Management Training: Lawsuit Avoidance

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Outline

• Supervision from a legal perspective.

• Three Areas of Concern:
  ➢ Employee complaints
  ➢ Leaves of absence
  ➢ Wage and hour
SUPERVISION:

A Legal Perspective
Supervision: Legally Speaking

Supervisors and Managers:

- Have on a responsibility to direct work, to manage people, to hire, to fire, to discipline, to recommend discipline, to counsel, to warn, etc.
- Companies are not people – they act *through* people.
- You are the eyes, ears, etc. for the auxiliary.
- 5 senses of supervision: You **see** the problems; you **hear** the problems, you **sense** the problems, you **handle** the problems, and you **talk** to your staff about the problems.
Supervision: Legally Speaking

- By the same token, when supervisors and managers act -- the auxiliary acts.
- When supervisors and managers fail to act -- the auxiliary fails to act.
- Your acts and omissions become the acts and omissions of the auxiliary.
- **Strict liability**: E.g., if an supervisor/manager sexually harasses an employee, the employer has sexually harassed the employee.
- Your conduct (or misconduct) has legal implications for your auxiliary.
Supervision: Legally Speaking

● There has been an up-tick in employment legal claims against auxiliaries.
● In every lawsuit, the supervisors and managers are called upon to give an account of what they did.
● Their files are scrutinized. Their decisions are second-guessed.
● Some are interviewed by a state or federal investigator.
● Some are deposed under oath.
Supervision: Legally Speaking

In an employment lawsuit, in what ways are supervisors and managers important?

- They are witnesses – they saw things, heard things, said things, etc.
- They write things – e.g., performance evaluations, e-mails, letters, etc.
- They enforce rules or fail to enforce rules.
- They are decision makers.
- They can be parties – can be held individually liable for certain kinds of acts.
- Supervisors and managers need to understand the legal impact of their actions and non-actions.
Example: Performance Evaluations And Disciplinary Actions In A Lawsuit

Written performance evaluations and disciplinary actions are important to the Defendant/Employer because:

- Used by counsel to assess the strength/weaknesses of a case.
- Present the history and background of a problem employee for the judge or jury.
- Demonstrate evidence of business justification for adverse action.
- Rebut evidence of discrimination, retaliation, and wrongful termination allegations.
Why are Performance Evaluations And Disciplinary Actions Important?

They are important to the Plaintiff Employee because:

- Highlights discrepancies in treatment between plaintiff and other employees.
- Tells a tale to the judge or jury of unfair treatment – particularly if nothing issued to plaintiff.
- Presents evidence of bias toward the plaintiff by management.
- Supports evidence of allegations of discrimination, retaliation, and wrongful termination.
- Blow up as exhibits at trial.
Anatomy of An Employment Lawsuit

What happens in an employment lawsuit?

Employment lawsuits are mainly not about what happened.

Employment lawsuits are usually about why the employer made a decision – was it for an unlawful reason, such as race, age, gender, etc.

The employee claims or alleges that he or she was fired or not given a promotion because of the employee’s sex, race, age, gender, disability, or because the employee complained about something.
Anatomy of An Employment Lawsuit

Most employment lawsuits start with an *inference* – e.g., I was mistreated because I took time off from work for my diabetes, or because I am African-American, or because I complained about something.

It is then up to the employer to demonstrate that it made its decision for a lawful, legitimate, business-related decision.

- Note: At will employment is *not* going to help at all. Look at the record (performance evaluations, warnings), circumstances, witnesses, etc.

Judge or jury decides what was in the supervisor’s mind.
Essential Elements For Supervision

- ACCURACY
- FAIRNESS
- CONSISTENCY
ACCURACY: In Evaluations

- Performance evaluations should be accurate, clear, and complete.
- Include specifics, details, and examples – Specifics force you to be accurate.
- Do not include anything in the evaluation that you do not mean.
- Do not include anything that is not necessary to the evaluation of the employee’s performance.
- Be clear on the specific performance problems and corrections to be made.
FAIRNESS: In Evaluations

- Evaluate employee’s performance and merits fairly and on objective facts. (Avoid the “Halo” effect.)
- Solicit input from the relevant individuals who work with the employee.
- Recognize employee’s strengths and weaknesses; identify good performance and areas where improvement needed; be even-handed. (Avoid the “Sybil” effect.)
- Identify specific examples that support the evaluation.
- Solicit the employee’s input/feedback on the evaluation and performance goals.
- Give the employee an opportunity to raise other issues that might be of interest or affecting performance.
CONSISTENCY: In Evaluations

- Conduct regularly scheduled evaluations.
- Do not have gaps in evaluation periods.
- Use the same evaluation process/procedure for all employees.
- Have a uniform rating system.
  - Treat like cases alike.
• Don’t let personal feelings bias your evaluation.
• Don’t discuss evaluation with anyone who does not have a need to know (i.e. co-workers).
• Don’t make remarks about protected traits or protected groups that may be construed as discriminatory or derogatory.
• Avoid irrelevant issues.
• Don’t fail to listen to the employee’s input.
Employee Complaints:  
*Why important?*
Employee Complaints

Many different types of employee lawsuits:

- Breach of contract.
- Discrimination: age, race, color, national origin, pregnancy, physical or mental disability, sex, gender, sexual orientation, ancestry, religion, marital status, and medical condition.
- Harassment based on a protected category.
- Retaliation or wrongful termination in violation of public policy. (Becoming the most popular.)
Employee Complaints

Unlike discrimination claims, a claim for retaliation or wrongful termination in violation of public policy does not depend on a trait or characteristic of the employee.

Retaliation claims depend solely on the employee’s conduct, such as:

- They were fired for complaining about unlawful conduct.
- They were fired for refusing to engage in unlawful conduct.
- They were fired for engaging in some type of protected activity, like testifying or cooperating in an investigation.
Employee Complaints

Examples of protected employee complaints:

- About harassment or discrimination.
- About wages.
- About rest or meal periods.
- Improper expenses or accounting.
- Safety matters – unsanitary conditions in food service or improper safeguards on equipment.
- Complaints to state or federal government agencies – Labor Commissioner, DOL, OSHA, University, etc.
Employee Complaints

Once the employee establishes that he/she engaged in protected activity, he/she must demonstrate an adverse employment action.

- E.g., termination, demotion, loss of promotion, etc.

Then, he/she must establish a causal connection between the protected activity and the adverse action. What is the easiest way to do that?

- **Timing** – “I complained in January and was fired three months later.”
Employee Complaints

How will employer defend?

- Must demonstrate that the decisions or actions taken by a supervisor had nothing to do with the employee’s complaint – legitimate, lawful, work-related, business reasons.

- Some retaliation statutes require the employer to establish by “clear and convincing evidence” that it would have made the decision, or taken the adverse employment action, “even if the employee had not engaged in” protected activities.

*How does an employer demonstrate that?*
Employee Complaints

Best way is to show that, when the complaint was made, the employer took it seriously and was not upset:

It investigated and made a decision -- either to take action or to take no action -- where the decision is supported by the investigation.

Complaints must be reported to management and/or HR so that an independent investigation can be performed and a decision made.

Ignoring complaints creates a basis for potential liability. (“I complained about not being paid overtime. My boss ignored my complaint and then I was fired.”)

You have to follow through and you have to make sure that the supervisors who report to you follow through.
Employee Complaints

Not only is it a good idea to follow up on complaints and look into them, but in many instances an employer has a legal obligation to do so:

California Gov't Code Section 12940(k):

> It is an unlawful employment practice for an employer to *fail to take all reasonable steps to prevent* discrimination and harassment from occurring."

See *also* 29 C.F.R. § 1604.11(f) (EEOC guideline).
Employee Complaints

The employer also must demonstrate that its reasons for termination, demotion, etc. were strong – i.e., it must show by “clear and convincing” evidence that it would have made the decision “even if the employee had not engaged in” protected activities:

- Any warnings?
- Any mention in performance evaluations?
- Any documentation at all?

Demonstrate that you notified the employee of the problem and gave him/her a chance to correct. (Fairness)
Employee Complaints

If *timing* is what an employee has to show to establish a causal connection between the complaint and the adverse action (retaliation), what is the employer trying to show in a retaliation lawsuit?

*Employer is trying to show why it needed to terminate, demote, discipline, etc. *AT THAT TIME.*
Employee Complaints: General Concerns

- It can be difficult to supervise someone who has engaged in protected activity.
- Proceed with caution.
- Involve others in making decisions about the employee: Consult HR before disciplining someone who has engaged in protected activity.
- Any disciplinary action must be based on job performance or a policy violation that warrants the discipline to be taken.
Time Off Requests: Why important?
Time Off Analysis: Types of Leave Laws

1. Family Medical Leave Act
2. California Family Rights Act
3. California Pregnancy Leave
4. California Family Sick Pay
5. Workers’ Compensation
6. Parental Leave for School Activities
7. Domestic Violence
8. Alcohol and Drug Rehabilitation
9. Disability Leaves
10. Victims of Domestic Violence Or Sexual Assault
11. Other Types: Bereavement, Personal Leave, Vacation, Voting Rights, Jury Duty, Military
Time Off Analysis

1. Determine the levels of legal protection.

2. What are the reasons for the leave – reasons determine employee’s eligibility for each type of leave protection.

3. What can the employer require from employee – notices, medical certification, etc.?

4. What benefits?

5. When does each protection end?

6. Evaluate reinstatement rights.
## Time Off Analysis: Sample

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Legend:
- **Red** indicates leave taken.
- **Empty** indicates leave not taken.
The name of the game is STRIP:
Strip away the employee’s legal protections before making major decisions about replacement or termination thereby stripping away your legal risks.
Time Off Requests: What To Do?

When a supervisor or manager has an employee who takes time off from work, it is essential that the auxiliary determine whether the time off is protected or not.

Any time off must reported immediately to those who determine whether it is protected – HR.

Also, certain types of time off trigger obligations for the auxiliary to send out notices to the employee – it is essential that HR be notified.

Leaves of absence are complicated and the law places numerous obligations on employers, and thus on managers and supervisors.
Time Off Requests: What To Do?

Supervisors and Managers:

● Do not argue with the doctor.
● Do not speculate about the employee’s possible illness.
● Do not automatically reject requests for accommodations – e.g., shift changes, closer parking spaces, relaxing attendance rules, time off requests, intermittent leaves, change in job etc.
● Do report information to HR.
● Get as much information as you can.
● Assist in the interactive process.
● Be patient (pun intended)
Wage and Hour Issues: Why important?
Recent Settlements and Verdicts in Wage & Hour Class Actions

- **Wells Fargo**: $12.8 million
- **SBC Communications**: $35 million
- **Coca-Cola Bottling Co. of Los Angeles**: $20.2 million
- **Bank of America**: $22 million
- **Farmers Insurance**: $90 million
- **Wal-Mart**: $172 million for meal and rest periods violations
How do the dollar amounts get so high? Class Actions

Class actions are lawsuits filed by one or more employees on behalf of many claiming that the employer violated their rights in the same way.

Proving one claim means that all claims are proved.

Each individual claim may be small, but the aggregate can by huge.

Example: 25 employees claiming that they have not been paid one hour of wages @ $20/hr may have a group claim equal to $520,000 over 4 years.
Hot Areas of Wage & Hour Litigation:

- Overtime – misclassified employees.
- Inadequate time records of employee hours actually worked.
- Pay stub violations.
- Employees being required to work off-the-clock.
- Dishonest practices of management shaving off reported hours.
- Failure to provide rest or meal period breaks.
- Late meal periods.
- Deductions from wages that are not permissible.
- Failure to pay all final wages.
WAGE & HOUR ISSUES: Meal & Rest Periods

Meal Periods:

An employee who works more than 5 hours but no more than 10 hours in a workday is entitled to one 30 minute duty free unpaid meal period.

An employee who works more than 10 hours in a workday is entitled to two 30 minute duty free unpaid meal periods.

Meal periods may be waived by mutual consent if:

- If an employee works more than five hours but no more than six hours in a workday.
- If an employee works more than 10 hours but no more than 12 hours in a workday, the second meal period may be waived provided the first has been taken.
Meal Periods:

An "on duty" meal period will be permitted only when:

- The nature of the work prevents an employee from being relieved of all duty; and
- The on-the-job meal period is paid time; and
- Employee agrees in writing and can revoke at any time.
WAGE & HOUR ISSUES: Meal & Rest Periods

Rest Periods:

- Employer must “authorize and permit” one “net” 10-minute paid rest break for each 4 hours or major fraction thereof worked.
- No rest breaks required for employees who work less than 3 ½ hours.
- The rest break should be as near to the middle of each 4 hour work period as is practicable.
WAGE & HOUR ISSUES: Meal & Rest Periods

Consequences for failing to provide meal and rest periods:

- Labor Code Section 226.7(b): “If an employer fails to provide an employee a meal period or rest period in accordance with an applicable [Wage Order], the employer shall pay the employee one additional hour of pay at the employee’s regular rate of compensation for each work day that the meal or rest period is not provided.”

- This is extra pay – *i.e.*, a “premium wage” that is owed to employees.

- So what does it mean to “provide” a meal period or rest period?
WAGE & HOUR ISSUES: Meal & Rest Periods

• Rest periods: “Employers are thus subject to a duty to make a good faith effort to authorize and permit rest breaks in the middle of each work period, but may deviate from that preferred course where practical considerations render it infeasible.” (Timing of rest breaks is not mandated.)

• Meal periods: “The employer satisfies [the meal period] obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so.”

• Meal periods: “[F]irst meal periods must start after no more than five hours.”
**WAGE & HOUR ISSUES: Meal & Rest Periods**

How do employers “provide” meal and rest periods:

- Policies.
- Verbal instruction.
- Meetings with staff.
- Schedules with rest and meal periods listed.
- E-mails to employees reminding them.
- Discipline for not taking meal and rest periods.
WAGE & HOUR ISSUES

Ways To Avoid Wage-Related Lawsuits:

- Take payroll issues seriously.
- Proceed cautiously when designating someone as an independent contractor or as exempt from overtime.
- Have employees verify that time records are true and correct.
- Provide rest & meal periods.
- No deductions from wages unless authorization from employee.
- Audit time records, payroll practices and other employment practices.
To Summarize:
Supervision/Management

● Understand your role as a supervisor or manager.
● Understand that your acts and omissions have legal consequences to the auxiliary.
● Be accurate, fair, and consistent.
● If you receive a complaint, take it seriously.
● Complaints tend to protect employees, which means you need a heightened reason to take action against a complainer.
● Take time off issues seriously.
● Keep track of time off reasons and notify HR.
● Take wage and hour issues seriously.
Questions?

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