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LESSONS LEARNED FROM LITIGATION TO HELP YOU AVOID EMPLOYMENT CLAIMS: PART III

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This month, we conclude our series on practical tips that can help you reduce your risk of workplace lawsuits and minimize your exposure to liability. In our first two installments, we covered the importance of being fair and consistent, using a system of progressive discipline, avoiding inconsistent statements, and relying on objective criteria (for reprints, please contact the authors). In our final installment, we take a look at the perils of loose talk, the pitfalls of employment contracts, avoiding defamation claims, the importance of supervisor training, investigating workplace complaints, how to conduct a termination interview, and avoiding equivocal answers in depositions and at trial.

6. Avoid Loose Talk About Personal Characteristics and Other Sensitive Subjects

Discrimination claims can be proven either with direct or indirect evidence. An example of direct evidence is a statement by a supervisor like, "We need to get rid of the old people," right before the supervisor terminates an older worker. That type of proof is rarely found. Most supervisors aren't that mean or stupid. So most employment discrimination cases center around indirect or circumstantial evidence from which a jury might infer that discrimination took place. One of the most common forms of circumstantial evidence is loose comments by supervisors or managers that seem to suggest a discriminatory animus. Comments like these by supervisors when muttered in staff meetings or even in informal conversations can lead to expensive lawsuits. For this reason, supervisors should avoid making pejorative comments that might correlate to age, gender, sexual preference or orientation (in some jurisdictions), race, religion, national origin, etc.

For example, in a recent age discrimination case, an employee claimed the president of his company said he wanted "young blood" and a "fresh, young look." The employee also claimed the president remarked that people shouldn't stay with the same company for more than ten years and that he didn't want any of his employees staying with his company until they retire. The employee argued that these comments, though unrelated to his termination, proved he was fired because of his age. Even though the employer offered proof that the

employee's position was eliminated for economic reasons, the court found there was enough evidence to support the employee's age discrimination claim.

Remember the old saying, "Loose lips sink ships." There's a way to communicate to your employees that you want a more dynamic or energetic work force without making age-related comments. Likewise, supervisors shouldn't joke or tolerate jokes by their employees about personal characteristics. Making or allowing such comments is an invitation to lawsuits for workplace harassment and discrimination.

And remember this: Many employees nowadays are apt to be carrying concealed tape recorders when speaking with their supervisors, especially in performance reviews and disciplinary meetings. In most states, including Louisiana, it's perfectly legal. So tell your supervisors to assume they're being recorded and behave accordingly, lest some loose comment comes back to haunt them.

7. Leave Contract Drafting to Your Lawyer

Most employees are employed "at will," meaning they're guaranteed no specific term of employment and can be terminated at any time for any lawful reason—good or bad—or for no reason. But sometimes companies give employees an offer letter, memorandum of understanding, or term sheet outlining their job duties, compensation, benefits, and other terms of employment. The company, of course, expects its employees to abide by its terms but still wants the freedom to make changes and discharge at will. In some states, the courts won't let you have it both ways. And in states like Louisiana, if the author sticks in language that, if not carefully worded, might indicate an intent to keep the employee employed for some express period of time, you might be stuck with a binding contract you can't get out of until the term expires. One example might be a requirement that an employee remain employed for a certain period of time in order to avoid repayment of a signing bonus. If you fire the guy and demand repayment of the bonus, you might have a hard time defending his breach of contract claim. So don't mess around with employment agreements or even memoranda or letters that look like they might be construed as an employment contract. Let your lawyer look at it first or, better yet, leave the drafting to your lawyer.

You also can create oral contracts with your employees. So avoid making comments that could be construed as a promise of employment for a definite period of time. And be wary of employees who approach you, even casually at a company social event, and ask whether the company is planning a RIF or

what are their chances of continuing to work until some future date like their retirement date. If you say anything that doesn't begin and end with, "There are no guarantees," your employee may have just set you up for a breach of contract suit if you later have to let him go.

8. Don't Broadcast Your Reasons for a Discharge

When you fire an employee for poor performance or misconduct, you naturally have to discuss the reason with certain other supervisors, management and HR officials, benefits administrators, and maybe even some of the employee's coworkers. But make sure you limit your conversations to those who have a legitimate need to know the basis for the employee's separation, and make sure they do likewise. As long as you're in good faith, such conversations are protected by a qualified immunity against a claim of defamation. But this immunity does not protect conversations with people outside your company or even some persons within your company who have no need to know the reason behind an employee's discharge. Some states, like Louisiana, extend the immunity to references given to prospective employers, provided the reference is given in good faith. The safest policy, however, is to require that all requests for references be submitted in writing and to provide only a neutral reference—you know, the old "name, rank, and serial number" reference that confirms only dates of employment and positions held. And don't answer questions like, "is he eligible for rehire?" They may be a setup.

9. Train Your Supervisors—and Employees—to Avoid Discrimination and Harassment Claims

Most employers have long recognized the value of supervisor training in preventing unlawful workplace discrimination and harassment and reducing the risk of costly, time-draining lawsuits. Recent U.S. Supreme Court decisions have made such training virtually mandatory for both supervisors and employees.

The gist of the Court's decisions is that you can be held liable for workplace harassment by either supervisors or employees unless you can show you took reasonable steps to prevent it from happening and prompt remedial action to eliminate it when it occurred. Translation: if you don't have a workplace harassment policy that's publicized to your employees, if you don't train your supervisors on avoiding and eliminating workplace harassment, and if you don't instruct your employees on how to make a complaint, you're asking for trouble. You may still be able to avoid liability if you can show you took prompt remedial action as soon as you knew about the alleged harassment. But

it would be a whole lot easier if you also could show you provided appropriate training.

In addition to training your supervisors on avoiding conduct that might amount to harassment, it's critical that you instruct them to report any complaints or allegations of harassment immediately to upper management or HR, even if told to them in confidence. The courts now hold that knowledge by a supervisor equals notice to the company that harassment may have occurred, which triggers your obligation to take prompt remedial action.

10. Thoroughly Investigate All Workplace Complaints . . .

Prompt remedial action starts with a thorough investigation of any harassment claim. And to minimize your exposure to other kinds of employment lawsuits, investigate all other workplace complaints just as thoroughly. Interview witnesses face-to-face instead of asking employees to provide written statements on their own. You don't want to tell employees what to say, but you do need to exercise some control over the process. So the better practice is to interview your employees with another manager present to take notes. Then prepare type-written statements for them sign voluntarily. If an employee refuses to sign or tries to make "corrections" that are inconsistent with what he told you in your interview, write and sign a statement to that effect and have the manager who witnessed the interview sign it too.

. . . And Remember Due Process

When credible employees report wrongdoing by a coworker, it's often easy to form an immediate opinion about what occurred. Avoid this temptation. Your employees may have good intentions, but they may be mistaken. Before you decide to discipline, always allow the accused employee to tell his side of the story. Only after thoroughly investigating both sides of the story should you attempt to determine who's telling the truth and how you're going to handle the situation.

11. Terminate Employees With Dignity

The law does not require you to be nice when you terminate an employee. The law also doesn't require you to provide a reason. But you should do both, unless the employee has just committed some kind of capital offense like gross insubordination or assault. Then you may be justified in throwing the bum out. But most terminations aren't like that. Most of the time, the employee just doesn't work out. And if you don't handle it right, he may end up feeling hu-

miliated or unduly angered and decide to take it out on you in a lawsuit. Okay, okay, we understand most people when fired are going to feel some degree of anger and humiliation, but you needn't make it any worse than it has to be. If you call a long-term employee into your office, tell him he's being let go without giving a reason, hand him his final paycheck, and then have him escorted from the building by security, you've probably increased your chances of being sued if only so the employee can get a reason for his discharge. So unless the circumstances require some other action, always treat the employee you're about to fire in a dignified manner. Tell him in a straight forward way the basis for your decision without trying to humiliate him. Be firm, but sensitive to his feelings. Don't argue, and don't let him argue. And keep your cool even if your employee doesn't keep his.

12. <u>Don't Equivocate When You Testify</u>

It goes without saying that, if called as a witness either in a deposition or at trial, you must tell the truth, the whole truth, and nothing but the truth. But the truth sometimes can become elusive if you equivocate, meaning you provide answers that are vague, inconsistent, or unclear. To be effective as a witness (i.e., to convince a judge or jury that you're telling the truth), you must say what you mean and mean what you say. If you're too easily led around by the employee's attorney and fall into the trap of agreeing with everything he says because you're afraid he's trying to trap you or you don't want to be confrontational, you can single-handedly destroy your entire defense. Stand your ground.

Hopefully, the foregoing tips can help you stay out of trouble and avoid claims or at least reduce your risk of being sued . . . and keep the peace in your workplace.

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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