Managing in a Litigious World

Anna Elento-Sneed
Alston Hunt Floyd & Ing
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 you 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