

EMPLOYEES BEHAVING BADLY: MISTAKES EMPLOYERS MAKE AND HOW TO FIX THEM

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*No Statements made in this seminar or in the written materials/PowerPoint should be construed as legal advice pertaining to specific factual situations.

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2. The Consequences of Off-Duty Conduct.
3. I Have To Show Up To Work?
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Mistake No. 1

The Hot Mess In The Cubicle Next To Me

Interviewing Mistakes

How'd We Hire *That* Guy?

- Effective personnel practices begin with the hiring process.
- Employers must treat the hiring process as a very serious part of their business and vie it the time and attention to detail required.

How'd We Hire *That* Guy?

Issue: Failure to Set Qualifications:

Under all federal and state laws, the employer has the right to set qualifications. Those usually come through job descriptions which need to be updated and clear.

How'd We Hire *That* Guy?

The Consequences of Failing To Set Qualifications:

- If the bar is too low, everyone is qualified.
- Title VII/ADA Implications.
- The Pennsylvania Veterans' Preference Act.

How'd We Hire *That* Guy?

Background Checks:

Do we have a release and what does that really cover?

- Word of Mouth.
- Use of Social Media.

How'd We Hire *That* Guy?

Background Checks (continued):

Pennsylvania: Privilege to provide job references in good faith.

Fair Credit Reporting Act issues.

Why Do A Background Check?

- Negligent hiring:
 - Employer knew or *should have known*, the employee was dangerous, careless, incompetent and if employed, there was a reasonable/foreseeable chance the employee could harm a third-person (coworker or customer).
 - Employers *must* take reasonable steps to investigate suitability for job.

How'd We Hire *That* Guy?

When hiring, **cannot** consider:

Race, creed, color, religion, gender, age, medical condition or disability, national origin, marital status, child bearing plans, child care arrangements, injury or workers compensation history.

How'd We Hire *That* Guy?

Wait, what about:

- Prior arrests?
- PA Statute; EEOC Guidance.
- Financial condition?
- Obvious physical or mental issues?
- Lying on the application packet?

How'd We Hire *That* Guy?

Best Practices:

Qualifications reviewed and in writing.

Maintain applications for two years.

Standardize interview questions.

Two people involved in all interviews.

Document background checks and interviews and follow all legal requirements for background checks.

Mistake No. 2

Well, Based on the Facebook Pictures,
It Must Have Been A Great Party

Off Duty Conduct and its Consequences

Off Duty Conduct

Off duty conduct can be a basis for discipline depending on the facts.

Public vs. Private Employees

Off Duty Conduct

Is it a matter of crimini falsi—a crime of dishonesty?

What about a conviction for domestic violence?

What about a DUI or loss of license?

Constitutional Rights?

- Public Employees:
 - First Amendment: Freedom of Speech:
 - Must be “matter of public concern.”
Weigh against employer’s interests.
 - Fourth Amendment - Unreasonable Search/Seizure:
 - “Reasonable expectation of privacy.”
Was intrusion motivated by work-related reasons?

Off Duty Conduct

Best Practices:

No rumor—just facts.

What is the nexus with work?

Independent investigation.

Have a clear vision on how this impacts the workplace.

Mistake No. 3

I'll Be Off Next Week,
Forward My Mail To Ibiza

Attendance Problems

I Have To Show Up To Work?

An employer has the right to expect an employee to show up to work as scheduled and as directed.

However, the employee has the right to leave under certain federal statutes and the right to use the leave time afforded by the employer.

I Have To Show Up To Work?

If an employee is not showing up to work as scheduled, what do we do?

First, determine whether or not the employee has a “serious health condition” covered by the Family and Medical Leave Act.

If so and you are a covered employer, you are required to provide notice of FMLA leave which protects an employee from termination and discipline while on FMLA qualifying leave.

I Have To Show Up To Work?

If an employee is not covered by the FMLA or is simply late repeatedly, then what?

Question 1: What are your attendance rules and policies?

Question 2: Does the employee know about these rules and policies?

Question 3: Can you prove violations of those rules and policies?

I Have To Show Up To Work?

How do we prove non-compliance?

- Video
- GPS
- Time clocks
- Personal observation
- Swipe records

I Have To Show Up To Work?

I got him, now what?

- Patience and progressive discipline.
- Can we terminate for the first violation?
- What if we have a attendance policy?

I Have To Show Up To Work?

Best Practices:

Proof.

Constant documentation and correction.

Progressive discipline.

Demonstrate why the absence hurts the business.

Mistake No. 4

When I Say “Meets Expectations,”
What I *Mean* Is You’re Awful

Evaluations and Why We Hate Them

You Stink. Evaluating Performance

A performance evaluation can help or hurt you. It *must*:

- Explain to the employee how his/her yearly performance is viewed by management.
- Alert the employee to performance deficiencies.
- Provide a strategy for improvement.
- What if it doesn't?

You Stink. Evaluating Performance

Can you trust managers and supervisors to do this well without training? Must that training be repeated?

Is there a “right” or “perfect” evaluation?

Evaluations must be tied to the requirements of the job and should flow from the job descriptions.

Every evaluation should be reviewed and, hopefully, be consistent.

You Stink. Evaluating Performance

Use of labels versus actual documentation in a narrative.

Can supervisors be judged on their evaluations?

Can employees be required to sign off on the evaluations? What if they refuse?

You Stink. Evaluating Performance

What if we don't do them? What good are they?

What does the personnel file say about the employee?

The power of writing versus the power of testifying.

You Stink. Evaluating Performance

Best Practices:

All evaluation criteria must be within the control of the employee.

Must match up with job description.

Must be reviewed with the employee and retained.

Should not be a surprise (they don't have to like it) to the employee.

Mistake No. 5

Its Just A Flesh Wound

Returning The Injured Employee to Work

I'm Back For More Cash. Injured Employees and Return to Work

When an employee is injured, the employer should have policies requiring documentation of the injury.

If it's an on-the-job injury—is it covered by the Heart and Lung Act?

What is the difference between a HLA injury and a WC injury?

I'm Back For More Cash. Injured Employees and Return to Work

If a non-work related injury, then use of leave time.

What about short-term and long-term disability insurance?

Interplay of WC, FMLA and STD benefits.

I'm Back For More Cash. Injured Employees and Return to Work

What can I ask an employee to document?

Aren't I violating HIPPA?

Do I have to give an employee light duty? What if I don't want to? What if I only give light duty for on-the-job injuries?

The benefits of having a light duty policy.

I'm Back For More Cash. Injured Employees and Return to Work

Do I have to allow an employee to return to work?

What if I don't agree with or don't understand his doctor's note?

What if I think the job to which the employee is returning to is too much for the employee?

What if the employee is not fully released to duty?

I'm Back For More Cash. Injured Employees and Return to Work

Best Practices:

Document, Document, Document.

Demand proof where unclear.

Send for RTW exam where necessary.

Have Light Duty policy.

Clearly communicate regarding essential functions, restrictions and position to which an employee is being returned.

Mistake No. 6

Yes, That Is My Picture on Facebook and
No, I Don't Remember Having It Taken

The Weird World of Social Media

#Ihatemyjob—Social Media

Every employer must have an electronic communications/ social media policy that provides, at a minimum, that there is:

- No expectation of privacy.
- Reserve the right to monitor.
- Reasonable personal use of the network and Internet-related systems is permitted at the discretion of the employer.
- Harassment and other conduct policies apply at all times.
- Abuse can lead to discipline, up to and including discharge.

#Ihatemyjob—Social Media

If an employer wants to regulate the use of social media, the employer's policy should:

- Define whether blogging and/or social networking is permitted during work hours.
- Provide clear guidelines about your expectations and what types of posts are appropriate and what are not.
- Reaffirm policies on ethics and business conduct, privacy, confidentiality and harassment.
- Remind employees to adhere to copyright, fair use and financial disclosure laws.
- Mandate that employees clearly convey when they are posting on their own behalf and when they are posting on behalf of the company.

#IhateMyJob—Social Media

The National Labor Relations Board has held that an employee's Facebook posts about work can be protected conduct.

Also, what about First Amendment issues for posting about matters of public concern?

What does "derogatory" mean?

Should/Can you take employment action based on social media posts?

#IhateMyJob—Social Media

Best Practices:

Must have an electronic use/social media policy.

Must make sure that your use of/monitoring of electronic communication and social media does not violate someone's rights.

Should always make sure that the conclusions you are drawing about electronic communications are reasonable ones.

Cannot make illegal decisions about employment based on someone's social media postings.

Mistake No. 7

Boom Goes The Dynamite

Disciplining The Hard Case Employee

Boom Goes The Dynamite—Discipline Issues

Two kinds of employees:

"Just Cause": must be significant deficiencies in performance or behavior (usually following progressive discipline).

"At will": can terminate:

- At any time.
- For any or no reason.
- With or without prior notice.

Boom Goes The Dynamite—Discipline Issues

The foundation of any discipline for a unionized/ statutorily protected employee is the seven step test for just cause set forth originally in *Enterprise Wire*, 46 LA 359 (1966).

- *Notice*
- *Reasonable Rule or Order*
- *Investigation*
- *Fair Investigation*
- *Proof*
- *Equal Treatment*
- *Penalty*

Boom Goes The Dynamite—Discipline Issues

A unionized/statutory employee has the right to a *Weingarten* representative, *Garrity* warnings and before he is deprived of property—before he loses money—a *Loudermill* notice.

An at-will employee is not entitled to any of these protections.

A *Loudermill* notice includes:

- Notice.
- Explanation of the Evidence.
- Opportunity to Respond.
- Can be conducted face to face or in writing.

Boom Goes The Dynamite—Discipline Issues

What are the questions that an arbitrator/EEOC/Factfinder will ask?

Was there progressive discipline or was the offense significant enough that serious discipline is warranted the first time?

- Is the offense correctable?
- Was it because of lack of training?
- Was it negligent or deliberate?
- The ultimate question: Is the employment relationship salvageable?

Boom Goes The Dynamite—Discipline Issues

Best Practices:

Meet *Enterprise Wire* every time—both for unionized and non-unionized workers.

Go slow, gather evidence and do it right the first time.

Understand what an arbitrator/the EEOC/a Judge or Jury will think—is it fair? Is it consistent?

Understand discipline is a process.

Mistake No. 8

This Hurts You More Than It Hurts Me

Firing Employees

You're Fired

The Termination Decision.

After a reasonable period of progressive discipline.

If you can demonstrate willful misconduct of an important work rule.

One of the deadly sins—sleeping, theft, fighting.

What about repeated violations of a lesser rule?

You're Fired

Termination considerations.

Where? When? How many People? How to document?

What to say?

What never to say and why that is.

Mistake No. 9

I Said, *Buh-Bye*

Post Termination Issues

Your Fired—The Aftermath

Severance packages.

Resignation in lieu of termination. Resignation after the fact.

Neutral letter of references.

COBRA obligations

Cessation of medical coverage.

Your Fired—The Aftermath

Unemployment compensation:

- Irrevocable resignation.
- Willful misconduct.
- Involuntary quit.
- Necessitous and compelling reason for quitting.

Thank You!