



Do Zero Tolerance Policies Make Zero Sense?

Insights

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When one hears about a workplace shooting, it's easy to demand a "Zero Tolerance" rule against workplace violence. It's understandable that after the staggering and even criminal revelations of the #METOO Movement that employers would want to nip harassment and discrimination in the bud before it rises to the level of unlawfulness. And in the safety setting, a single violation of Lock Out or Confined space entry procedures or removal of a guard could result in multiple deaths or grievous injuries. No violation is acceptable.

Keep in mind that "Zero Tolerance" is generally being used in practice as automatically discharging any violators - regardless of severity and mitigating factors, and with little or no investigation and due process. Zero Tolerance is often NOT used simply to mean that we will not tolerate bad behavior.

You'd be hard pressed to find many management side employment lawyers who favor broad use of Zero tolerance policies, and from what I can tell, the employee side lawyers have about as many concerns as do we. Why is that?

REASON 1 – Managers are paid to manage. A Zero Tolerance policy eliminates the need for supervisors, managers and HR to use judgment to weigh the seriousness of the offense, mitigating factors, the history of the employees involved, and the appropriateness of the selected responses. On the other hand, many surveys show that executives like the seeming automatic efficiency of such processes, but human interaction is even more unpredictable than a manufacturing process.

REASON 2 – Regardless of whether the state or federal law requires "Due Process," employees expect some level of due process and a chance to defend themselves. Denying this right harms morale and can generate problems ranging from law suits by the accused employees or even union drives. Incidentally, I often find that Zero Tolerance processes or even "Safety Absolutes" conflict with a collective bargaining agreement and may have never been discussed.

REASON 3 – Zero Tolerance usually means automatic Discharge. Most offenses involve shades of gray. A Zero Tolerance of waving a gun in the workplace or slugging a coworker is uncomplicated, but few other situations are so straightforward. Calling someone a c___ or a n___ probably is such egregious behavior as to warrant termination even with mitigating factors, but will that always be the case? What if Joe slapped Ruth on the rear and commented on her breasts, and Ruth responded by breaking his nose? Do we fire both Joe for harassment and Ruth for an act of violence?

REASON 4 – Difficult situations often result in occasions of waiving the Zero Tolerance process. Are you really going to fire 21 year employee, Mike, for violating the prohibition of downloading and removing confidential materials from work when he did so because the Company had only 36 hours to beat out an un expected competitor on a huge deal ... and employees literally worked around the clock?

Inevitably, an employer will have occasions where it enforced the rule against a female, over-40, black, Hispanic, or other employee in a protected category and waived it against a male, under-40 or white employee. It may look as if the employer treated employees differently because of a protected characteristic ... as well as looking “unfair” to others. The decision may have actually been correct and a proper balancing of the facts ... which mitigates against an automatic “Zero Tolerance” process.

REASON 6 – The categories of Zero Tolerance Offenses tend to expand. I read a good Harvard Business Review case study, *The Reign of Zero Tolerance* that described how an incident of a crazed spouse of an employee making a scene in the lobby led to a culture of mindless Zero Tolerance rules. After establishing a Zero Tolerance standard on Workplace Violence, the company implemented a Zero Tolerance rule on smoking because an employee taking an outside smoking break unintentionally facilitated the troubled person’s entry:

It came to seem wise to include anyone possessing alcohol or showing signs of intoxication on-site; misappropriating company property, regardless of value; incurring unauthorized expenses above \$100; or engaging in unauthorized e-mailing and Internet use. Additions came every few months or so, and each was announced in a global e-mail.

Reason 7 – Zero Tolerance policies may paradoxically make employees more reluctant to report issues when they know that a single violation will cost a coworker their job. Democratic EEOC Commissioner Chai Feldblum recently made this point by saying that “zero tolerance” policies can actually make it harder for employers to fight workplace harassment. According to Ms. Feldblum, a zero tolerance policy:

Will not only be correctly perceived as an unfair system, but it might also chill reporting. A lot of people don’t want their co-worker to be fired, they just want the conduct to stop.

Reason 8 – Automatic Zero Tolerance discipline may violate an employer’s pledge to demonstrate real corporate values. What does it say if an employer holds employees to strict adherence to rules on gifts to overseas customers or SEC rules and then publically fires someone simply to look good who looks as if he or she should not have been fired. Ironically, in addition.

Arguments for a Zero Tolerance Process.

As a start, no company should tolerate unlawful harassment, dishonesty, workplace violence, bullying or discrimination. However, having a Zero or “No” Tolerance for such behavior does not have to mean that any prescribed act automatically triggers dismissal – that’s the problem

have to mean that any prescribed act automatically triggers dismissal – that's the problem.

Nevertheless, let's discuss some of the reasons for a Zero Tolerance process.

Stop unlawful conduct well by nipping it in the bud in its early stages.

Fear and respect are as important to rule enforcement and maintain a workplace as rewards and positive motivation.

Some commentators have likened Zero Tolerance processes to NYC's successful "Broken Windows" strategy to reduce crime. The theory is that if we maintained an urban environment in a well-ordered manner ... and every "broken window" repaired (*i.e.*, every act of public disorder addressed), this might stop an escalation into more serious crime – "if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken." Set the tone.

To apply the policy to preventing harassment, the theory is that if employers aggressively discouraged every stray or trivial unwanted comment or act that did not yet rise to a legally-actionable level, more serious conduct would not occur.

Does Safety Present a Unique Situation?

There has been less criticism of safety-related Zero Tolerance rules, especially involving lock out and guarding, which are extraordinarily difficult to ensure are consistently followed. It takes only one failure to kill or maim someone.

Often the list of automatic discharge rules is short. Of course, a short list begs the question of whether some safety rules are less important than others. Intellectually the answer is no; however, if you are wrestling with hundreds of lines in numerous plants in different areas with varying levels of quality work forces, lock out and guarding may in fact be the most dangerous or costly risk. Likewise, violating certain electrical or confined space entry rules may pose a serious risk of death.

One common approach is to single out certain safety rules as "Safety Absolutes." From the article, [Are Safety Absolutes, Absolute?](#)

Why use Safety Absolutes?

Companies use Safety Absolutes for several reasons. They may work in a highly hazardous environment and specifically point out which risky behaviors can get you killed. Some companies have a difficult time getting their employees to comply with certain rules, so they enlist Safety Absolutes as a "line-in-the-sand". Some organizations use Safety Absolutes as new safety programs to raise awareness by calling them "Rules to live by".

Although safety absolutes are often created for good reason, they pose a problem for a number of reasons. Most importantly, if companies single out a group of rules that are elevated to Safety Absolutes, then this diminishes the importance of the rest of the safety rules. Secondly, if companies take a "black or white" approach to rule violation, this will severely limit their ability to become a learning organization because employees will hide the truth.

Nevertheless, some of the same concerns apply as for non-safety rules.

Howard

Articles on Safety and Zero Tolerance:

"Zero-tolerance" rules are anything but absolute

Are safety Absolutes, Absolute? (Good discussion with examples.)