6 Employment Actions That Can "Automatically" Land Your Hospital In Court

Insights
2.01.17

As a healthcare employer, it must be tempting to want to develop rigid workplace rules that will help newbie bosses reach conclusions almost automatically, especially where the best nurses or techs often become supervisors before obtaining much formal management training. Though well-intentioned, such practices can be disastrous in today's legal environment, where plaintiffs' lawyers and government enforcement agencies seem eager to second-guess employers' decisions at every step.

Now more than ever, it is vital to teach new supervisors to seek guidance from human resources or other more-seasoned managers instead of making quick or "intuitive" choices. Illustrating the tricky landscape of employment decisions, here are six employment actions that can "automatically" land your hospital in court.

If You Automatically Reject An Applicant Because Of A Criminal Record...
With the Equal Employment Opportunity Commission (EEOC) leading the charge, employers face increasing skepticism – or even outright prohibition – when it comes to considering the criminal history of a job applicant. The primary theory is that any across-the-board ban on hiring convicted felons would have a disparate impact on certain minority groups. Courts have somewhat curtailed the EEOC's campaign against the use of criminal background checks, but the federal agency continues on its quest.

It remains true, however, that when an applicant's record includes criminal activity, a prospective employer *must* consider the nature of the underlying conduct, how that conduct relates to the job in question, the length of time since that conduct occurred, and the applicant's record since the criminal activity. A hospital that cannot demonstrate it considered these factors before rejecting an applicant is asking for a lawsuit.

If You Automatically Deny An Exception Request To Your Dress Code Or Safety Policy...
Just because your hospital has never before granted an exception to one of these policies, or the policy exists for safety or "image" reasons, a supervisor cannot summarily dismiss such a request. Instead, you must determine the reason behind the employee's request and involve experienced leaders to help evaluate it.

If the employee claims the request is for religious or medical reasons, it is critically important for you to engage in a careful evaluation, even if you have enforced this policy without exception for years. If exceptions have been made in the past, the situation quickly becomes more treacherous, and a trip to the courthouse is more likely should you now deny such a request.

If You Automatically Reject A Medically Related Accommodation Request…
Whether or not your supervisor believes that an employee has a disability, or that a request can be accommodated, the request must be evaluated on an individualized basis. Your hospital must be able to prove you completed an interactive process. As is the case in each situation above, the evaluation and consideration process is often as important as the ultimate decision.

To complete a proper evaluation, you must first obtain medical information (shielded from the supervisor) to determine whether the employee actually has a qualifying disability. If so, you must consider whether a reasonable accommodation would enable the employee to perform the essential functions of the job. If a lone supervisor reaches a premature conclusion without following this sometimes-tedious process in concert with HR, expensive litigation is almost certain to follow.

If You Automatically Terminate An Employee For Misconduct Without Investigating…
When a report of "obvious" misconduct (such as a fistfight or cursing a patient's family member) reaches a supervisor, it would be easy to leap to the conclusion that immediate termination is the only course of action. However, experience shows that first reports are often inaccurate and witness perceptions could vary. When challenged, some witnesses may even change their story.

Again, it is critical to invest the time required to gather all relevant information – especially input from the accused – before reaching a conclusion. By suspending an employee during an investigation, you can save your hospital lots of time and money in the long run and not be accused of committing a rush to judgment.

If You Automatically Revoke FMLA Leave Because Of Reported Misuse…
When management learns of a Facebook post of an employee lounging by a swimming pool while on Family Medical Leave Act (FMLA) leave, it might make the supervisor's blood boil. Your supervisor may be tempted to act immediately, by either revoking the leave or terminating the employee. There are circumstances, however, where such a seemingly inappropriate activity turns out to be perfectly legitimate.

This was the case, for example, when an employee who was taking FMLA leave to care for her seriously ill mother was spotted on social media relaxing in another city. After her leave was revoked, a closer examination of the leave certification demonstrated that the employee had done nothing wrong. Unfortunately, this kneejerk reaction landed the employer in court.

If You Automatically Send Your Employees To A Post-Accident Drug Test…
If you are like most employers, you have a written policy requiring your workers to submit to drug testing automatically after they have been involved in a workplace accident. But given the new

Occupational Safety and Health Administration (OSHA) rule which took effect on December 1, this practice could land you in hot water.

OSHA believes blanket post-accident drug testing policies violate its new anti-retaliation rules. Instead, the agency instructs employers to conduct drug testing only when you have a reasonable basis to believe that the incident or injury was likely to have been caused by the employee's impairment, and that the drug test will determine whether the employee was impaired at the time of the incident or injury. Policies and practices should be updated accordingly.

Conclusion: Don't Automatically Act

These are only a few examples of rash workplace practices that often lead to litigation. In each of these cases, an objective and centralized review of the supervisor's recommendation could have saved tremendous amounts of time and money. Such a review would ensure the hospital could demonstrate that its decision respected the employee's legally protected rights and was free of discrimination.

Unfortunately, there are few one-size-fits-all roadmaps to help employers avoid costly and time-consuming litigation. Instead, most employment decisions require detailed, individualized assessment of the facts and circumstances. Often there are myriad variables, any one of which could form the basis of a legal claim.

As a result, it is important to always gather all the pertinent facts, including whether the employee recently engaged in any kind of legally protected activity; obtain the basis for workplace requests (get the employee's side of the story); evaluate how you have handled comparable situations in the past; and consider whether you have an affirmative duty to make any further inquiries. Finally, you should train your managers to always involve experienced HR managers or other leaders who have the expertise to evaluate the situation.

Unfortunately, "common sense" and seemingly intuitive decision-making leaves too much room for expensive errors. Even when the ultimate decision may not change, following and documenting the right process will almost always save headaches and money in the long run. On the other hand, failure to take these prudent steps may "automatically" lead you to the courthouse.

For more information, contact the author at KTroutman@fisherphillips.com or 713.292.5602.

Related People

A. Kevin Troutman
Senior Counsel
713.292.5602
Email

Service Focus

Employee Leaves and Accommodations

Employment Discrimination and Harassment

Litigation and Trials

Counseling and Advice

Workplace Safety and Catastrophe Management

Industry Focus

Healthcare