



Managing in a Litigious World

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Discussion Topics

- Current trends in employment litigation
- Management's responsibilities
- Ten tips for managing employment litigation



Current Trends

- Compensation and Benefits
 - Wage and hour class action lawsuits
 - USDOL audits
 - Lily Ledbetter Fair Pay Act claims
 - Health Care Reform issues



Current Trends

- Discrimination, Harassment & Retaliation
 - New guidelines
 - ADA Amendments Act
 - Genetic Information Nondiscrimination Act
 - New theories
 - Stereotyping
 - Conflicting protections
 - Responsibility for “third parties”
 - EEOC & HCRC investigation procedures
 - Severance agreements
 - Access to investigation records
 - Enforcement priorities
 - EEOC focusing on ADA and systemic discrimination cases
 - HCRC focusing on “serial offenders”



Current Trends

- Whistleblowers and White-Collar Crime
 - Failure to comply with federal and/or state laws or regulations
 - Failure to comply with government contract and/or grant requirements
 - False claims



Current Trends

- Immigration

- More stringent requirements for work authorizations
- Closer scrutiny of student visas
- More aggressive enforcement
 - E-verify
 - Audits and enforcement actions



Current Trends

- Workplace Violence

- Common situations

- Disputes between employees (bullying, harassment, threats, fights)
- Domestic disputes
- Crimes

- Claims against employers stem from

- Failure to adequately supervise employees
- Failure to take precautions
 - Address known hazards
 - Proactive policies and procedures
 - Procedures for crisis response
 - Training of employees



Current Trends

- Privacy

- Laws governing disclosure of employee information
- ADA
- HIPAA
- GINA
- Focus on computer and internet use



Management's Responsibilities

- Employer Liability
 - University is responsible for employee injuries and illnesses that arise or occur in the course of employment
- "Respondeat Superior"
 - Employer is responsible for actions of its employees (injuries to third parties)
- Fiduciary Liability
 - University employees have "ethical" responsibilities under HRS Ch. 84
- Personal Liability
 - Managers and supervisors can also be held personally liable under HRS Ch. 378



Management's Responsibilities

- Bottom Line:
 - Must act in the best interests of the State and the University
 - Must comply with all applicable federal and state laws, regulations, procedures, etc.
- “Ignorance of the law is no excuse”



Management's Responsibilities: Be Proactive – Establish “Rules”

- Hiring
- Attendance
- Compensation
- Benefits
- Performance evaluations
- Employee grievance procedures
- Work rules
- Safety & health
- Workplace violence
- Discipline
- Terminations
- Discrimination, harassment & retaliation



Hard Facts About Litigation

- The number of cases filed continues to increase
- Litigation costs continue to increase
- Litigation cannot be controlled
 - Process has a life of its own
 - Involves two or more parties
- Litigation can be “managed”



Tip 1: Base Every Decision on Legitimate, Nondiscriminatory Business Reasons

- “At will” employment is not a defense
- Employers must be able to prove legitimate, nondiscriminatory business reasons for their actions



Tip 1: Base Every Decision on Legitimate, Nondiscriminatory Business Reasons

- Provide your managers with tools to meet your burden of proof
 - Written job descriptions
 - Employee handbooks
 - Investigation records
 - Discipline records
- Major decisions should be “checked” for compliance
 - Hiring, promotions, demotions, compensation, suspensions without pay, terminations, reductions in force



Tip 2: Document Well

- Juries do not believe verbal testimony by supervisors and managers
- Do it right!
 - Contemporaneous (date the document)
 - Thorough (who, what, where, when ...)
 - Accurate
 - Clear



Tip 2: Document Well

- Discipline & EEO investigations should be detailed
 - Witness statements
 - Copies of relevant policies
 - Copies of relevant documents
 - Factual findings
 - Conclusions
 - Remedial action and rationale for same
 - Discipline notice (if applicable)
- Keep discipline logs & investigation records



Tip 3: Adopt Document Retention & Destruction Policies

- Federal and state laws require employers to retain a substantial amount of documents
- Document retention periods vary
- Documents refer to “hard” and “soft” copies, as well as “metadata”
- Federal court rules require:
 - Production of hard and soft copies, and possibly metadata
 - Litigants to preserve all documents that could be relevant
 - Imposition of severe sanctions if documents are destroyed



Tip 3: Adopt Document Retention & Destruction Policies

- When you adopt your policy and procedures think about who ...
 - Creates the document and why
 - Receives the document and why
 - Revises the document and why
 - Distributes the document and when
 - Retains the document and which version
 - Produces the document and how
 - Purges the document and when
- You want the final document to be the “official” record, controlled by someone responsible for production and destruction



Tip 4: Plan Terminations

- Before you act, ask the following questions:
 - Was the situation properly investigated before the decision was made? Did the employee know the rules?
 - Did the employee violate the rules?
 - Preponderance of the evidence establish guilt?
 - Are there mitigating circumstances?
 - Is discipline appropriate?
 - Based on legitimate, nondiscriminatory business reason?
 - Consistent with contractual obligations, established company practices and past practice?



Tip 4: Plan Terminations

- Consider whether there are any risks (e.g. complaints of discrimination, harassment, retaliation or whistleblowing)
- Plan the termination ahead of time
 - Have paperwork and final pay check ready
 - Know what you are going to say
 - Do not humiliate the employee; be considerate
 - Know what you are going to do after the termination (e.g. announcements to coworkers, job references, etc.)



Tip 5: Do Not “Wing” Administrative Proceedings

- Administrative hearings include:
 - EEOC and HCRC investigations
 - Unemployment hearings
 - Workers compensation claims
 - Wage and hour investigations
- Information and documents can be obtained by the other side
- Plaintiff’s counsel use statements in hearings against you in subsequent court battles



Tip 5: Do Not “Wing” Administrative Proceedings

- Treat your responses in agency proceedings like court filings
 - Clearly set out your arguments
 - Support the arguments with evidence
 - Do not say things that may be contradicted later
- Use legal counsel, particularly in high risk cases



Tip 6: Get EPLI Insurance

- Employment practices liability insurance is different from:
 - Commercial & general liability
 - Directors and officers
 - Errors and omissions
 - Workers compensation
- Policy pays for defense costs and back wages
 - Excludes punitive damages
 - Excludes breach of contract damages



Tip 6: Get EPLI Coverage

- Check policy terms before your sign
 - Exclusions
 - Deductibles
 - Policy limits
 - Choice of counsel
 - Settlement authority
- Ask about discounts
- Always notify carrier as soon as you know a claim has been or is about to be filed



Tip 7: Tell Your Attorney Everything

- Fact finding is critical, so don't be "pennywise and pound foolish"
- Provide the documents that may be relevant
 - Personnel files
 - Handbooks and other written policies
 - Investigation records
 - Correspondence with employee in question
- Make potential witnesses available for interviews
- Encourage everyone to tell the truth – good and bad



Tip 8: Consider ADR

- Alternate dispute resolution includes:
 - Mediation (private settlement negotiations)
 - Arbitration (private “litigation”)
- Generally faster and cheaper than court trials
- Parties must voluntarily agree to the process if they want a successful outcome
 - Mandatory arbitration agreements must be carefully drafted



Tip 8: Consider ADR

- Must carefully choose mediator/arbitrator
 - Use a mediator who can “push” the parties toward compromise
 - Use an arbitrator experienced in employment law
- Educate the mediator/arbitrator
 - Pre-arbitration briefs are very good
 - Post-hearing briefs are also good
- Encourage the arbitrators to tape the proceedings or use a court reporter



Tip 9: Coordinate All Efforts

- Employment litigation often involves disputes in multiple forums
 - E.g. Workers compensation claims and discrimination claims
- Handling of disputes often parceled out to different people
- Must coordinate handling of each dispute to minimize conflicts, inadvertent admissions, etc.



Tip 10: Require a Litigation “Plan”

- Plan should include:
 - Preliminary assessment of the case
 - Assessment of risk and possible damages
 - Estimated budget
 - Proposed strategy for resolving the case
- Have your lawyer periodically update the plan and assessment of the case



Final Thoughts

- Employment litigation has become common in Hawaii – it's part of the "costs" of doing business
- You need to implement effective risk management procedures
- Don't put it off ... it's time to get serious