Heed The Flashing Lights – Or 5 Ways To Avoid An Employment Litigation Trainwreck

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When railroad crossing lights flash and whistles blare, everyone knows to stop, look, and listen. Those signals represent a warning, not a permanent roadblock to proceeding. The same is often true of workplace controversies. To an experienced eye, the lights and whistles can be just as obvious.

Thus, seasoned human resources representatives and managers who recognize when to "stop, look, and listen" can help their company avoid employment litigation trainwrecks. With this in mind, those who want to avoid or minimize the costs of litigation should keep in mind five fundamental tips. While these tips are not guaranteed to *prevent* all employment litigation, they can certainly reduce the likelihood of lawsuits. And they will help you reduce the costs and risks arising from litigation when it does occur.

1. 1. 1. **Pay Close Attention To Employee Complaints Or Disagreements With Management**

    As difficult as it may sometimes be, you should welcome and respond thoughtfully to workers' complaints. This is especially true when an employee puts a concern in writing. You should always remember, however, that even a verbal complaint may trigger legal duties to the worker. It is also worth remembering that if employees do not present their questions and concerns internally, they are likely to share them with someone else, such as the Equal Employment Opportunity Commission (EEOC) or plaintiffs' lawyers, for example.

    When employees bring concerns to management, they provide an opportunity to identify and resolve problems early, before they grow. Even if unable to resolve a situation to the employee's satisfaction, evaluating and addressing the issue thoroughly demonstrates a commitment to maintaining a fair and harassment-free workplace. Timely, responsive documentation also helps preserve pertinent facts and strengthens your overall position.

    On the other hand, if you do not respond timely, fail to document your response, or perform only a superficial assessment without showing that you took the matter seriously, these shortcomings increase the likelihood that a problem will grow. And of course in that case, your own documentation will not paint a flattering picture.

This could come back to haunt you in various ways, even if the originating employee does not pursue the issue. Specifically, another employee who subsequently pursues a similar issue may be able use an earlier, seemingly cavalier response in their own lawsuit against the company. It therefore always helps to demonstrate that you consistently take complaints seriously and respond accordingly.

2. **Be Especially Attentive When An Employee Mentions Retaliation, Whistleblowing, Or Their Lawyer**

   For years, the most common allegation presented on EEOC Charges has been retaliation. Further, various types of whistleblower claims are becoming increasingly prevalent. Therefore, if an employee uses any of these terms, or if other circumstances make a retaliation claim more likely, you should pay particularly close attention.

   Any time you get a sense of a possible retaliation allegation, HR should ask the employee for details about what happened, when it occurred, and what facts or documents lead to a feeling of retaliation. You should also remind the employee (and regularly remind all supervisors) that your policies prohibit retaliation for engaging in protected activity, including "whistleblowing." Make sure the employee understands that the company will not tolerate retaliation and knows your reporting policy in the event that retaliation is suspected. In fact, you should widely promulgate and often repeat these policies.

   In healthcare especially, many whistleblower statutes establish a legal presumption of retaliation if a termination, disciplinary action, or other adverse action occurs within a specified period after the employee has engaged in whistleblowing activity. This does not mean that an employee who has engaged in protected activity is not accountable for their conduct, however. Such an employee (who has complained about discrimination or possible regulatory violations) has no greater rights than others. These circumstances, however, require you to be prepared to articulate and prove the legitimate, non-retaliatory reasons for any action that you take toward the purported whistleblower.

   You should always maintain documentation to support employment decisions. If an employee has made explicit threats about taking legal action or has repeatedly referred to their lawyer, however, you should focus even more carefully on identifying the employee's specific concerns. If disciplinary action toward the employee becomes necessary, your organization must be very conscientious about being prepared to explain and prove the legitimate reasons for your actions.

   The same is generally true whenever an employee presents a complaint, either orally or in writing. This is not to suggest that making threats somehow gives an employee free rein in the workplace. On the contrary, allowing an employee to run roughshod over company policies will likely make the situation worse. Simply put, however, HR and management must always ensure that they can support, with evidence, the genuine, non-discriminatory

reasons for taking adverse employment actions. This is simply more important after an employee has presented a complaint.

3. **Be Especially Alert To Signs Of Unhappiness Or Frustration From Newer Employees**

   No matter how effective your interviewing and background-checking process, a new employee does not really get to know the organization or their coworkers for a while. For everyone, this is a time of getting acquainted and learning new policies, procedures, personalities and a new workplace culture.

   Additionally, for many people, changing jobs is one of the more stressful events in life. Thus, the first 12 months on a new job can be a time of surprises – and surprises are almost never good in the workplace. In short, practical experience shows that the first year of employment represents a higher-risk period for misunderstandings, disputes, hurt feelings – and litigation.

   You can manage these risks more effectively by simply recognizing them and paying more attention to new employees. Not just during their first 90 days, but during the first full year of their employment. This attention includes actively seeking feedback from the employee, answering their questions, and, above all, responding promptly to any concerns. When managed effectively, this extra attention can make the difference between a successful relationship and a costly and ugly workplace divorce.

4. **Tap The Brakes And Verify All Relevant Facts**

   Once again, experience shows that initial reports of egregious, unexpected workplace incidents are notoriously unreliable. Despite the good intentions of those involved, a first report of fisticuffs can quickly turn out to be nothing more than a heated verbal exchange. The same can be said of an employee's alleged insubordination or "threatening" conduct. An investigation, after everyone has taken a deep breath, frequently brings the allegations back to a new reality. It is therefore very important to avoid a hasty termination or other drastic actions based upon first reports.

   When faced with a report of horrific conduct that seems to cry out for a termination, it is important for HR or someone in authority to first tap the brakes, let the situation cool, and go back to talk with the first-hand witnesses to confirm what actually happened. You should ask witnesses to document what they heard or saw. It is not unusual to find that first-hand witness accounts are not as definitive as first reported, and that the alleged conduct was not as specific or outrageous as initially understood. If you rush into a termination before confirming the reports of witnesses and giving the alleged offender a chance to tell their side of the story, hard feelings and litigation are far more likely to ensue.

5. **Be Particularly Attentive To Medical Or Mental Illness Leave Requests Shortly After A Corrective Action**

   This scenario is all-too familiar: a marginal or poor-performing employee sees that their supervisor's warnings are accumulating and presents a doctor's note, without warning, seeking leave for a medical or mental condition. Often, the condition is allegedly caused by the supervisor's unreasonable insistence upon requiring the employee to regularly and reliably perform their duties.

   Even when a scenario like this appears to be completely contrived, you must avoid the temptation to jump to conclusions. Instead, you must examine the documentation and work your way through any processes that may be required pursuant to the Family and Medical Leave Act (FMLA) or the Americans with Disabilities Act (ADA).

   This can be particularly difficult in a healthcare setting, where supervisors and others have clinical training that makes the employee's purported condition seem even more implausible. Nevertheless, both the FMLA and ADA (which may both be applicable simultaneously) require employers to work through a process to ensure that employees receive all rights and protections to which they are entitled. If the employee's reason for leave is bogus, or the employee is a malingerer or attempting to take advantage of intermittent FMLA leave, you must follow your own policies and processes to address these abuses.

   In these cases, as well as requests for religious accommodation, the process itself is often as important as its ultimate result in terms of helping you reduce your legal exposure. So especially when a request for leave or accommodation appears to be suspect, you must patiently work through the applicable processes before making denial of leave or termination of employment decisions. Depending upon the circumstances, your options may include seeking clarification, addressing specific questions to the medical provider, or even seeking another opinion. The process can admittedly be painstaking. One thing is certain, however. Failing to follow these processes will almost certainly land you in expensive, stressful litigation.

Conclusion

Employment litigation is time-consuming and costly enough to justify taking preventive steps, especially when warning signs indicate that the risk of a lawsuit is high. To a trained eye, those flashing lights and warning whistles can thus become invaluable signals that will caution you to take a few extra steps and avoid an employment law trainwreck.

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