primer on supervisor liability is helpful to drive this point home. Supervisors must be aware that they may be held liable for illegal conduct.

Communication with supervisors should not end after training. Keeping tabs on other departments (or the heads of other departments in the case of a large organization) is important. Regularly scheduled visits with department heads and phone calls to "check in" help maintain good working relationships and put departments at ease in communicating with the legal department.

Do: Use your email to communicate.
Don't: Fall victim to the "Email Trap"

While email is an efficient method of communication, some information is more appropriate to share with a telephone call. This includes anything controversial and potentially inflammatory. The speed and ease of forwarding email may lead to your communication reaching unwanted eyes. A good rule of thumb is to compose emails under the assumption that they may be read by anyone and maintain a professional level of communication in every message. If you are concerned that your email message may be used in an unintended way, do not send it. Further, do not assume that all email communications between the attorney and client are privileged. General communication that does not involve specific legal advice may not invoke attorney and client privilege.

There is no expectation of privacy on a government email system. Employees should be aware of this fact through employee policy. Acquaint yourself with how the Internet Technology department can search email (and computer) files, freeze accounts, etc.

Know if your city monitors internet email. Email on a city system is subject to open records and discoverable in legal situations. In short, think of the “e” in email as standing for “evidence”.

Email allows us to respond to work issues outside of work hours. This is not an issue for time exempt employees, but non-exempt employees should not respond to email outside of work hours. To set this kind of expectation of availability and responsiveness equates to requiring them to work, for which they may be awarded compensation under FLSA, resulting in overtime and compensatory issues.

Do: Take complaints seriously.
Don't: Try to make bad facts fit a charge.

Courts have held that employers have a duty to investigate complaints of sexual harassment.[11] Likewise, employers are encouraged to investigate allegations of harassment of other types. City policy should detail the investigation process, the level of confidentiality that should be afforded, and the prohibition against retaliation directed toward those involved in the investigation. Human Resources typically handles harassment investigations, and it is usually sufficient for one person to conduct the investigation. Should litigation arise, courts will examine how the employer has addressed the alleged harassment when assessing the liability on the employer.[12] The Supreme Court has established the existence of vicarious liability when the actions of a harassing supervisor result in a tangible employment action. Did the employer have notice of the alleged discriminatory actions, and if so, did the employer take prompt remedial actions?[13] If harassment did occur then discipline is warranted: this may range from counseling to termination for egregious cases.

Not every report of harassment will result in a finding of harassment. There may instances where the facts do not fit a charge of harassment or the investigation is inconclusive. For example, offensive or unwanted touching in a complaint may not have been an intentional act of sexual harassment, even when it is between a male and a female. It may be more appropriately addressed through discipline for unbecoming conduct or a violation of the horseplay policy. It is imperative that the legal department coordinate with Human Resources or the entity conducting investigations and thoroughly review the facts of the incident for potential legal liability.

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11 *See Hall v. FlightSafety Int'l, Inc.*, 106 F. Supp. 2d 1171, 1192 (D. Kan. 2000).

12 *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

13 *Nash v. Electrospace Sys., Inc.*, 9 F.3d 401 (5th Cir. 1993).

Do: Run background checks on applicants.
Don't: Forgot to post your job listing.

Always have applicants' background check run prior to extending a job offer: there is no reason not to take this step. This can be done after narrowing a candidate pool to reduce expense. The average city employee applicant may be disqualified for several reasons, but a felony conviction or failure to disclose criminal history will disqualify a candidate across the board. Other convictions such as misdemeanors may or may not disqualify an applicant depending on the job sought and the city or organization's policy regarding those offenses. Police and Fire departments may have other unique requirements in their background checks due to issues such as officer licensing.[14] Background checks are also appropriate when a current employee promotes into a new position within a city.

Employers should also consider conducting credit checks on their job applicants to assess an applicant's financial management abilities. This is particularly important when the vacancy being filled involves some sort of cash-handling aspect. Employment decisions based on credit checks may be subject to discrimination claims.[15] If this is something an employer wishes to pursue, consult Human Resources and the legal departments to review forms that will be provided to the applicants as consent is needed to run a credit check. These forms are typically part of the application paperwork. Applicant credit checks are considered to be controversial and several states have attempted to prohibit them or limit their use in employment decisions.[16]

An emerging issue is the use of social media in background checks. This is a disputed topic in the legal community, and is still unresolved concerning privacy and freedom of speech due to an absence of case law. Employers have started including waivers with their applications that permit them to search for applicants' information on social media outlets.

Whenever possible, obtain an employee's personnel file from the previous employer. Release forms are available for the former employee to sign which allow another employer to access their files.

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14 TCLEOSE requires that the F-5 form, or Separation Form from an officer's previous employer be requested prior to an officer being hired by the next employer. 37 TEX. ADMIN. CODE § 217.7(a) (2010) (Tex. Comm'n on Law Enforcement Officer Standards and Educ., Reporting the Appointment and Termination of a Licensee). In addition to this form, it is strongly recommended that an employer request the employee file from the previous employer, as the F-5 form has become less detailed, and therefore less helpful in communicating the reasons for the officer's separation from employment.

15 The EEOC found that Kaplan had acted in a discriminatory manner when it refused to hire a class of black applicants nationwide based on their credit checks. Press Release, EEOC, EEOC Files Nationwide Hiring Discrimination Lawsuit Against Kaplan Higher Education Corp. (Dec. 21, 2010) (http://www.eeoc.gov/eeoc/newsroom/release/12-21-10a.cfm).

16 Texas tried and failed to limit the use of credit information in 2009 with HB 437. The same bill has reemerged as HB 449 this current legislative session by as of March 2011, but still pending in committee.

To avoid discrimination claims, a city should post its open positions in a way that will reach a broad audience. The Internet makes this quite easy. There is no legal requirement to do this, but it avoids the appearance of trying to withhold information from potential applicants or limiting the candidate pool.

Conclusion

Knowing who to contact is vital to the legal profession. Utilize the the knowledge of your own legal department. Network at training events and gain contacts outside of your place of employment. Subscribe to online journals and internet resources to keep abreast of the most current legislative issues and case law.

Good luck!