



Problem Employee Issues

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Goals of this Seminar

- Increase Awareness of the Mistakes which Raise the Risk of Employment-Related Claims.
- Recognize the Duties of Management that Typically Result in Costly Litigation.

Rule #1

NO GOOD DEED GOES UNPUNISHED!

Rule #2

IF IT WASN'T WRITTEN DOWN,
IT DIDN'T HAPPEN!

Aren't They At-Will?

- 75% of Jurors feel Employers must:
 - Give the employee fair warning prior to termination;
 - Ensure that the employee understands what went wrong; and
 - Work with the employee to correct the problem.

Aren't They At-Will?

- 60% believe the best evidence of work performance is the employee's performance evaluation.
- 60% believe companies need to be “sent a message.”
- 90% believe that a company is negligent if it does not properly document performance problems.

Why Supervisors Fail to Document

- It's not my responsibility – They know if they are doing a good job.
- I am uncomfortable criticizing people.
- I am too busy.
- I have a good relationship with my employees & they wouldn't sue me.

They Wouldn't Sue Me

- Both Federal and State courts in Iowa allow Plaintiffs to sue companies AND individual managers.
- Insurance companies may refuse to defend individual managers if he/she failed to take appropriate action.

Benefits of Documentation

- Educates employees.
- Juries draw negative inferences from the absence of documents.
- Written records refresh memories.
- Establishes that similarly-situated employees treated the same.
- Courts give greater weight to documents than to memories.



Essential Employee Documentation

- Specific incidences of job-related misconduct.
- Records of verbal/written warnings.
- Attendance records.
- Notes from disciplinary meetings.
- Performance evaluations.

Who is the Audience?

- Employee
 - Seriousness of the Offense
 - Future Expectations
 - Future Consequences
- Employee's Lawyer
- State/Federal Agencies
- Judge and Jury

Documentation Should Include:

- Who, What, When, Where & Why;
- Impact on the company and other employees;
- What should have happened;
- Consequences of future occurrences; and
- The employee's response.

Suggestions for Documentation

- Prepare documentation as soon after the incident as possible.
- Expect everything to be an exhibit.
- Give an opportunity to improve.
- Avoid jargon and use understandable language.
- Narrate a story.

Suggestions for Documentation

- Email and voicemail are effective forms of documentation.
- A short email to an employee is sometimes all that is needed.
- If you don't make email or voicemail work for you, it will certainly work against you and the company.

The Role of Background Checks

- When making personnel decisions based on background checks (including hiring, retention, promotion or reassignment), you must comply with federal laws.
- Request for background check information must be given in a stand-alone document.

Actions Based on Background Checks

- Before you take action you must:
 - Provide the employee notice that includes the Consumer Report you relied on.
 - Provide the employee with a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act.”
- After you take action you must:
 - State that the decision was based on information in the Report.
 - That he/she has the right to dispute the accuracy of the Report.

Court Test

- Most courts follow the 8th Circuit test developed in the 1970's:
 - Nature of the crime;
 - Time elapsed since the crime; and
 - Nature of the job.
- Denial of Job Requires:
 - Notice that the crime was the reason;
 - Opportunity to respond; and
 - Reconsideration by employer.

Equal Employment Opportunity Commission Position

- The EEOC has issued Enforcement Guidelines on criminal background checks.
- Employer's use of criminal background checks in making an employment decision can be **presumed** to be discrimination on the basis of race or national origin.
 - Disparate treatment or disparate impact theories of discrimination.

Performance Reviews

- On a scale from 1 to 5, how would you rate an employee that:
 - Is never late;
 - Never misses work;
 - Completes all assignments on time; and
 - Does not cause problems.

Performance Evaluations

- When disciplining or terminating for ongoing job performance, the performance issues must be documented.
- The first place courts look is an employee's past performance evaluations.

Good Performance Evaluations

- Recognize achievements.
- Identify areas for improvement.
- Coordinate employee's goals with Employer's goals.
- Set expectations and consequences.
- Describe performance instead of merely "checking a box."

Good Performance Evaluations

- Are based on notes kept during the year.
- Address any discipline during the year.
- Are honest.
- Are not all above average!

Types of Discipline

- Coaching (performance)
- Oral warning
- Written warning
- Leave with pay (pending investigation)

Types of Discipline

- Suspension without pay
- Probation (performance)
- Resignation (in lieu of)
- Termination
- These are not meant to be rigid steps to follow in every case!

Guidelines for Making a Discipline Decision

- Was the employee given prior warning of the consequences of his or her conduct?
- Was the company's rule "reasonably related" to the efficient and safe operations of the company?

Guidelines for Making a Discipline Decision

- Are you confident that the employee did engage in the misconduct and/or violated the rule resulting in the discipline?
- Are you confident in the results of the company's investigation?
- Was the investigation objective (*i.e.*, was a third party used)?

Guidelines for Making a Discipline Decision

- Is this discipline consistent with past actions under similar circumstances?
- Was the discipline reasonably related to the seriousness of the offense and the employee's past work record?

Common Termination Issues

- Retaliation
- Selective Application of Criteria
- Performance Appraisal Unrelated to Job Performance
- Defamation
- Failure to Follow Policy
- Failure to Allow for Improvement

The Termination Decision

- Did the company give prior warnings of the possible consequences of the conduct?
- Was the company's rule or the supervisor's order reasonably related to the efficient and safe operation of the company?
- Did the company obtain sufficient evidence?

The Termination Decision

- Did the company investigate?
- Was the company's investigation objective?
- Was this termination consistent with past actions?
- Was the amount of discipline "reasonably related" to the offense?

The Termination Meeting

- STRATEGY

- Prepare for obstinance
- Have security alerted and standing by
- Use outplacement counselor or other resource
- Identify resource providers
- Have a departure strategy
- Terminate access to system, garage, premises

The Termination Meeting

- WHO ATTENDS
 - Union Rep
 - Other employee
 - Attorney
 - Advocate
 - Witness
 - Note Taker

The Termination Meeting

- WHAT TO SAY
 - Brief explanation of basis for termination
 - Opportunity for response
 - Limit self to, at most, a very brief expression of regret
 - Procedure for departure

The Termination Meeting

- WHAT TO SAY
 - COBRA and benefit information
 - Return of property – theirs and yours
 - Severance offer and details, if applicable
 - Effect of contractual restrictions, e.g. non-compete

The Termination Meeting

- POST TERMINATION ISSUES
 - Unemployment
 - References
 - Non-compete or confidentiality issues
 - Communication with employees
 - What to say to other employees

Landmines

- 1) Failure to Document
- 2) Failure to Train
- 3) Failure to Develop and Keep Good Evidence
- 4) Performance “Grade” Inflation
- 5) Failure to Consult HR Professionals

Landmines

- 6) Inappropriate Email
- 7) Inconsistent Treatment
- 8) Inappropriate Communication about Former Employees
- 9) Uncontrolled Statements of Reference

Questions?

