



Labor Letter

March Mayhem Bracket For Employers: Final Four Revealed!

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The votes are in, the contests have been played – we are down to the Final Four Biggest Workplace Headaches for 2011! We received bracket entries from employers across the country telling us about their biggest frustrations, and after tallying all of the submissions, we can reveal the most annoying four situations that employers face every day. Here are the winners, along with some practical tips for dealing with them.

Documentation Region: Supervisors Forgetting to Document Warnings

This was a very close contest, as the #4 seed edged the #6 seed "Whiners" in a thrilling contest that came down to the wire. In the end, the frustration of having to deal with supervisors who forget to document warnings won out as one of the country's biggest workplace headaches. This is such a big problem for employers because as many have experienced first hand, juries often follow the "if it's not in writing, it didn't happen" line of thinking.

What you can try to do when you become aware of the problem is prepare a written statement supporting the discipline in a way that "captures" the past undocumented discipline – for example, "As you know, two weeks ago, your supervisor talked to you about your attendance problems. Last week, your supervisor issued you a verbal warning for coming to work late. This final warning is to notify you that" You may also want your supervisor to document the past discipline as best as possible at this point and take written statements from other witnesses if possible (file this under "better late than never").

You will also want to search through emails, text messages, personnel logs, and other places to see if the incidents in question can be supported by other documentation. Finally, it goes

without saying, train your supervisors on documentation and discipline, or set up a better system to capture their thoughts.

Medical Issues Region: Employees on Intermittent Leave

This wasn't even close. The dominant #1 seed dispatched all challengers and rolled to a convincing victory; although the #4 seed "Hangnail workers' compensation claims" gave its best shot, it was no match for the headache that is intermittent FMLA leave.

There was little surprise that this topic proved to be such an employer headache – it is perhaps the most oft-abused tactic by employees looking to game the system. But there are a few definite steps employers can take to tighten the reins. First, make sure that the certification requesting intermittent leave is properly documented and contains the detail required by the regulations, and if there are legitimate questions remaining, have your company doctor communicate with the employee's doctor to see if treatments or absences can be scheduled around work time.

Second, make sure that the employee offers a good-faith effort to schedule absences so that they do not conflict with work time. If the time off is needed for treatment, it should be scheduled far enough in advance to provide you with reasonable notice. Finally, the law allows you to require re-certification every 30 days to ensure the need for intermittent leave still exists. If your state law allows you to require the employee to pay for these doctor visits, that could offer an incentive for an employee to reduce intermittent requests.

Litigation Region: Hostile Work Environment Allegations

In somewhat of a surprise, the #11 seed ground out an upset victory over the #9 seed "EEOC Complaints." In the end, however, the tournament veteran "hostile work environment allegations" – which rose to fame in the early 1990s and has been a steady presence ever since -- rode to a fairly comfortable victory.

Many harassment claims originate with seemingly-friendly interactions, and it is only after the employment relationship sours that one employee claims they have been "harassed" by being subjected to inappropriate chatter. Don't make the mistake of allowing "friendly" teasing in the workplace, especially between supervisors and employees, as these conversations are often taken out of context down the road. If a hostile environment complaint is lodged, the worst mistake you can do is sit on the complaint or ignore it – immediately investigate and document every step along the way.

And once the investigation is concluded, present complainants with a letter informing them that an investigation was conducted; note that actions have been taken to ensure that the employees will not experience a hostile work environment in the future, and remind them about your anti-retaliation pledge. If you simply verbalize this conclusion, unscrupulous employees may later claim that they never knew you conducted an investigation at all.

Everything Else Region: Employee Theft

A dramatic finish in this region saw the #5 seed "Employee Theft" hit a buzzer-beater shot to claim the tightest of victories over the #10 seed "Open Enrollment Time." No contest was closer, with only a few votes separating the two.

Just as with many employee problems, the best way to prevent thieving employees is to not let them in the door in the first place – hire the right people by conducting criminal-background checks and pre-employment drug tests. Once hired, make sure that those with access to tangible items and money are aware of your tight audit and examination procedures, and make sure to implement them regularly to keep an eye on things. Employees will be less apt to risk theft if they are aware of the safeguards in place.

Company computers are often treasure troves of information about employee theft, so make sure your company policies allow for monitoring without risking privacy claims, and take advantage of surveillance opportunities. In those industries where client lists, contact information, and other proprietary data are theft risks, require non-solicitation and non-disclosure agreements. Make sure your IT department monitors computer use and emails for irregularities, and restrict access to and dispose of consumer reports regularly.[1]

For those who want to keep playing, even if your "favorite" has been eliminated, please help us decide the ultimate winner by voting for one of these tournament champions. Just send an email with your pick to **finalfour@laborlawyers.com**.

For more information contact the author at rmeneghello@laborlawyers.com or 503-242-4262.

[1] For more on the topic of stealing, read the article "Common Mistakes When Terminating Employees For Theft." It appeared in the March 2011 issue of the Fisher & Phillips *Retail Sales Update*.