

Top 10 Mistakes Employers Make

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Taft/

1

Mistake Number One: Failing to Train Managers

- Untrained managers/supervisors are more likely to violate basic employment laws “unintentionally.”
- Ignorance is NOT a defense.
- Training provides employers with a defense to employment claims and reduces risk of punitive damages.
- Training should be done on a regular basis.
- Attendance to training should be mandatory.

Taft/

2

- Primary topics on which employers should train managers/supervisors:
 - Prevention of harassment and discrimination
 - How to manage medical leaves (FMLA, ADA, worker's compensation, state family/sick leaves)
 - Best practices for hiring, disciplining, and terminating employees
 - Complying with wage and hour laws
 - Managing union issues and NLRA compliance

Taft/

3

Mistake Number Two: Failing to Follow Policies

- Many employers make significant employment decisions without first reading their own policies, handbooks, employee agreements, or CBAs.
- Making employment decisions contrary to stated policies, handbooks, agreements, or CBAs can give rise to discrimination and retaliation claims, and ***can provide evidence of pretext.***

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4

- Discipline or termination decisions contrary to stated policies should be done with caution.
- If stated policies are inconsistent with current practice or procedures, **revise policies!**
- Managers and supervisors must be the experts in your policies. This requires training.

Mistake Number Three: Failing to Fully Investigate

- Jurors expect employers to conduct investigations before disciplining or terminating an employee.
- Investigations should be comprehensive and impartial.
- Investigations should provide employees with an opportunity to defend themselves (i.e., due process!).
- Comprehensive and impartial investigations also promote fairness in the workplace among employees.

- Characteristics of an effective investigation:
 - Prompt: Investigation should begin immediately upon learning of complaint/issue
 - Neutral: Remain neutral throughout investigation. Do not pre-judge results
 - Thorough: Interview all potential witnesses, review all documents and evidence, review all relevant policies, and document results
- Promptness is key!

Taft/

7

Mistake Number Four: Violating the ADA

- Failing to comply with the ADA is the leading cause of employment claims today.
- The ADA requires employers to engage in the “interactive process” and provide “reasonable accommodations.”
- Employers should never make significant employment decisions involving the ADA without first obtaining medical information.
- ADA employment decisions must be made based upon knowledge, not belief, fear, or stereotypes.

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8

- The following four-step interactive process is recommended:
 1. Analyze job and determine its essential functions (job descriptions are important);
 2. Consult with employee to determine job-related limitations imposed by disability;
 3. Identify potential accommodations; and
 4. Implement accommodation that is most appropriate for both the employee and employer.

- Examples of reasonable accommodations:
 - Job restructuring (but not essential functions)
 - Part-time or modified work schedules
 - Leave of absence (most common accommodation)
 - Modifying leave policies
 - Telecommuting
 - Reassignment (last resort)
- Accommodation ultimately chosen does not have to be employee's first choice. Rather, accommodation must be reasonable.

Mistake Number Five: Violating the FMLA

- FMLA violations typically involve the following:
 - Terminating employees based on an absence covered by the FMLA
 - Failing to notify employees that their leave is covered by the FMLA
 - Failing to accurately calculate the 12-month period
 - Improperly questioning reasons for FMLA leave
 - Improperly communicating with an employee's medical provider

- Ways to limit FMLA abuse:
 - Require medical certifications for all FMLA leave requests
 - Require medical certifications be returned within 15 days
 - Require 30 days' notice for foreseeable FMLA leaves
 - Demand "foreseeable" medical treatments be scheduled around work hours
 - Hire an investigator in extreme cases

Mistake Number Six: Violating the NLRA

- Union AND non-union employees are covered by the NLRA.
- Employees have the right to engage in “concerted activities” (i.e., right to discuss and complain about terms and conditions of employment).
- Beware of restricting employees’ use of social media.
- Beware of enforcing employment policies that restrict employees’ concerted activities (e.g., confidentiality, non-disparagement, email, and distribution policies).

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13

Mistake Number Seven: Failing to Terminate Properly

- Always conduct a thorough investigation first.
- Be compassionate when terminating an employee.
- Always provide a reason for termination.
- Have two or more management employees present.
- Call HR or outside counsel before a high-risk termination.

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14

- Consider preparing a “script for termination meeting.”
- Consider confidentiality/trade secret issues.
- Consider workplace violence issues.
- Consider severance agreements for high-risk terminations or “no-fault” terminations.
- RIFs require special considerations and severance agreements.

Mistake Number Eight: FLSA Violations

- Misclassifying employees as exempt.
- Major exemptions are:
 - Executive
 - Administrative
 - Professional
 - Outside sales
 - computer

- Misclassifying employees as independent contractors.
- Improper deductions from exempt employees' salary.
- Not paying exempt employees a guaranteed salary.
- Poorly drafted job descriptions.
- Internal wage and hour audits are important!

Mistake Number Nine: Emails

- Emails are the greatest source of potential liability.
- In lawsuits, all electronic communications (even deleted ones) are required to be produced!
- Develop good email habits.
- Do NOT use email (or texting) if you are communicating something you do not want others to ever see.
- Train managers/supervisors on good email habits.

Mistake Number Ten: Unlawful Background Checks

- Many states/cities have enacted “ban-the-box” legislation.
- Employers must comply with the FCRA.
- Many states/cities have restricted employers from running credit checks.

Questions?