

The Biggest Mistakes Made by Human Resources

Delaware Valley Employment Law Conference

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HYPOTHETICAL #1: MY FIRST APPLICATION

I just started my company and am going to hire my first employee. I went to the office supply store and bought an application. The application contains all the normal information I will need about the applicant. It contains the applicant's name, address, age, prior work history, criminal arrests record, citizenship and military service. It also states that if I hire the applicant, he or she will be an at-will employee and that nothing can change the at-will nature of the employment relationship. Pretty good for \$5.00?

Do I have problems with the application?

A) Yes

B) No



MISTAKE #1: USING FORMS THAT ARE NOT CUSTOMIZED FOR YOUR COMPANY

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HYPOTHETICAL #2: DO I NEED AN EMPLOYEE HANDBOOK

My company has 75 employees and has been growing faster than I expected. I asked a couple of friends who run businesses if I needed an employee handbook to help organize my workforce. They told me to avoid handbooks because written rules and procedures just get in the way. I don't want to pay for a handbook if I don't need one.

Should he have a handbook?

A) Yes

B) No



MISTAKE #2: NOT HAVING AN EMPLOYEE HANDBOOK

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HYPOTHETICAL #3: HARASSMENT COMPLAINT

Jill is my bookkeeper. She is good looking and models on the side. She sometimes wears provocative clothes to work, but I have not said anything about her clothes. She came to me today and said that Tom, one of my supervisors, has asked her out on a date. When she said she wasn't interested, he started to make comments about the way she looks and said that he would like to get into bed with her. Jill tells you about Tom's behavior "in confidence." When you ask her to fill out the complaint form, she refuses to do so. Instead, she tells you she will let you know if the behavior continues or becomes hostile.

Should you investigate?

A) Yes

B) No. Jill told you in confidence and did not make an official complaint.

C) No. But you should monitor the situation to see if it continues, or if Jill complains again

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MISTAKE #3: NOT PROPERLY RESPONDING TO REPORTS OF IMPROPER CONDUCT

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HYPOTHETICAL #4: HARASSMENT OF TEAM MEMBERS

Jim is the supervisor of one of my teams. The team is made up of six white employees and four black employees. It also has several women on it including Tina. Tina came to me today and told me that Jim was harassing her and other team members. He yells at them all the time. He refuses to answer questions about the job, telling the employees to figure it out on their own. Because of Jim, she is considering applying to a different department. She also says if this continues, she will go to the EEOC and file a complaint.

What should I do?

- A) Move Tina to an open position in another department**
- B) Fire Jim because he is harassing Tina**
- C) Ignore it, Jim is not harassing Tina**
- D) Provide Jim training on how to be a good supervisor**



MISTAKE #4: NOT TRAINING SUPERVISORS

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SUPERVISORS MUST

- Treat employees with respect and dignity
- Treat employees fairly
- Be positive about the company
- Be approachable

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SUPERVISORS MUST

- Uniformly enforce the company's rules
- Accurately evaluate employees
- Recognize when to refer the employee to human resources
 - Employee is asking for a reasonable accommodation
 - Employee is asking for a religious accommodation
 - Recognize when an employee is asking for an FMLA leave
- Know how to behave and what to do when s/he sees/learns of inappropriate conduct by others

HYPOTHETICAL #5: DISCHARGES

Your company is union free and all employees are at-will. Employees are required to sign a statement every year confirming their at-will status. Kim has worked for your company for over 40 years. Lately her performance has been declining and she just doesn't seem to be "keeping up." She frequently turns in her reports late and full of errors. Her evaluations have been good over the years and she has never been in trouble. However, her late and inaccurate reports are really starting to affect the company.

What should you do with Kim?

- A) Fire her. She's an at-will employee and can't bring a lawsuit against you.**
- B) Don't fire Kim. She's a potential ADEA lawsuit waiting to happen.**
- C) Discipline Kim for her performance issues.**

NON-ABUSIVE DISCHARGES

- Have the decision-maker and a witness present
- Keep the meeting short
- Inform the employee of the true reason for the discharge
- Treat the employee with respect and dignity
- Allow the employee to comment
- Both the decision maker and the witness should document the discharge

MISTAKE #5: NOT PROPERLY (AND UNIFORMLY) DISCHARGING EMPLOYEES

SIX RULES OF DISCHARGE

- Did the employee know of the rule?
- Was the rule reasonable?
- Was there a fair investigation before the discipline was given?
- Can the employer prove the employee violated the rule?
- Was the rule uniformly enforced?
- Was the discipline reasonable?

HYPOTHETICAL #6: CONDUCT ISSUES

Cindy came to work late this morning. We had a big client coming in, and we really needed her here to help with the last minute preparations. I was so mad I wanted to fire her on the spot. She's been late before, and I've mentioned it once in awhile, but she always laughs it off and says it will never happen again.

Can I fire Cindy?

A)No, because she has not had any discipline

B)Yes, because she is an at-will employee

MISTAKE #6: NOT PROPERLY DOCUMENTING CONDUCT PROBLEMS

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PROPER DISCIPLINE FOR MINOR INFRACTIONS

- First 1, 2, 3 times:
 - inform the employee of the rule infraction
 - Let employee know what happens the next time
 - Create a document reflecting the verbal reprimand
- Next time:
 - I've talked to you about it, you did it again
 - We now need to put written discipline in your file (incorporate verbal)
 - Let employee know what happens the next time
- Next time:
 - Follow through on your earlier threat (e.g., suspension without pay)

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HYPOTHETICAL #7: JEFF COMPLAINS TOO MUCH

Jeff is a problem employee. He has a history of being absent on Fridays and Mondays. He is also a poor performer who complains about everything. Bill, Jeff's supervisor, has counseled him on a number of occasions and has documented the counseling sessions. Last week Jeff really screwed up a project that is going to cost the company \$25,000. Bill came to my office and after we discussed the incident, we decided to terminate Jeff's employment on Friday. On Thursday, Jeff came in and said he had filed a complaint with the EEOC and with OSHA.

Can we still terminate Jeff?

- A) No, he is protected because you cannot retaliate against an employee who complains to the EEOC.**
- B) He is protected by the Whistleblower's Protection Act because he complained to OSHA.**
- C) Yes, you made the decision before he made any of the complaints.**

MISTAKE #7: NOT GIVING PROPER ATTENTION TO PROTECTED ACTIVITY

HOW TO PREVENT RETALIATION

- Document disciplinary issues and counseling sessions
- Talk to the employee before taking an adverse employment action
- Monitor the situation
- Keep employee complaints confidential to the extent possible
- Inform the supervisors not to retaliate or allow retaliation
- Establish a policy against retaliation and communicate to employees

HYPOTHETICAL #8: BARB WANTS OVERTIME

Barb is my office manager. I pay her a salary of \$600 a week. I pay the secretaries a salary of \$400 a week. Barb is in charge of the office staff. She ensures that the secretaries do their job; ensures that the billing statements are sent out on time; ensures the collection of the accounts receivables; and purchases supplies for the office. I do not pay her or the secretaries overtime because they are salaried employees. They do not punch a clock. I just got a call from Barb's attorney claiming I have to pay her and the secretaries overtime for the past three years.

Do I have to pay overtime?

- A) You have to pay overtime to both Barb and the secretaries.**
- B) You have to pay overtime to Barb, but not the secretaries.**
- C) You have to pay overtime to the secretaries, but not Barb.**
- D) You don't have to pay any of the salaried workforce overtime**

MISTAKE #8: MIS-CATEGORIZING EMPLOYEES AND NOT ADDRESSING OTC WORK

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HYPOTHETICAL #9: EMPLOYEE DOES NOT GIVE RETURN TO WORK DATE

Beth has been out for 12 weeks on FMLA leave. She is claiming that her supervisor's management style has caused her severe depression. The doctor has moved her return to work date back. Beth has been a poor employee since the Company hired her. She complains about everything and claims that her supervisor harasses her. When asked what form the harassment takes, she says he yells at everyone including a number of male employees. She admits that none of her supervisor's behavior is sexual in nature. The Company just received a slip from her doctor saying that he is putting her on indefinite leave and suggesting we discharge or discipline the supervisor. Her supervisor is fed up with Beth and wants to fire her.

HYPOTHETICAL #9: EMPLOYEE DOES NOT GIVE RETURN TO WORK DATE

What action should the company take with Beth?

- A) If she cannot return to work at the end of her leave, you can automatically terminate her under the FMLA.**
- B) Seek to accommodate her by discharging the supervisor.**
- C) Request clarification from the doctor to see if there is a date when she will be able to return to work. If he cannot give a date, then terminate her.**
- D) You cannot discharge her because her complaint of harassment is protected activity under Title VII, and she will have a retaliation claim against the Company.**

MISTAKE #9: NOT HAVING (AND USING) A UNIFORM PROCESS FOR FMLA LEAVES

COMMON MISTAKES FOR FMLA LEAVES

- Failing to provide employees with a Notice of Rights under FMLA. (WHD Publication 1420)
- Failing to recognize when an employee has made a request for FMLA leave
- Failing to provide the employee with a Notice of Eligibility and Rights & Responsibilities. (WH-381)
- Failing to notify the employee that a fitness for duty certification is required and to provide a description of job duties
- Failing to designate an employee's leave as FMLA leave. (WH 382)

COMMON MISTAKES FOR FMLA LEAVES

- Failing to educate front line supervisors
- Failing to require an employee to run his/her FMLA leave concurrent with other leaves and paid leaves
- Failing to require a complete certification of health care provider (WH Forms WH 380-E and WH 380-F)
- Sharing too much medical information with supervisors.
- Terminating an employee who fails to return to work at the conclusion of his/her FMLA leave
- Failing to return the employee to the same or an equivalent position

BEST PRACTICES FOR FMLA LEAVES

- Review and revise all FMLA policies for compliance with the law and best practices
- Identify those individuals who have responsibility for identifying and administering FMLA and ensure adequate training
- Use the DOL Forms
- Date-stamp all FMLA paperwork and be sensitive to timeliness
- Monitor absence patterns for abuse

BEST PRACTICES FOR FMLA LEAVES

- Rely on medical documentation throughout FMLA process – not your assumptions
- Remain aware of deadlines – avoid being caught on a technicality
- Understand FMLA rights supplement any ADA rights
- Regular communication between HR and management on FMLA issues and any developments
- Use second and third opinions and recertifications to combat against fraud and abuse

PAY (A LITTLE) NOW OR PAY (A LOT) LATER



IT IS MUCH LESS EXPENSIVE FOR THE COMPANY TO
GET LEGAL ADVICE ON AN EMPLOYMENT ISSUE
THAN TO DEFEND A LAWSUIT.

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Thank You



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Note: This document is not intended to give legal advice. It is comprised of general information. Employees facing specific issues should seek the assistance of an attorney.