

White Paper

The “Five Deadly Sins” That Could Land Your Company In Court



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The “Five Deadly Sins” That Could Land Your Company In Court

While it is often the largest employers in the United States that garner media attention, according to recent surveys, nearly 50 percent of all employment-related lawsuits are brought against companies with less than 100 employees. In fact, employers with as few as 15 employees have faced lawsuits, from present and former employees, that have resulted in substantial cash damages.

Many of these lawsuits could have been avoided if the leaders of these firms understood that there were actions they could take, to not only protect their company from legal liability, but simultaneously to establish within their organization “best” Human Resource (HR) practices. Such practices would enable them to also dramatically increase the productivity of their employees and therefore the Return on Investment (ROI) in one of their largest expenditures - their employees. Well managed firms have discovered that legal claim protection is not a burden, but rather is a part of a successful organization’s culture and management philosophy.

Sin # 1 Defective EEO/Harassment Policies

It is essential that all firms have legally compliant EEO and Anti-Harassment policies in place and that these policies are shared with all employees. Some of the critical factors that contribute to what is called an “affirmative defense” if an employer is sued include:

- ✓ documented proof that an organization has an established process that allows for expedient and confidential investigation of claims
- ✓ evidence that legitimate claims are being acted on immediately with corrective action
- ✓ regular training of managers and employees regarding these policies.

It is also essential that the complaint process provides employees with alternative channels for reporting incidents beyond just their immediate managers.

In one recent case, a firm successfully defended itself against a harassment claim because: (1) the leadership team had properly disseminated a policy in an Employee Handbook, for which employees and managers signed an Acknowledgement Form; and (2) the company possessed documentation that managers had not only been trained on the policy (they had them “sign in” at the classes), but managers had also been held accountable by including compliance with the policy as a measure in the performance review process. Thirdly, the firm established a hot-line where employees could call immediately if they believed they were a victim or witnessed a violation of the EEO or Anti-Harassment policies. Conversely, in another case a firm was found liable since while the company’s leadership team had issued a policy, it had not properly disseminated this policy to all employees and did not follow that policy when a sexual harassment incident occurred. In fact, the company terminated the employee who filed the complaint of harassment.

The bottom line is, the most successful companies have discovered that emphasizing the expectation “treat others as you would like to be treated” helps to create an environment that not only assists in avoiding legal liability regarding EEO and Anti-Harassment suits, but creates a more positive and productive work environment.

Sin #2 Non-Compliance with Wage & Hour Laws

One area that continues to be the focus of much attention of the federal Department of Labor (DOL), as well as plaintiff attorneys, is the Fair Labor Standards Act (FLSA). Each year, companies of all sizes are audited to determine if they are correctly classifying employees as being either “Exempt” or “Non-Exempt” from these regulations based on their duties and levels of compensation. The DOL also audits whether companies are properly paying overtime to employees who are “Non-Exempt” from these laws, including, for example, paying for time that Non-Exempt employees eat lunch at their desk or “clock in early” before their shift, even if they do so voluntarily, or improperly “docking” the pay of employees classified as “Exempt” from the FLSA regulations.

Effective August 23, 2004, after much debate, the Department of Labor issued new FLSA regulations that revised a number of rules, including the payment of overtime and the docking of pay of employees. The new regulations are designed to make it easier for employers to identify which positions should be paid overtime for hours worked in excess of 40 hours a week, and raised the minimum salary level of employees who would be “Exempt” from overtime to \$455 per week. The new laws also clarified the limited number of circumstances under which employers may dock an “Exempt” employee’s pay, if they are absent from work, without running the risk of jeopardizing the “Exempt” status of that employee. The regulations continue to reinforce that before docking an Exempt employee’s pay a company must carefully review the reasons for the employee’s absence.

One key way to help avoid violation of these regulations is to create written, accurate job descriptions that provide a clear rationale for the assigned FLSA status. Well managed firms find that providing employees with job descriptions also clarifies for them their key responsibilities, and results in greater productivity. Again, legal compliance becomes a management tool for enhancing performance, not a management burden.

Sin #3 Failure to Recognize Qualifying Medical Conditions and Accord Them Proper Treatment under the Americans' With Disability Act (ADA) & the Family and Medical Leave Act (FMLA)

Employees and qualified applicants who have certain medical conditions may be entitled to "reasonable accommodation" in order to perform their job within an organization under the ADA. Under the FMLA, eligible employees may be entitled for up to 12 weeks annually of unpaid leave where their job and benefits are protected due to their own or an immediate family members qualified medical condition.

It is essential that firms carefully review their compliance with these laws since FMLA and ADA cases can often be very complex. For example, an employee who has a "serious health condition" under the FMLA may also have a "disability" that entitles that individual to a "reasonable accommodation" (identified through an interactive dialogue which is an essential step in showing a "good faith effort") under the ADA, which might include a modified schedule and extended leave.

This is an area where a lack of compliance can also communicate to fellow employees, and to a jury if an employee sues, an apparent lack of sympathy and appreciation on the part of the company for what an employee is suffering. It is human nature to empathize with individuals who appear to be unfairly treated by their employers and often fellow employees and juries react to a perceived apparent lack of concern on the part of a company by considering how they would be treated in a similar situation.

A case in point: an employee who had a good work record as a school district secretary for over 20 years, developed a mental disorder that required she receive three weeks of inpatient psychiatric treatment, which is a FMLA "qualifying event." Upon her return to work from a FMLA leave, she requested "reasonable accommodation" under the ADA to allow her to continue her treatment via outpatient visits and medication. Her job duties were suddenly dramatically increased by her manager and she began to make errors in her work. The manager documented these errors and issued written disciplinary notices, the first such notice four weeks after her return to her job, citing errors made just four days after her returning to work. Ultimately, the school district terminated her employment. The employee filed suit against the school district alleging discrimination under the ADA, claiming the district impeded her return to work by increasing her job duties and by excessively monitoring her work in order to check more closely for errors. The Court ruled in the employee's favor by finding that her employer not only failed to engage in an interactive dialogue with her to try to reasonably accommodate her mental illness, but that the school district actually made her job more difficult.

Effective leaders appreciate the importance of carefully monitoring their firm's obligations under the highly complex and litigious areas of FMLA and ADA. They also realize, where it is not an undue hardship to the company, providing "reasonable accommodation" to a qualified employee results not only in legal protection for the firm, but is a good business practice. It allows the company to maintain a productive employee and communicates to other employees the company's commitment to its employees and strengthens their loyalty to the firm.

Sin #4 Erosion of the At-Will Presumption

Many employers are under the misconception that they can terminate the employment of any employee in their organization, at any time, with or without cause or notice. This is not only a faulty presumption that can lead to lawsuits from former employees, based on a wide range of exceptions to the employment "at-will" doctrine, but it is also an ineffective business practice.

Federal and state legislatures have created significant exceptions to the at-will doctrine including those based on discrimination charges and implied contracts. If employees can prove, for example, that their employment has been terminated because they were members of a "protected class" (i.e., due to their race, sex, age, etc.), firms are considered to have discriminated against these individuals, in direct violation of the law, and the "at-will" doctrine may not be upheld.

In addition, an employer can inadvertently change the "at will" status of employees by creating "implied contracts. This can occur, for example, in an improperly drafted Employee Handbook or by managers making verbal statements such as, "we have never had a layoff here" or "you are a good worker and will always have a job here."

To help avoid legal liability, and more effectively manage their work force, highly effective leaders not only ensure that all employee communication materials contain the proper legal disclaimers, but that they also establish policies and performance standards and train their managers to properly communicate, document and consistently apply these policies and standards.

Sin #5 Ineffective Discipline/Performance Processes

It only makes sense that to obtain the highest level of productivity from employees, and therefore the highest ROI on the investment made in its employees, that companies put in place processes that clearly establish performance expectations for employees. Once these expectations are established, the firm must then communicate to employees on an on-going basis their progress against those objectives, holding them accountable for reaching these performance levels. Firms should also pay employees according to their achievement of established performance standards. These practices encourage employees to devote the “discretionary effort” that is the basis of highly effective organizations.

If an employee fails to meet their performance standards, there must be a “due process” for adopting a fair, consistent and balanced approach to discipline and performance issues. From both a management and legal liability perspective, firms that fail to establish and follow these practices put the organization at risk for liability.

Defending claims such as discrimination requires evidence of legitimate, non-discriminatory reasons for a firm taking adverse job actions such as demotion or termination of employment. Written documentation, that is consistent with the company’s policies and the actions taken, are critical if a legal action is brought against a firm. For example, it can be very damaging to an organization in a lawsuit to have terminated an employee for poor performance, when the only written documentation that exists in that employee’s personnel file is a recent performance review that indicates the employee is “meeting performance” standards. In addition, if there is no evidence that the employee was given warning that his/her performance was not meeting standards, as well as a reasonable opportunity to correct his/her performance, juries will most often sympathize with the employee. Many employment attorneys would have to find another livelihood if managers practiced providing employees with on-going, honest performance feedback and consistently followed an established performance improvement process where they documented their communications with employees.

Effective leaders also know that it is important to deal with “problem employees” as soon as issues occur. Nothing is more demoralizing to highly productive workers than to see an employee who is disruptive or under performing not being held accountable. Long avoidance of a problem can also lead the Courts to ask, “Why has this long-tolerated behavior suddenly become unacceptable?” Leaders of successful organizations, however, also know that problem employees need to be addressed in a respectful fashion, avoiding labels such as “you are lazy” or “you have a bad attitude,” and focusing instead on specific behavior such as “you are consistently late for work” or “you were not polite and helpful to that customer.” A recent study found that employees not treated fairly and respectfully by their firms were 35 times more likely to sue!

Final Suggestions for High Performance Firms

What are some of the things an employer can do to protect itself? The first step is to make sure that you have leaders in place that understand the myriad of federal and state laws the company needs to be in compliance with. Then work toward bringing the company into compliance. This may involve actions ranging from creating or updating an Employee Handbook, to reviewing the FLSA status of employees, to conducting Anti-Harassment training with managers and employees. Once the appropriate policies and practices are in place, audit them regularly to make sure that they are being consistently and uniformly followed by managers. Make sure also that employees understand the company’s internal compliant procedures so problems can be resolved before they result in litigation. And, of course, move cautiously when taking “adverse employment actions” such as terminating an employee.

Business leaders need to learn the secret that well managed firms have discovered: legal compliance does not need to be a burden, but rather can be the natural outcome of the development of a work environment that results in a committed, loyal and productive workforce. Successful firms have learned this critical lesson - avoiding the “Five Deadly Sins” is really not only about understanding and complying with the law, but about effective leadership.

This article is based on a meeting of more than 130 CEO’s, business owners, HR executives of local businesses who attended a two hour seminar entitled “The 5 Deadly Sins That Could Land Your Company In Court.” The seminar was presented by Brian D. Pedrow, Esq., Partner in Ballard Spahr Andrews & Ingersoll LLP’s Labor, Employment and Immigration Group and Barbara Fitzgerald-Turner, SPHR, Vice President of Human Resource Consulting, the Elite Group. “The ‘5 Deadly Sins’ That Could Land Your Company In Court” was written by Barbara Fitzgerald-Turner.