

Reducing Labor Litigation Exposure

By Brendan Coffey

Labor-related litigation is a frequent problem for counsel. Most lawsuits and Equal Employment Opportunity Commission inquiries can be avoided through a thoughtful and systematic approach to dealing with employees.

Hire the Right Way

Few companies capitalize on protections available during the hiring and application process. “Employers can get a lifetime of protection against many types of employment claims if they simply take advantage of the opportunities that present themselves,” says Chuck Roesch, chair of the Labor and Employment Department at Dinsmore & Shohl LLP. Employers can limit exposure by stating on the application a statute of limitation on litigation. This strategy received a boost recently from *Thurman v. DaimlerChrysler, Inc.*, in which the Sixth Circuit Court of Appeals upheld the automaker’s written six-month limit on discrimination and other claims.

For this to pass muster, there needs to be a reasonable time frame to investigate the claim, and the waiver should be signed voluntarily, explains Roesch.

Other steps include inserting language in the employment agreement stating that employees work on an “at will” basis, and

that they can leave or be terminated for any reason. Such language prevents many breach of contract and promissory estoppel claims. Also, companies should obtain a release for checking (and giving) references, absolving employers from being subject to claims and boosting the likelihood of honest evaluations. “You’ll get a much higher-quality employee and avoid hiring someone else’s problem,” says Roesch. Lastly, employers should get permission for drug testing, to avoid having to ask if the employee shows symptoms later.

Maintain Proper Discipline

Too often, companies misstep when dealing with problematic employees, leading to litigation. “When an action calls for discipline and/or termination, employers should take it,” advises Jon L. Fleischaker, a litigation

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attorney with Dinsmore & Shohl in Louisville, Ky. While there is a tendency to give serious offenders a second chance, it usually leads only to greater aggravation down the line. “Of every termination case I’ve had, in 95 percent it wasn’t the first time something had happened.”

Taking firm action requires honest evaluations. This is not easy, since it runs counter to the desire to encourage employees to do better. Still, dissatisfaction with performance should always be noted honestly for two reasons: Straightforward evaluations provide a record of issues should it be needed in litigation and also ensures that termination is not a surprise to employees.

Honest evaluations also mean counsel need to ensure equal standards are maintained, a problem at larger companies where unsupervised middle managers may play favorites. When employees feel a lack of consistency, lawsuits often follow, Fleischaker observes.

Training Often Overlooked

While top-level policies are important, it is the implementation of corporate policy by front-line supervisors where most companies could improve, notes Colleen P. Lewis, a partner with Dinsmore in Cincinnati. Nowhere is this seen more than in the

notion of an “informal” complaint, where an incident is reported to a supervisor, but for subjective reasons goes no further. “Emphasize that there is no such thing as an informal complaint,” Lewis advises corporate counsel. “If somebody goes to a manager, they know and the company now knows, and action needs to be taken.”

One key facet to training supervisors is stressing that emotion needs to be set aside, with only factual and performance issues the subject of disciplinary action. In-house counsel should also educate managers on the need to avoid inflammatory and emotional language in email discussions of employees.

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Many companies use e-training to complement live sessions. Typically, e-training involves 30- to 45-minute PC-based programs on topics such as harassment. Employees are able to complete it at their leisure, but since they must sign in and out and click through the program, it provides a detailed record of training to display in court, Lewis explains.

Keep the Lines Open

One proactive strategy with demonstrable impact is holding regularly scheduled

meetings between employees and management for the express purpose of a free flow of information, says Mark A. Carter, a partner with Dinsmore in Charleston, W.Va. “When employees have that open door and they know that ideas are not only allowed but encouraged, it builds trust,” Carter says.

Regular meetings also lessen the chance of a third party—a union, federal agency or plaintiff’s attorney—being injected into the relationship. When employees are heard, they won’t find someone to speak for them. Another benefit is that management can see if there is litigation imminent or in the works, and try to solve the problem before a lawsuit is filed.

For such gatherings to be effective, companies need to ensure that managers don’t dominate discussions and employees are encouraged to speak. Equally as important, management should be prepared to respond and follow through on employee suggestions. That doesn’t mean accepting all ideas, Carter explains, but management should explain why ideas wouldn’t work. “It still has a positive impact, because at least the employees know why,” he adds.

If counsel implement practical defensive measures allowed in the hiring and disciplinary processes along with proactive employee engagement, it should reduce the volume and intensity of labor litigation, adds Roesch. ●

Training to Reduce Litigation Surprises

The following fictional case study was recently tackled by one of Dinsmore & Shohl’s clients:

XYZ Manufacturing Corp. was reeling from years of labor-related lawsuits. The company, which employs 472 people, first had trouble firing an employee because of missteps in its background-check system. Then, employees filed two harassment suits against managers. Next, two disgruntled ex-employees sparked a Department of Labor wage-hour audit, which found the company made a common error of accounting for comp time in a manner contrary to overtime regulations. “This would be a nightmare for them that could take a year and a half to resolve,” says Colleen P. Lewis, a partner with Dinsmore & Shohl LLP.

Wanting to prevent litigation rather than just respond to it, the company president called for a total audit and training session. The executive’s approach was to have outside counsel do a complete review of all labor-related documents and practices. The two-day session was attended by the president, the CFO and all department heads, who asked detailed questions about the forms and regulations they dealt with regularly. The law firm was also able to provide fully vetted forms and standardized procedures for the company to follow.

The training days had immediate impact: The company immediately reclassified five jobs to avoid looming wage-hour pitfalls, and when two terminations were required, the executives performed flawlessly.

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