HR Tomorrow Conference

MANAGEMENT DECISIONS AND THE HUMAN RESOURCES DEPARTMENT – AVOIDING OR CREATING LIABILITY?

Friday, April 15, 2011

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INTRODUCTION

Both company managers and the Human Resources professionals who assist them have an extraordinarily difficult task with regard to personnel issues. They must possess a broad knowledge base about an ever changing legal landscape, which for the management team, may be well outside their primary areas of expertise. When forced to participate in complicated personnel situations, they need strong inter-personal skills that must be applied in tense, difficult, emotional contexts. At times, management and the HR professionals will desire contrary results and will need to work collaboratively to avoid careless, thoughtless, or, sometimes, wrongful conduct.

Management, and at times, the HR professionals themselves, make certain mistakes when managing a company’s workforce. Fourteen of the most common mistakes are described below, a few with subparts. My hope is that by understanding and reflecting upon the mistakes made by others, you will be able to avoid making these mistakes yourselves.

1) **The Mistake of Ignorance**

As referenced above, one reason that managing employees can be so challenging is that the employment environment is constantly changing. These changes reflect economic changes, leadership changes, and competitive changes that directly bear upon the workplace. So too is the legal environment ever evolving. New statutes and regulations are enacted at a dizzying pace at both the federal and state level. Judicial decisions are rendered daily, again in the parallel federal and state judicial schemes. It is extremely difficult to keep abreast of these changes in the legal environment.

1.1) Not familiar with the law:

- New federal legislation (*See Ex. A*)
- Important judicial developments (*See Ex. B*)
- Additional examples
  
  FMLA Leave (*See Ex. C*)
  
  Defamation
  
  Post-employment restrictive covenants
  
  Sexual harassment (*See Ex. D*)
  
  Marital status (*See Ex. E*)

1.2) Not familiar with the company’s own policies
At will employment
Reference letters

2) **The Mistake of Expression**

In the classic movie, *Cool Hand Luke*, the Captain of the Road Prison # 36 explained to Paul Newman’s character, Luke, “What we got here is . . . failure to communicate.” That communication failure is one of the most fundamental and recurrent mistakes in the work environment and appears in a variety of different ways and contexts.

2.1) Cryptic communications: at times, the communications are difficult to decipher

2.2) Offer letters: at times, the communications do not accurately convey the offer or make promises that will not be kept

2.3) Spoken expression: at times, the communications are careless and easily misunderstood or conclusory and erroneous

Whatever their fundamental flaw, communications mistakes lead to litigation and liability. This problem is exacerbated by two essential features of life in the 21st century – a) written records are near permanent (even deleted files are recoverable); b) the litigation process is slow and recollections fade. Communicating clearly, recording information accurately, and maintaining records carefully are all crucial to minimizing the risk of employment claims.

3) **The Mistake of Carelessness**

Given the pace and crush of business and the complexity of the legal environment for employment law, it is not entirely surprising that careless mistakes are made. That is reflected in the way we communicate (*e.g.*, the poorly crafted offer letters; the unintended promises, the disregard of company policy). At times, however, the mistake of carelessness simply reflects a failure to consider thoughtfully the logical ramifications of a course of action (*e.g.*, the agreement to provide a reference letter; the disregard of problematic employee conduct; the poorly constructed presentation; the carelessly drafted handbook). Such mistakes give plaintiffs’ counsel a lot to work with in the prosecution of an employment lawsuit. With extra time and attention (admittedly, not always easy to come by), these types of mistakes can be reduced if not eliminated entirely.

4) **The Mistake of the Wrong Messenger**

Conveying difficult messages, particularly terminations attributable to reductions in force or chronic performance problems, requires a unique skill set. There are many things that can go wrong in a discharge discussion, but the fundamental prerequisite to success is that the person with the right skill sets participates in the process. *First*, that individual needs to know the potential problems that frequently arise in these settings and be prepared to address them. *Second*, the company’s representative needs to be an articulate, straightforward communicator. *Third*, the individual conveying the message needs to be a good listener – information may be revealed during the discharge meeting, explicitly or subtly, that requires a radical change in
course. Fourth, the person representing the company needs to be both sensitive and likeable. Arrogant or obnoxious behaviors cannot be exhibited at this meeting. Fifth, the person needs to be presentable. At a later time and date, whether in deposition or at trial, this person will need to be able to present the company’s explanation and summarize accurately and persuasively the content of the discussion.

5) **The Mistake of Omission**

There are times when it is important to stand up and be counted. The failure to speak up when objections or clarification are clearly warranted puts a company at risk. It is problematic enough when someone in management makes racist, sexist, ageist or otherwise prejudicial comments. If those comments are made to a group, and no one else raises concerns about the content of the remarks, the initial problem is exacerbated. Omission can lead to the “silence is acquiescence” argument, or worse yet, claims of “ratification” and “endorsement.”

It may be that it simply is not possible to address the ill-conceived comments precisely when they are expressed. But, action should be taken soon thereafter to ensure that the company’s true principles on these issues are conveyed clearly to all who were present when the comments were made. Depending on the nature of the comments, the “clarification” may need to be coupled with appropriate disciplinary action of the speaker. Whether or not this step is necessary, it is a mistake to ignore the problem and assume that it will disappear. It won’t.

6) **The Mistake of Concealment**

This mistake, whether by management or the HR professional can be fatal in litigation. We live in a society of fast-moving and seemingly ephemeral images. But, as noted above, these seemingly transient images are nearly etched in stone. Digitization is another word for “permanent.” Moreover, the preservation of documents or images, often long since forgotten, can result in undermining a witness’s most important asset – credibility. If the judge or jury simply decides that someone is dishonest or has destroyed inculpatory evidence, the chances of success are diminished. As I routinely advise my clients, there is no document worse than a potentially incriminating document that has been destroyed.

7) **The Mistake of Non-Retention**

A corollary to the preceding point is the failure to retain relevant data. Although less problematic than the destruction of inculpatory evidence, the consequences associated with failing to retain information can be troubling. At a minimum, the non-retention of relevant data will complicate litigation and create arguments for plaintiff’s counsel that otherwise would not have existed. Keep in mind that some of the non-statutory claims in the employment arena have lengthy statutes of limitation. Negligence claims and other intentional torts typically have a two-year statute of limitations. Breach of contract claims may be governed (depending on the nature of the dispute) by a six-year limitations period. Certain statutory claims (aside from discrimination claims) have a three-year statute of limitations. And those periods only reference the date by which the plaintiff’s complaint must be filed. Substantial additional time may elapse before the key depositions in the case are taken or before the matter is tried. Therefore, it is
important to preserve carefully the relevant data. Moreover, these precautionary steps are critical
to avoid any spoliation of evidence arguments.

8) The Mistake of Compassion

Compassion is a wonderful attribute. I am reticent to write anything advocating a
reduction in compassion or empathy. But, at certain times in the employment arena, compassion
is counter-productive. Despite best intentions, it can create unanticipated problems.
Consequently, it is important to think through the consequences of compassionate gestures.
Does it make sense to provide a reference letter to an employee exiting without a release, even if
he/she is a friend? Does it create any problems if employees are allowed to “volunteer” for an
involuntary layoff and receive additional compensation as a result? Are there any problems
associated with allowing employees to “donate” their sick leave to a co-worker confronting a
serious illness? In each of these contexts, compelling arguments can be advanced for rejecting
the compassionate approach. At a minimum, careful thought and consideration should be given
to the possibility that any of these legitimately motivated behaviors might later create serious
problems. If the company then decides to allow them anyway, at least it has made an informed
decision, based on a comprehensive assessment of the associated risks.

9) The Mistake of Inaction

When a company becomes aware of problematic behavior, it must act. Simply put,
problematic conduct cannot be ignored without risking significant liability. This concept has
been embodied in the well known hostile environment sexual harassment standard of “knew or
should have known.” Once the company “knows” or once the behavior is so pervasive that it
“should have known,” it fails to act at its peril. The same is true with regard to the trio of
negligence torts – negligence hiring, retention and supervision. Once a company becomes aware
of serious employee problems, it must act. Failure to do so exposes other employees and/or
members of the public to unnecessary risk, a risk that will be transferred to the back to the
company in the subsequent litigation by any injured party.

10) The Mistake of Narrow Thinking

Both employment discrimination cases and other types of employment disputes often turn
on the concept of differential treatment – was one group or one person treated better or worse
than someone outside the group who in other respects was similarly situated? Given that fact, it
is important for the HR professional or other members of management to think broadly when
taking adverse action against an employee. If an individual has exhibited multiple problems over
the years, consider the entire mix of issues when deciding the appropriate company response.
Focusing narrowly on just the last problem experienced with the employee in question (e.g.,
insubordination) unduly circumscribes the subsequent debate. This approach creates the
likelihood that the plaintiff-employee only will be evaluated by the subsequent decision-maker
by comparing him/her to others who exhibited the same specific conduct in question. There is
no reason to limit the assessment, and the comparison to others, to one narrow issue when other
considerations actually were in play. Think broadly.
On the other hand, don’t create a laundry list of grievances about an employee’s performance, when some of these reasons had nothing to do with the discharge decision. Doing so will simply diminish the legitimacy of the compelling reasons for the company’s action. And, above all else, don’t fabricate reasons that did not exist. Once your credibility is gone, it’s gone.

11) **The Mistake of Rubber Stamping**

The HR professional, or the next level up in management, that does not critically examine the rationale articulated for taking a certain course of action, is exposing his/her company to potentially significant and unnecessary risk. Particularly when the action advocated meets any of the following six criteria, it is crucial to scrutinize and test the underlying explanation. **First**, the action has never previously been taken toward other employees. **Second**, the action will adversely affect an employee or group of employees. **Third**, the action advocated is difficult to reconcile with the employee(s) past work history or performance. **Fourth**, the action will benefit the decision-maker or someone supported by the decision-maker. **Fifth**, if the rationale for the action is rejected by a neutral fact-finder, whether judge or jury, the financial repercussions are significant. **Sixth**, it would be difficult to explain the decision in the court of public opinion.

In these (and other) contexts, the failure to test the proffered explanation and instead just rubber-stamp the planned course of conduct will almost always be a mistake the decision-maker later regrets.

12) **The Mistake of Gullibility**

Not everything that employees state is truthful. It is important to acknowledge, however, that this observation applies with equal force to both managerial and non-managerial employees, to the decision-makers and those about whom the decisions are being made. It is essential to bring critical judgment when evaluating someone’s veracity. If this initial assessment is ignored, or simply made in error, the later consequences can be significant.

13) **The Mistake of Arrogance**

With the exception of mendacity, there is possibly no more serious flaw in an employment dispute than arrogance on the part of management. This attribute will alienate the judge and jury alike. It will seriously erode a defendant’s chances for success.

14) **The Mistake of Defeatism**

At times, it may seem as though the chances of success when defending employment discrimination claims or other disputes arising in the workplace are slim. If, however, the mistakes enumerated above can be avoided, and if companies are willing to take principled positions with regard to employment litigation, not compromising or capitulating when confronted with dubious claims, these cases are winnable. Don’t minimize your chances of prevailing while simultaneously maximizing the likelihood of losing and the amount of the damages a plaintiff might recover. Don’t be unduly pessimistic. Don’t be a defeatist. Defendants can (and do) win employment cases.