

TOP TEN HR MISTAKES MADE BY SUPERVISORS

And How to Avoid

**Part of the
“Managing Employees With Success” Series**

May 2011

Presented By Michael S. Lavenant, Esq.

Alfred J. Landegger, Esq.

Marie D. Davis, Esq.

**LANDEGGER | BARON
LAVENANT | INGBER**

A LAW CORPORATION

Managing Employees With Success

- **Top Ten Topics to be covered:**
 - **1. Socializing Supervisors**
 - **2. Disclosing Employee Privacy**
 - **3. Broadcasting Employee Discipline/Termination**
 - **4. Failing To Compensate All Hours Worked**
 - **5. Profane Language**
 - **6. Playing Favorites**
 - **7. Denying Reasonable Accommodation/RTW**
 - **8. Skipping New Hire/Orientation Processes**
 - **9. Disciplining Employees for Protected Leaves**
 - **10. Failing to Discipline/Counsel Immediately**

Managing Employees With Success

- **Socializing Supervisors**
 - **Most supervisors want to develop a good rapport with their subordinates.**
 - **However, friendships are best left outside of the office. Caution - supervisor interaction with subordinates outside of work can also create claims of harassment.**
 - **Supervisors must maintain level of professionalism to avoid issues:**

Managing Employees With Success

- **Socializing Supervisors**

- **Issues:**

- **Lack of respect**

- **Decreased production**

- **Employees who are "friendly" with supervisor may be more prone to skate by and not dedicate their full resources to their productivity, attitude and attendance.**

- **Favoritism**

- **Creates Liability**

- **Paramour**

- **Discrimination - gender, age, national origin as supervisor may tend to socialize with employees with similar demographics**

Managing Employees With Success

- **Socializing Supervisor**

- **Remedy**: The employer should train supervisors to remain objective and honest with all subordinates.
- Supervisors should be challenged when recommending a change in the conditions of employee (benefits, compensation, hours or work, titles, promotions, duties).
- Without objective criteria, the supervisor's decision should be overruled.
- If supervisor makes change without prior authorization - supervisor should be disciplined and only when appropriate, should benefits or compensation be reversed or pulled back.

Managing Employees With Success

- **Disclosing Employee Privacy**
 - **California provides excessive protection to employees when it comes to their personnel and medical information.**
 - **Confidentiality of Medical Information Act, federal HIPAA, and both the California and US Constitutions limit the information that can be provided to co-workers, third parties, and even public entities.**

Managing Employees With Success

- **Disclosing Employee Privacy**
- **Even a well intentioned comment concerning an employee can lead to liability.**
- **For example, in an effort to generate support (financial or emotional) or compassion, a supervisor will advise her staff that an employee's tumor was caught early and with chemotherapy, the employee will be back to work in 6 months.**
- **In California, the unauthorized disclosure of private medical information is a mandatory statutory penalty of \$3,000. There is no need to show actual harm.**

Managing Employees With Success

- **Disclosing Employee Privacy**
 - **Remedy**: Without the employee's prior written consent, only supervisors who "need to know" should be involved in a discussion about an employee's health condition.
 - HIPAA requires that employees with access to confidential medical information must be provided training on how to maintain and protect the information.

Managing Employees With Success

- **Broadcasting Employee Discipline**
 - **Supervisors sometimes will delay in issuing discipline or corrective action.**
 - **Supervisors will also discuss what actions will be taken regarding an employee with subordinates.**
 - **Either scenario can create liability.**

Managing Employees With Success

- **Broadcasting Employee Discipline**
 - **When an employee is made aware of pending discipline, the employee may seek to "strike first" by filing:**
 - **Discrimination/Harassment claim**
 - **Workers Compensation**
 - **Stress or other medical leave of absence (whether or not work-related).**

Managing Employees With Success

- **Broadcasting Employee Discipline**
 - **All types of claims are easy to allege and difficult or costly to defend.**
 - **Employees may obtain "whistleblower" protection.**
 - **Any negative employment action after the allegation may be perceived as retaliation and lost its impact.**

Managing Employees With Success

- **Broadcasting Employee Discipline**
- **Remedy:** Supervisors must be trained to work confidentiality with HR when contemplating discipline.
- Only involve necessary decision makers.
- If other employees are involved because of the investigation, work promptly to reach a conclusion before the employee takes the offensive approach.
- Counsel supervisors who announce discipline before it is issued or who disclose private personnel matters to those who do not need to know.

Managing Employees With Success

- **Failing To Compensate For All Hours**
- **Supervisors are pressured - either directly or self-imposed to keep labor costs down.**
- **Supervisors are also trying to protect the company from employee abuse.**
- **Other times, supervisors believe that providing COMP time is a benefit to employee. While employees usually agree, this practice is illegal.**

Managing Employees With Success

- **Failing To Compensate For All Hours**
- **Labor Code requires that NONEXEMPT employees receive straight or overtime pay for all hours worked as required by state or federal law.**
- **NO EXCEPTION.**
- **EMPLOYEE CANNOT waive right to receive overtime.**
- **Comp Time - practice or rewarding time off later in the week, month or year in lieu of paying overtime.**

Managing Employees With Success

- **Failing To Compensate For All Hours**
- **Remedy: Supervisors should discourage off the clock work.**
- **However, if employee works unauthorized overtime or straight time, employee must be compensated and only remedy is DISCIPLINE.**
- **If employee's unauthorized time creates a lunch/meal period penalty, the employer may want to self-impose a penalty.**
- **Policies should be created and distributed to employees to remind them that no off the clock work is allowed and that they should obtain authorization to work overtime.**

Managing Employees With Success

- **Profane Language**
- **Abusive and obscene language was previously frowned upon but did not create liability unless directed towards a protected individual with the purpose of offending that individual**
- **Now in light of recent court decisions, such language can create hostile work environment regardless of whether the language is directed at a particular individual or not.**
- **Said language also has and continues to have an impact on workers' compensation - stress claims.**
- **Also speakers intent is no longer relevant - is the perception of the recipient.**
- **Politically incorrect statements are prima facie evidence of discrimination or harassment.**
- **See the attached "Watch Your Language" publication distributed by the Department of Fair Employment & Housing.**

Managing Employees With Success

- **Profane Language**
- **Remedy:**
- **Supervisors should be provided harassment prevention training on a regular basis. This is recommended even if the company is not legally required (50+ employees).**
- **Diversity/Sensitivity or Anger Management consulting should be provided as needed.**
- **Do not condone any obscene language in the work place - especially sex-based titles and language (see recent fines against NBA personnel for utilizing homophobic slurs made in anger.)**
- **The jury is inclined to issue NBA-type fines or greater in harassment claims.**

Managing Employees With Success

Playing Favorites

- **Similar to the issue of socializing with subordinates, but this is primarily focused on work-related activities.**
- **Assignment of key roles or "comfy" assignments can be viewed negatively by co-workers.**
- **Has tendency to create claims of harassment or discrimination if it results in tangible differences in pay, benefits and even STATUS.**
- **Also, if friendship status ends, employee who once had the favored relationship may now claim harassment or worse - RETALIATION.**

Managing Employees With Success

REMEDY:

Similar to Socializing Supervisor discussed above. The supervisor must be trained to treat everyone objectively alike.

If the supervisor is not objective, he or she should be counseled.

Managing Employees With Success

Denying Reasonable Accommodation

Background: An employer may not require any medical or psychological examination or make any inquiry of an employee, or inquire whether an employee has a mental or physical disability or medical condition or inquire into the severity of the disability or condition.

Managing Employees With Success

(cont.)

However, an employer may require any medical or psychological examination or make inquiries that it can show are job-related and consistent with business necessity. An employer may conduct voluntary medical examinations, including medical histories, which are part of an employee health program available to the employee at the work site.

Managing Employees With Success

(cont.)

MENTAL/PHYSICAL DISABILITY (POST- OFFER/ PRE-EMPLOYMENT) -- medical/psychological examination/inquiry may be made as long as the examination/inquiry is job-related and consistent with business necessity and all applicants for the same job classification are subject to the same examination/inquiry vs. any inquiry into the applicant's general health, medical condition, or physical/mental disability, if not job-related and consistent with business necessity.

Managing Employees With Success

- **Denying Reasonable Accommodation**
 - In most employee leaves, the employer does not conduct a complete thorough review of their obligations:
 - **FMLA, CFRA**
 - **PDL**
 - **ADA**
 - **Workers Compensation**
 - **NO BRIGHTLINE RULE ALLOWED**

Managing Employees With Success

- **Reasonable Accommodation is not a one-way street or a decision made unilaterally or in a vacuum.**
- **Employee is obligated to engage in the interactive process:**
- **This entails communicating with the employee (do not make the communication difficult). Some employers have complicated archaic "Reasonable Accommodation" Request Forms.**
- **Process should be a discussion in person or on the phone - live - and involve HR and even the supervising manager.**
- **Review restrictions, job description, duration of restriction, importance of duties, financial condition or staffing levels of company.**
- **If the employee suggests an accommodation, consider it unless the employer has an accommodation that is equal to or better than the employee's request.**
- **Employee does not get ultimate decision - up to employer.**
- **Accommodation could be return to work even though the EMPLOYEE wants to continue leave or vice versa.**
- **Document dialogue in writing and even consider sending summary to employee so there is no misunderstanding.**

Managing Employees With Success

- 1. Do not always consider leave when a return to work is possible with modifications.**
- 2. Employer CANNOT be paternalistic - i.e., worried about the health of the employee. If a health care provider specifies that the employee can return to work, supervisor cannot deem the work to be detrimental to the employee's health or recovery or that there is a potential for a workers' compensation claim.**

Managing Employees With Success

- **New Hire/Orientation**
 - All too often when employers are busy, the company just wants to get boots on the ground.
 - The failure to provide a thorough orientation can be detrimental to the success of the employment relationship and sometimes can create outright liability.
- **Potential Claims:**
 - State law requires that employees receive a pamphlet outlining the protections against sexual harassment. Other state forms are required. If the forms are not provided, it can be detrimental to a defense of sexual harassment. Employees always claim that they did not know that they could complain.
 - OSHA fines can be increased if employees are not provided required safety training.
 - Federal law requires that employees complete I-9s. The last workshop on I-9s demonstrated the potential penalties that could be imposed if these new hire documents are not completed or properly completed.

Managing Employees With Success

- **Remedy:**
- **Create new hire packets/checklist that must be completed before an employee can start active work.**
- **Supervisors must be held accountable if the new hire paperwork/orientation is not timely or thoroughly completed.**
- **Have redundant systems in place to double check that all forms, policies, pamphlets, handbooks, training, and orientation is provided.**

Managing Employees With Success

- **Disciplining Employees For Protected Leaves**
 - **The attached Guidelines To Managing Leaves Chart is helpful in identifying when absences may be protected.**
 - **This is the area with the most potential for liability.**
 - **Supervisors are not properly trained on the myriad of potential leaves.**
 - **Any absence is met with an attitude, invasive questioning, berating or discussing in front of others.**
 - **Supervisors who engage in this behavior may be creating liability for the company.**

Managing Employees With Success

- **Remedy:**
 - **Supervisors should be provided with a copy of the guidelines and identify which leaves apply to their subordinates, or potential could apply.**
 - **Supervisors should also be trained that before they comment, counsel, discipline or negatively evaluate an employee for taking a day off of work, they should consult with HR.**

Managing Employees With Success

Failing To Counsel/Discipline Immediately

- Supervisors will sometimes forget to document a situation that could be a "counselable" event. As time goes by before the matter is addressed, the incident becomes "stale." Subsequent discipline for stale items has the potential of creating retaliation or harassment claims.**
- Supervisors should discipline promptly.**
- Following the rules below should minimize your Company's exposure to any kind of allegations of unfair treatment, discrimination or wrongful demotion or termination:**

Managing Employees With Success

- **1. FAIRNESS.**
- **Ask yourself the following question: Is it fair to discipline this employee based upon the quality and quantity of the evidence before you?**

Managing Employees With Success

- **2. CONSISTENCY.**
- **In the past has your company imposed the same discipline in similar situations?**

Managing Employees With Success

- **3. UNIFORMITY.**
- **Each Company should have an employee handbook, written policies or job descriptions so that employees know what is to be expected of them. Each company must promote the understanding of such policies to each employee.**
- **Examples: Excessive absenteeism.**
- **Insubordination.**

Managing Employees With Success

- **4. BRUTAL HONESTY.**
- **During discipline it is essential that you are candid and direct with the employee regarding performance and performance appraisals. Never tell any employee they are being laid off when performance is the real issue.**

Managing Employees With Success

- **5. BE OBJECTIVE.**

- **To demonstrate validity and legality of actions.**

Managing Employees With Success

- **6. VALIDATION.**
- **Be in a position to demonstrate all of the above. Imagine yourself in the witness chair. This is what you want to portray to the judge or the jury.**

Managing Employees With Success

- **HERE ARE SOME TOOLS THAT YOU SHOULD ADOPT IN DISCIPLINE:**
- **Investigation – Be thorough.**
- **Protect the integrity – Consider having two people present.**
- **Flexibility in progressive discipline system - Do not rely on “at will” LC 2922.**
- **Careful Balance - Patience vs. too much patience.**

Managing Employees With Success

- **HERE ARE SOME TOOLS THAT YOU SHOULD ADOPT IN DISCIPLINE:**
- **Document, document, document - The final warning notice should not be the first written notice.**
- **Good documentation - If it's worth talking about, it's worth putting in writing. When, where, who, what happened in the first person. Tell employee what employee must do to improve performance and what is wrong with current performance. Tell employee how long you will allow to improve (don't put on probation for 30, 60, 90 days). Tell employee what to expect if unable to or unwilling to improve performance appraisal vs. progressive discipline.**

Managing Employees With Success

- **What Type of Discipline is Available?**
 - **Disciplinary action may include, but is not limited to, the following:**
 - **Coach/Counseling**
 - **Verbal warning**
 - **Written warning**
 - **Unpaid leave/suspension**
 - **Probationary period**
 - **Reassignment/demotion**
 - **Reduction in pay/benefits**
 - **Transfer**
 - **Termination**

Managing Employees With Success

- **When Should The Discipline Be Issued?**
 - **An employee should be disciplined when:**
 - They have engaged in a violation of established work rules or performance standards;
 - They have engaged in a series of events that create an unproductive environment, even if one of the actions standing alone is not violative of work rules or performance standards;
 - They have engaged in conduct that did or could have caused harm to themselves or others;
 - Promotion of the Company's mission or goals may be furthered by admonishing misbehavior; or
 - Failure to discipline an employee may result in liability to the company or third party.

Managing Employees With Success

- **When Should The Discipline Be Issued?**
 - HR managers and other senior company officials often make discipline and termination decisions based on facts and recommendations from subordinates. In fact, disciplinary decisions should not be made in a vacuum. If the supervisor is unfamiliar with the work history or the employee(s) involved, a brief discussion with the prior supervisor, HR officer, or a review of the personnel file would be help. Ignorance of the employee's past may not be a defense if the employee action is potentially unlawful.

What have you learned?

LANDEGGER | BARON
LAVENANT | INGBER
A LAW CORPORATION

Questions & Answers

- **Any Questions?**
- **Contact Information:**
 - Los Angeles Office: 818.986.7561**
 - Ventura County Office: 805.987.7128**