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10 TIPS FOR AVOIDING EMPLOYMENT LAWSUITS

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WHY ARE WE HERE?

33% of the backlog in the federal court system is employment law cases

REALITIES OF LITIGATION

- ◆ Employees can bring claims against the Company (**and - potentially - supervisors**) regardless of the merits of the claim
- ◆ The Company has to defend even non-meritorious claims
- ◆ Litigation is expensive, in both dollars and time
- ◆ Even if an employer “wins”, the law does not generally provide for recovery of its own attorneys’ fees

WHY EMPLOYEES VISIT AN ATTORNEY

- ◆ A plaintiff is created when an individual feels that s/he was treated with disrespect, unfairly and/or inhumanely
- ◆ Talking to an attorney is an emotional decision, driven by things such as:
 - Different treatment for the same offense
 - Humiliating or surprising performance feedback
 - Challenging unemployment situations
 - Personal dislike for a supervisor
 - “Nickel and diming”
- ◆ NOT money!

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No. 10

AVOID HIRING HICCUPS

No. 10 - HIRING HICCUPS

◆ Interviews:

- Untrained Interviewer
- Legal Do's and Don't's
- Interview Notes/Documentation

PERMISSIBLE/IMPERMISSIBLE INQUIRIES

Which of these is an IMPERMISSIBLE interview topic/question?

- ◆ Do you have a college degree?
- ◆ What did you like/not like about your last job?
- ◆ I see you're wearing a wedding ring. Do you have any kids yet?
- ◆ How much did you make at your last job?
- ◆ Do you require any type of accommodation to perform the essential job duties?
- ◆ How do you spend your free time?
- ◆ Where were you born?
- ◆ This job requires a lot of stamina. Are you going to be up for it?
- ◆ Are you able to work overtime?
- ◆ Were you ever in the military?

OFFER LETTER DO'S

- ◆ State that offer letter is NOT a contract and employment is ***at-will***
- ◆ Set out prerequisites to employment
 - Background check
 - Drug test
 - Signing of non-compete
 - Confirm that employee is not subject to restrictive covenants from previous employer
 - Whether relocation is required
 - Address repayment of relocation fees

OFFER LETTER DON'T'S

- ◆ Reference “annual” salary
 - Instead state rate of pay (e.g. \$10.00/hour or \$700/week)
- ◆ Guarantee terms of employment (e.g. “These terms will remain in effect for one year”)
- ◆ Allow managers/supervisors to draft offer letters
- ◆ Fail to follow up on having employee sign non-compete and other required agreements **before** starting work

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No. 9

INVESTIGATE

WHEN TO INVESTIGATE

- ◆ Allegations of unlawful discrimination/harassment
 - Can come in the form of a ***direct or indirect*** internal complaint, anonymous tip/report, exit interview, supervisor's observations or any other means
 - Complaints are often vague
- ◆ Whistleblower claims
- ◆ Receipt of EEOC or other charge

FAILURE TO PROPERLY INVESTIGATE

- ◆ Begin ASAP, at least within 24 hours
- ◆ Select an appropriate investigator
- ◆ Question the alleged harasser/subject of the investigation
 - Instruct him/her not to interfere or retaliate
- ◆ Maintain confidentiality of the investigation to the extent possible - limit information to those with a “need to know”
 - Assess the need for confidentiality and restrictions on employee discussions of investigation – may violate NLRA
- ◆ Create appropriate documentation of investigation
- ◆ REMEMBER: The Investigation Report will be Exhibit #1 at trial

TAKE APPROPRIATE CORRECTIVE ACTION

- ◆ Did inappropriate conduct occur?
 - **Yes:** Take immediate and appropriate corrective action designed to: (1) stop the wrongdoing; (2) correct its effects on the complainant; and (3) ensure that the wrongdoing does not recur and does not adversely impact the complainant
 - **Not Substantiated or Unclear:** Undertake further preventive measures, such as training and monitoring
 - Advise complainant the matter has been investigated and appropriate action has been taken
 - Follow-up periodically with complainant

HYPOTHETICAL No. 1

- ◆ Monica casually mentions to you one day that a manager has a habit of making sexually suggestive remarks to her. She thinks his behavior is pathetic but it doesn't really bother her because she can handle him. When you press for details, Monica says she will tell you who it is only if you promise not to tell anyone else or take any action. Monica doesn't want to make a complaint because she doesn't want to make waves and possibly jeopardize the good working relationship she has with the manager.
 - **What do you do?**

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No. 8

DOCUMENT DEVELOPING PROBLEMS

MOST COMMON PROBLEMS

- ◆ No documentation
- ◆ Incomplete documentation
- ◆ Inaccurate documentation
- ◆ Inconsistent documentation
- ◆ Delayed or untimely documentation

FAILURE TO DOCUMENT

- ◆ Methods of documentation:
 - Written Warnings/Final Warnings
 - Annual Evaluations
 - File Memos (documenting verbal discussions)
 - Evidence (including emails, voicemails, computer documents)

FAILURE TO DOCUMENT

- ◆ Purpose of documentation:
 - Putting employee on notice of performance issues
 - Establishing a reasonable basis for the adverse employment action
 - Termination should **never** be a surprise to the employee

DO NOT INFLATE EMPLOYEE EVALUATIONS

- ◆ Accuracy is a must- do not inflate ratings
- ◆ Be specific and give examples
- ◆ Be honest
- ◆ Don't "pass" on the problems to get along
 - "Exhibit A" for the Plaintiff - "Jack is a fine employee and a pleasure to work with"

HYPOTHETICAL No. 2

Daryl is 53. His performance is substandard. His manager Rick complains that Daryl's work output is significantly below department standards, he is resistant to change and frequently challenges Rick's instructions, and he has a habit of calling in sick on Mondays. As the year-end annual evaluation time approaches, Daryl ups his game. Rick wonders if perhaps he has been too demanding and he gives Daryl an overall performance assessment of "meets expectations". By mid-February, though, Daryl's performance has sunk to his previous unacceptable level. Frustrated, Rick asks HR for approval to terminate Daryl.

◆ **Should HR approve the termination?**

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No. 7

PROVIDE ADEQUATE SUPERVISOR TRAINING

TRAINING TOPICS

- ◆ Respect in the Workplace (discrimination, harassment, retaliation)
- ◆ Performance Management (documentation, discipline, discharge)
- ◆ How to Properly Hire
- ◆ Leaves of Absence Issues
- ◆ Union-Free Training
- ◆ How to Draft Job Descriptions

BENEFITS OF TRAINING

- ◆ Train all managers on basic employment laws
 - Informed managers are more likely to spot issues and prevent litigation
 - Provides legal defense to discrimination claims
- ◆ Affirmative defense to harassment claims
 - *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998)

FARAGHER/ELLERTH DEFENSE

- ◆ To establish affirmative defense, company must show:
 - Employer exercised reasonable care to prevent and promptly correct harassing behavior and
 - Employee failed to take advantage of preventative/corrective opportunities
- ◆ Manager training is essential to establishing the first element
- ◆ Standard for employer liability is that “the company knew or should have known about the conduct”
- ◆ Managers are the “eyes and ears” of the Company

TRAINING TIPS

- ◆ Conduct annually
- ◆ Keep records of the training, including who attended
- ◆ Cover EEO laws and Company policies
- ◆ Use materials that you would show to a jury
 - Up-to-date and accurate
 - Professional
- ◆ Webinars and online training can be convenient
- ◆ Supervisors should remember training and be able to talk about it in a deposition

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No. 6

CARELESS HANDBOOK POLICIES

EMPLOYEE HANDBOOKS MISTAKES

- ◆ Not having one
- ◆ Poorly drafted policies
- ◆ Failure to update regularly
- ◆ Inadequate education & communication to ALL employees
 - Timely, consistently, repeatedly
 - Communicate every change or revision
- ◆ Non-uniform and inconsistent enforcement
 - Follow the policies... or don't have them
 - “Exhibit A” for the Plaintiff is the policy you did not follow

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No. 5

RETALIATION

RETALIATION

- ◆ The fastest-growing area in employment-related lawsuits
 - In 2016, 46% of all charges filed with the EEOC included a retaliation claim
 - Steady increase from 34% in 2008
 - There were more retaliation charges filed than any other type of charge

RECOGNIZING PROTECTED ACTIVITY

- ◆ Protected Activity: Opposition to an employment practice that the employee reasonably believes to be unlawful
- ◆ Examples:
 - Threatening to file or filing a complaint or charge with the EEOC, Commission for Human Rights, DOL
 - Whistleblower activities
 - Filing a workers' comp claim
 - Participating in an interview, investigation, hearing, trial or other proceeding (as a witness or complainant)
 - Discussing terms and conditions of employment (including on social media)
 - Complaining to anyone about alleged discrimination or harassment (yours or someone else's)
 - Taking FMLA leave
 - Requesting a reasonable accommodation for religion or disability

TIMING IS EVERYTHING

- ◆ Timing is key in the evaluation of retaliation claims
 - Taking an adverse action close in time to when an employee engaged in protected activity may suggest retaliatory intent, even if well-intentioned
- ◆ Documentation is the best way to defeat temporal proximity. Document all decisions and employee-management issues!

BEST PRACTICES FOR AVOIDING RETALIATION

- ◆ Get the message out that retaliation will not be tolerated
- ◆ Promptly investigate claims of retaliation and take corrective action when appropriate
- ◆ Never retaliate against someone for being involved with an investigation into harassment
- ◆ Document contemporaneously and accurately
- ◆ Be consistent in the application of any discipline
- ◆ If an employee complains about his immediate supervisor and the complaint is substantiated, consider reassigning the supervisor whenever possible
 - DO NOT reassign or transfer the complaining employee unless he or she requests it or agrees with it

SUPPORTING THE TERMINATION OF AN EMPLOYEE WHO HAS ENGAGED IN PROTECTED ACTIVITY

- ◆ Clearly defined performance requirements and rules of conduct
 - e.g. job descriptions, annual performance evaluations
- ◆ Consistent enforcement of performance requirements and rules of conduct
 - Treat similarly situated employees similarly
- ◆ Thorough and accurate documentation supporting decision
 - Performance improvement plans, written warnings, final warnings, e-mails, etc.
- ◆ Recognize the risks of terminating employee in close proximity to protected activity (i.e. 6 months or less)

HYPOTHETICAL No. 3

Li is a problem employee. She complains to her manager about everything – coworkers, low pay, minimal holidays, workload – you name it. Her manager listens to her complaints, but more often than not, there is no real solution. Li is just complaining to complain. In the meantime, Li makes frequent mistakes and has the lowest productivity scores in the department. One day she tells her manager that she thinks another manager has been stealing supplies. The Company investigates but finds no evidence to support Li's claims. The manager decides, though, that he's had enough of Li's disruptions and terminates her on the grounds that she's a poor performer.

◆ **Any issues?**

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No. 4

COMPLY WITH FLSA AND NH PAY LAWS

FLSA/NH PAY VIOLATIONS

- ◆ DOL data suggests that 72% of all employers are violating the FLSA in some significant manner
- ◆ Among the most common are:
 - “Off the Clock” violations
 - Meal/rest periods
 - Misclassifying employees
 - Exempt/Non-Exempt; Independent Contractors
 - 2-hour minimum pay rule

BEWARE “OFF-THE-CLOCK” TIME

- ◆ Written policy that no one may work overtime without supervisor’s permission is a good starting place, but...
 - If an employee violates this policy and works overtime, then they are owed for their hours worked
 - You can discipline the employee, but you must pay overtime due
- ◆ Train managers and supervisors to recognize and report “off-the-clock” work

BEWARE “OFF-THE-CLOCK” TIME

- ◆ Ex.1- Energetic secretary who works overtime but does not want to report it
- ◆ Ex. 2.- Assistant who eats lunch at desk and responds to work calls and e-mails during lunch
- ◆ Ex. 3 Coordinator who takes work home over the weekend

COMMON MISCLASSIFICATION MISTAKES

◆ Salaried ≠ Exempt

- For the **executive exemption**, the primary duty must be to supervise other employees
 - Executive must supervise the equivalent of 2 full-time employees
- For the **administrative exemption**, the employee must have duties that are directly related to management or general business operations
 - Must regularly exercise discretion and independent judgment regarding “matters of significance”
 - Ex. HR Director v. HR Clerk

COMMON MISCLASSIFICATION MISTAKES

- ◆ Just because other employers in your industry are treating a certain classification of employee as exempt or non-exempt does not mean that you should

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No. 3

RECOGNIZE FMLA TRIGGERS

HYPOTHETICAL No. 4

Abraham's work performance has been steadily declining over the last year. Despite numerous warnings, there has been no improvement. Abraham's manager knows that the next step in the Company's disciplinary process would be a performance improvement plan and a final warning. He also knows, though, that Abraham has been having a rough time lately and just lost his home to foreclosure, so he decides to hold off for a while. A few weeks later, Abraham apologizes to his manager for his poor performance, explaining that he's been depressed lately.

◆ **Now what?**

FMLA LEAVE TRIGGERS

- ◆ Employees must request or put employer on notice of need for leave, **but** they need **not** say “magic words,” such as “FMLA”
 - Burden is on the employer (i.e., supervisors) to recognize
- ◆ Situations that may indicate a need for FMLA leave include:
 - Time off due to surgery or hospitalization
 - **Any** absence due to pregnancy, including morning sickness, prenatal visits
 - Frequent absences or tardiness due to employee’s or family member’s health issues
 - Any health-related absence lasting more than 3 calendar days

FMLA LEAVE TRIGGERS

- ◆ Use the updated forms provided by the Department of Labor (available at <http://www.dol.gov/whd/fmla/>)
 - **Solution:** Centralize leave management and processing by knowledgeable staff and train supervisors to refer all requests
- ◆ Forms Include GINA safe harbor language in FMLA forms and correspondence

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No. 2

FAILURE TO RECOGNIZE ADA SITUATIONS

RECOGNIZING AN ACCOMMODATION REQUEST

- ◆ Employees must request reasonable accommodation for a disability, but need not reference “ADA” or “accommodation.” They may use plain English.
 - Under the ADAAA, disability could be ANY medical condition
 - Ex. John tells his supervisor Ramon that he has chronic back pain and is having difficulty performing his job.

RECOGNIZING AN ACCOMMODATION REQUEST

- ◆ Supervisors **MUST** be trained to recognize “requests” for an accommodation
- ◆ Err on the side of caution—if unsure if employee has requested an accommodation, ask the employee to clarify what is being requested and why
- ◆ The request triggers the obligation for the employer to engage in interactive dialogue – required even if no reasonable accommodation is possible
- ◆ Document efforts and basis for claiming undue hardship

ENGAGE IN THE INTERACTIVE PROCESS

- ◆ Gather information necessary to process the accommodation “request”
 - Job description
 - Documentation of the disability and the need for accommodation
- ◆ Engage in dialogue with the employee to determine if a reasonable accommodation exists.
 - Ask employee to identify proposed accommodation
 - Discuss specifics
 - Propose alternative accommodations, if appropriate

THE INTERACTIVE PROCESS

- ◆ Consult with outside sources if necessary
- ◆ Via employee, ask employee's medical providers for suggestions
- ◆ Communicate with supervisors about the accommodation
 - Remind them of ADA confidentiality rules
 - Remind them of anti-retaliation requirements
- ◆ Document in detail each step of the interactive process
 - Critical defense in litigation
 - Document employee's refusal to engage in interactive process or refusal to accept offered accommodation(s)
 - Document steps undertaken to accommodate employee and accommodation(s) offered

HYPOTHETICAL No. 5

Francesca, an OR nurse, has worked at the Hospital for 8 years. Four months ago she was diagnosed with breast cancer, and she took approved FMLA leave in order to have surgery and chemotherapy treatments. Francesca just provided the Hospital with a note from her physician stating that she will be cleared to return to work without restrictions in 2 months. Since this additional leave will exceed the 12-week maximum medical leave available under the Hospital's policy, Francesca's employment is terminated.

◆ **What are the issues?**

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No. 1

AVOID TRICKY TERMINATIONS

NOT TERMINATING POOR EMPLOYEES

- ◆ Sometimes you can't "fix" it
 - Sometimes the issues with a problem employee cannot be corrected
 - Correct hiring mistakes early
 - Ultimately, the answer may be termination, sooner rather than later with some issues
 - Conduct risk analysis to protect Company from claims of discrimination or retaliation prior to termination

COMMON TERMINATION MISTAKES

- ◆ Not providing a truthful and accurate reason for termination – even to at-will employees
- ◆ Not paying final pay within 72 hours of termination
- ◆ The “perp” walk
- ◆ Contesting unemployment compensation benefits for the wrong reasons and/or giving inconsistent reasons for termination
- ◆ Terminating within several months of taking/requesting leave, filing harassment/discrimination complaint, whistleblowing activity, disclosing pregnancy
- ◆ Poor documentation

QUESTIONS?



ABOUT DEBRA WEISS FORD

- ◆ Licensed in New Hampshire, Massachusetts and Maine
- ◆ AV (Preeminent) Martindale-Hubbell Peer Review Rating, the highest rating in legal ability and ethical standards
- ◆ "Top Rated Lawyer" by American Lawyer Media and Martindale-Hubbell
- ◆ Best Lawyers in America (Labor & Employment Law), Management Lawyer of the Year
- ◆ Business New Hampshire Magazine, Best Labor and Employment attorney in New Hampshire
- ◆ Listed in Top New Hampshire Lawyers in Labor and Employment, New Hampshire Magazine
- ◆ Elected as a Fellow to the College of Labor and Employment Lawyers
- ◆ Listed in New England Super Lawyers (Top 100 attorneys in New England)
- ◆ Listed in New England Super Lawyers (Top 50 Women in New England, Employment & Labor)
- ◆ Listed in Chambers USA as one of the top Lawyers in Labor and Employment

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