

Notes from **Legal Issues for Managers** (Essential Skills for Avoiding Your Day in Court) by Deblieux, Mike for AMI How to series (1997) ISBN 1-884926-49-5 12/06

<u>Cost of Lawsuits:</u>	time, lost productivity, attorneys' fees, court costs; Personal, emotional and physical health costs
<u>Supervisors/Managers</u>	walk the talk—clear, fair consistent example of fairness; show that you (the organization) cares
<u>Grievance/complaint Procedures</u>	your role as supervisor—ultimately responsible Personnel advisor—interpretations
<u>CRA (1964) (1972) (1972) (1978) (1991)</u>	Private sector and labor unions; State & local governments Equal Employment Opportunity Act expanded EEOC authority –allows it to file suit in fed. Courts against ers Pregnancy Discrimination Act (pregnancy, childbirth or related medical conditions.) Allows jury trials; punitive and compensatory damages
<u>Liability</u>	Supervisors can be sued and be held personally liable for discrimination <ul style="list-style-type: none"> - disparate treatment - disparate impact - retaliation
<u>Harassment and Sexual harassment</u>	verbal, physical and visual intentional or unintentional disturb, torment or pester persistently unwelcomed and unreasonable avoid epithets and/or slurs (label or stereotype people) avoid laughing at offensive or vulgar jokes take sexual harassment claims seriously conduct prompt and thorough investigation <ul style="list-style-type: none"> -totality of the circumstances -reasonableness -hostility implement timely and effective corrective action to eliminate harassment
<u>Types of sexual harassment</u>	quid pro quo---strictly liable (no excuse) Environmental (unreasonable interference with work --intimidating, hostile, or offensive)

Prevention

written policy—take it seriously and enforce it carefully
train employees and supervisors to identify and avoid
inappropriate behaviors (provide examples)
avoid saying or doing anything open to misinterpretation
be sympathetic and open to complaints and concerns
support open investigations
take appropriate disciplinary action

Avoidance

Training

inappropriate verbal contact (words or sounds)
personal excuses
Inappropriate touching

Positive Power

Expected behaviors
Unexpected behaviors
Training on harassment, sexual harassment, cultural and sexual
diversity, interpersonal communication; how to use the grievance
procedure and other related topics. Also test at conclusion and
low scores refer for additional training.

Help for
Supervisors to

Avoid legal problems

- Set personal example with the language you use
- Avoid unnecessary touching
- Take immediate steps to remove pictures, posters, cartoons, drawings and other visual cues that may degrade or offend others
- Do not date people with whom you work—no suggestive remarks relative to dating
- Set high standards of behavior (words and actions)
- Take complaints seriously

Recruiting and Hiring

- Before beginning process of filling a vacant position, write out the job duties you will want the new employee to perform.
- Work with HR to define qualifications needed to do the job successfully
- Plan your interviews—job-related questions only
- Work with HR conduct job-related reference check
- Give frequent, honest and objective feedback

Follow up (Are job openings available in audio format as well as print?) ADA (voice recorded and TDD)

Dates attended school (ADEA—67)

Driver's license no---valid form of ID yes

ADA (90) This job involves.....can you, with or without accommodation, perform these duties.....

CR (64) do not need to know religious beliefs or affiliation

Performance, discipline and at-will employment

- Review policy and practices on layoffs and RIFs
- Address performance and rule-violation problems each time they occur
- Write and present performance reviews before they are due
- Plan to keep promises and follow through as needed

When an employee is performing poorly; be able to show that:

- EE knew what was expected
- You notified EE of your concern in timely manner
- You explained what EE needed to do to correct problem
- You explained to EE that failure to correct problem would result in disciplinary action up to and including termination

Progressive Discipline

- Training
- Counseling
- Oral Warning (Facts, Objectives, Solutions, Actions)
- Written Warning ditto
- Last-Step Option
- Termination

Compensation

- Follow organizational guidelines in pay decisions
- Require nonexempt employees to record their work time
- Set an example for NE EE (don't take advantage of your exempt status)

(Compensatory Time—This may be granted by **public-sector** employers only if it is given at the rate of time and one-half the number of hours of work. Public-sector employees may accrue up to 240 hours of comp time.

Private Sector—comp time is not permitted for nonexempt employees—must pay for all hours worked.

Penalties—Failure to comply with FLSA—liable for up to 2 times back pay owed employee. FLSA also carries criminal penalties and requires ER who loses a claim to pay ee attorney fees (This applies to entire payroll—not just individual complainant.)

ADA (1990)

- Applies to hiring, firing, benefits etc.....
- Disability—substantially limits one or more major life activities (current)
- Record of an impairment that substantially limits
- Regarded as having an impairment (perceived disability)
 - carefully define job (essential functions)
 - do not give significant weight to nonessential functions

Supervisors can: Ask for a presentation on ADA for department; review job descriptions for job relatedness from the perspective of ADA (**Remove language that requires employees to be totally free of a disability when a reasonable accommodation could be made.**); ask HR to explain policy for helping or working with employees who become disabled.

Affirmative Action Executive Order 11246 (1965)

(government contractors with 50 or more employees or contracts or subcontracts for more than \$50,000 in federal government business)

Includes and not limited to state and local governments.

Requires that ER **take positive steps** to invite minorities and women to participate as full members of the workplace:

- Study availability of minorities and women in the community
- Compare workforce at all levels of organization to the availability of qualified minorities and women in the community
- Work to balance makeup of workforce with availability of qualified minorities and women in the community
- Ensure employment openings are well-publicized in the community in a way that makes them available to potential minority and female candidates
- Ensure employment policies and practices do not create discriminatory practices.

OFCCP , DOL, responsible for audits and compliance

Goal: Have employers reach out to the community to seek and include women and minorities in the workplace.
(increases diversity of labor pool)

Penalties—Stop funds, pull agreements, future list elimination; refer to Justice Department to file federal lawsuit against ER

FMLA (1993)

- BIRTH, ADOPTION OR FOSTER CARE PLACEMENT
- EE'S OWN SERIOUS ILLNESS
- SERIOUS ILLNESS OF PARENT, CHILD OR SPOUSE

(Up to 12 weeks in 12 months after 1250 hours of work in the 12 months before the leave.)

-Rights--- to be notified---to same or similar position

COBRA allows continuation of group health insurance after employment ends up to 18 months
-must elect within 60 days
-beneficiary eligible up to 36 months
Notify HR; Notify EE of rights

Drug-Free Workplace (1988)

-drug testing—privacy issues—usually controlled by state law—pre-employment testing acceptable in most states; random testing—ok in fewer states—reasonable suspicion acceptable in some states.
-certify drug-free workplace
-plan to ensure drug-free workplace
(must include elements such as education, establishing compliance with program as condition of employment and taking appropriate disciplinary action against employees who violate the policy.)

Supervisors—check with HR and/or Attorney before requiring a drug test—objective job-related reason.

IRCA (Immigration Reform and Control ACT (1986)

-proof of eligibility to work in US
-penalties for hiring, referring, recruiting or retaining those not authorized to work in US I-9

NLRA (1935)

- Supervisors never handle or inquire about union card
- Don't try to talk employees out of union
- Notify HR of rumors
- Do not threaten or intimidate, make promises or spy

WORKPLACE VIOLENCE

OSHA -holds ers responsible for providing safe workplace even when there are no regulations for ers to follow WV falls here.
Supervisors -special care to survey workplace to ensure reasonable efforts taken to minimize risk of violence (e.g. doors and entrances properly

secured, name tags, visitor logs and other access-control steps; reference and background checks on new employees).

-Train supervisors and employees to recognize employee, customer and visitor behaviors that may signal potential violence

-Refer to EAP troubled employees for professional assistance

-All must understand that threats and intimidation will be viewed as a serious matter and meet with serious disciplinary action up to and including termination.

Polygraph Protection Act (1988)

- Supervisors may not discipline, discharge, or discriminate against an employee or job applicant who refuses to take a lie-detector test.

State and Local Laws (such as smoking bans) need to be considered also.

Post notices required by most federal laws—explaining that employer is covered by the law. Criminal penalties in some cases. (visible and up to date in all work locations.)