

First Wednesday — A Monthly Discussion of Employment Law Issues and Other Hot Topics for Management



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Human Resources 101 — Top Ten Things NOT To Do

Having devoted my practice to representing companies and executives in employment law disputes, I have noticed some recurring mistakes that even the best employers make. Since many of these *First Wednesday* bulletins have served as checklists on how to proceed the right way (for example, in terminating an employee, compelling arbitration, or handling a wage & hour claim), this bulletin shifts course. Here, in no particular order, are my top ten “**Don’ts**” for employers:

1. *Terminate a Problem Employee by “Eliminating His Position” While Simultaneously Interviewing His Replacement.* Employers often want to avoid the difficult talk with a problem employee and not confront performance problems as the reason for termination. There is nothing wrong with doing a single-person layoff or job elimination, if that is what is really happening. However, when the ex-employee learns he has been quickly replaced by a much younger employee, the stated reason for termination will appear false, or pretextual. It may then lead to an investigation by the ex-employee’s attorney into the “real reasons” for termination, which could be claimed to relate to an age, gender or religious preference, or some other reason that could be claimed to be “pretextual” or illegal. It is much better to be straightforward in the company’s two-on-one termination meeting and mention the performance issues or, if

there are no such issues worth mentioning, consider using the “at-will” doctrine and explaining that the employment was not a good fit. (See *First Wednesday*, February 7, 2007.)

2. Avoid Overtime Claims by Putting Everyone on a Salary and Calling Them Managers. This strategy will likely fail. Employers, not employees, bear the burden of proving that an employee claiming overtime is exempt from California and federal overtime laws. In general, to be considered exempt, an employee must earn twice the minimum wage, calculated and paid as a salary (“salary test”), and must perform high-level duties that require the employee’s use of independent judgment and discretion (“duties test”). The Labor Commissioner’s office (DLSE) will look beyond fancy titles and determine whether the employee is spending a significant part of his day actually performing “exempt” duties, such as supervision of other employees, making key decisions for management or other high-level activities, and not simply doing the employer’s task work.

3. Suspend or Terminate an Employee Shortly After He Makes a Dubious Claim of Sexual Harassment. Investigate, don’t retaliate. Virtually every reported claim of sexual harassment must be investigated by the employer or an investigator hired by the employer. This is not only required by California law, but is typically covered in the employer’s own handbook policy covering sexual harassment. The policy usually says: “We do not tolerate sexual harassment and ask that you report any incidents of sexual harassment to us at once,” or similar words. A suspension or termination of the employee who brings such a complaint forward, even if viewed as a doubtful or unsubstantiated complaint, absolutely cannot be retaliated against. “Retaliation” can include subtle “smear campaigns” as well as bolder actions like termination. A non-retaliation guarantee is also covered within the typical sexual harassment reporting policy in your employee handbook.

4. Give “Excellent” Performance Reviews to Marginal Workers. The marginal worker who builds a record of “excellent” performance reviews is a threat in “wrongful termination” litigation and also presents some practical problems in company decision-making. The company loses some flexibility. For example, if the “excellent”

employee has built a 10-year record of strong reviews, then why is he suddenly being fired or demoted for non-performance? In a more subtle example, why is the “excellent” employee chosen for layoff instead of the employee who merely “exceeds expectations”? Performance reviews should not only be used as a Human Resource tool for improving communications and managing performance expectations, but also as a constant reality check so the employee is not surprised when terminated for poor performance.

5. Conduct Sensitive Personnel Discussions by E-mail. As everyone knows, e-mail is discoverable in litigation and often serves as the most damaging evidence used against the employer. E-mail discussions are often quick, frank, open and unfiltered. E-mail is never truly deleted and can be recovered by data recovery specialists hired by your adversary in litigation. If a sensitive, internal personnel discussion needs to occur, it is much better to conduct that discussion in person, without extensive note-taking, or by using an erasable white board.

6. Challenge Terminated Workers on Their Claims for Unemployment Benefits. While it is often tempting to challenge an ex-employee’s claim for unemployment benefits, particularly someone terminated for poor performance; this is rarely successful and can cause more headaches for the employer. The decision whether to grant unemployment benefits is up to the Government, and while the employer has some say in the matter, it is usually not enough for the employer to say that the employee was a poor performer, had a bad attitude, or even that the employee was terminated “for cause.” Typically, the employer must show that misconduct occurred; a higher standard than a “for cause” standard justifying your termination. Misconduct includes theft or damage to company property, drinking on the job, fighting with co-employees, or other serious violations. But it is not usually “misconduct” for an employee to be inefficient, fail to meet performance standards or make judgment errors. Also, if you try to block the unemployment claim, it could inflame the employee who, instead of going away quietly, may then focus his sights on filing a wrongful termination suit or other claim against the company.

7. Allow Flexible Time Schedules since Many Employees would rather Work four 10-hour days per week and Skip Lunch Breaks. With a few exceptions, this would subject the employer to overtime claims and penalties. Non-exempt employees who work over eight hours per day or 40 hours per week are entitled to overtime pay at 1.5 times their rate of pay, and twice their regular rate for over eight hours worked on the seventh consecutive workday in a workweek. The exceptions include signed requests for make-up time within the same week, and alternative workweek schedules, which have hurdles including an employee meeting, secret ballot vote, agreement, and a filing with the Labor Commissioner. Lunch breaks must be provided if the employee works five or more hours, and cannot be waived by agreement. Based on recent case law, the penalties for failing to comply with break law can reach back three years and result in a daily “penalty” of one or two hours per day that a meal or rest break was missed.

8. Hold an Employee’s Final Paycheck until She Returns the Company Keys and Cell Phone. Yes, it is the company’s property and the company is entitled to get it back. However, the employee’s final paycheck cannot be used as a hostage. Failure to meet a final paycheck deadline subjects the employer to waiting time penalties. This penalty is a continuation of the employee’s wages until the final paycheck is tendered, up to a maximum of 30 days. Final paycheck deadlines depend on whether the employee was terminated, quit without notice, or quit with at least 72 hours notice. A terminated employee is entitled to all final wages, including unused vacation, at the time of termination. An employee who quits with fewer than 72 hours notice must receive a final paycheck within 72 hours after giving notice. An employee who quits with more than 72 hours notice is entitled to a final paycheck on the last day of work.

9. Avoid Employment Laws Altogether by Making Everyone an Independent Contractor. This is a potentially disastrous strategy. Many companies believe that a worker is considered an independent contractor if the parties agree and sign an “independent contractor” agreement to that effect. However, independent contractor status is determined independently of any so-called contract; primarily by the degree of control the employer can exercise over the person’s work. There are

additional factors depending on which Government agency is conducting the audit or making the decision, but simply treating everyone as an independent contractor has tax and workers' compensation implications, and potential wage and benefit liabilities with several state and federal agencies.

10. Don't Give Sexual Harassment Prevention Training to Your Supervisors. The mandatory sexual harassment training law was passed in California in 2005, known as AB 1825 (California Government Code section 12950.1). Training is required of all "supervisors," which is broadly defined, and must occur every two years by a qualified trainer, or within six months of a person becoming a supervisor. The training is required for companies with 50 or more employees, including part-timers and contract employees. The Fair Employment and Housing Commission is monitoring the training, and a failure to conduct the basic training can also lead to disastrous results in litigated cases.

In conclusion, most employers want to do the right thing and, by instinct, end up doing the right thing. California labor law is very detailed and often rigid, frequently favoring the employee. Hopefully this list can be used as a starting point for auditing some of the practices that might lead to problems down the road.

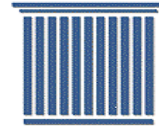
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