

# Top 10 Mistakes Employers Make and How to Keep from Making Them

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# Top 10 Employer Mistakes

1. Having out-of-date policies
2. Failing to train supervisors
3. Failing to document
4. Not following company policies
5. Mishandling investigations
6. Not complying with FLSA
7. Mishandling terminations
8. Failing to pay out money due
9. Failing to consult human resources or legal counsel
10. Mishandling employee leave



# 1. Having out-of-date policies

- Review employment policies annually
- Ensure email and social media policies exist
  - Avoid creating employees' expectation of privacy
  - Advise of legitimate business reasons for electronic monitoring
- Ensure policies state updated law
- Ensure other states are covered



## 2. Failing to train supervisors

- Hiring
  - Avoid promises
  - Avoid illegal questions
- Evaluating employees
  - Timing
  - Subjective v. objective
  - Plan for improvement
- Handling complaints
  - Knowledge of policies
  - Following of policies
  - What to do when you are told “in confidence”



# Discipline is a Coaching Tool

- Consistent
- Specific
- Performance Related
- Consequences
- Timely

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'I've written you a disciplinary letter in French to soften the blow.'



# Choose words wisely

## This

- Fails to perform job duties with accommodations
- Does not meet attendance requirements
- Does not focus on duties when at work/does not comply with code of conduct

## Not that

- Can't get around well because of limp/other issue
- Comes to work late because of kids too often
- Has a drinking problem



# Choose words wisely

## This

- Does not adequately focus on stated duties
- Fails to timely complete assignments
- Requires excessive supervision

## Not that

- I think she has ADHD
- Takes too many bathroom breaks since out on leave
- Bugs me with too many questions



# “If I only remember one page...”

- Be consistent
- Give notice
- Be specific
- Not everyone is “exceptional”
- Imagine your words on a poster in front of a jury – still okay with it?





## 3. Failing to document

- Maintain forms for documentation
- Train supervisors on documentation
- Don't put it in writing unless you want a jury to see it
- Unless egregious, don't terminate without a paper trail
- Require employee signatures on documentation
- Beware of inaccuracies (sloppiness may get you in trouble)



## 4. Not following company policies

- Failure to follow policies without good reason can sometimes be evidence of pretext
- Jurors don't like companies not following rules
- Policies can come back to bite you (beware of progressive discipline)



## 5. Mishandling Investigations

- 89.7% of employees who eventually file a lawsuit initially reported their concerns internally, either to supervisors or compliance departments



# Top 10 Mistakes Employers Make in Investigations

1. Failing to respect the complaint
2. Failing to conduct an investigation when the employee claims he does not want anything done
3. Failing to investigate promptly
4. Promising the complainant the Company will keep the complaint confidential
5. Failing to get the alleged wrongdoer's side of the story



# Top 10 Mistakes Employers Make in Investigations (cont.)

6. Placing the alleged harasser's buddy as the investigator
7. Failing to document the investigation
8. Retaliating against the complaining party
9. Failing to let the complaining party know the outcome
10. Letting a star employee slide



## 6. Not complying with FLSA

- Misclassification of exempt employees
  - Review job descriptions
  - Understand duties
- Are your “independent contractors” really employees?
- Is company including nondiscretionary bonuses in overtime calculations?
- Is company compensating employees for travel time?



## 7. Mishandling terminations

- Articulate specific reason for termination
- Be courteous
- Don't humiliate or embarrass your employee
- Avoid defamation claims – loose lips sink ships
- Don't say anything you would not want recorded (you may be)
- Follow neutral reference policy
- Beware of LinkedIn



## 8. Failing to pay out money due

- You cannot hold an employee's final check until they return company property
- You cannot deduct without a proper authorization
- You need to follow company policy with respect to PTO (beware of state laws)
- You need to follow agreement in place with respect to payment of bonuses or commissions





## 9. Failing to consult human resources or legal counsel

- “At will” employee just not enough
- Prevention is key
- Bring in a fresh set of eyes and ears before a termination decision is made
- How is a jury going to perceive the decision?



# 10. Mishandling Employee Leave

- The alphabet soup of leave law:
  - FMLA
  - ADA
  - TWCA



# Common Leave Mistakes

- Failing to accommodate
  - No one size fits all answer – it depends on individual circumstances
  - Leave is a reasonable accommodation – beyond FMLA allotment
  - Don't assume an accommodation can't be made – consider restructuring the job when reviewing accommodation choices



# Common Leave Mistakes

- Assuming Undue Hardships
  - Significant productivity losses due to employee absence
  - Serious workflow complications
  - Less responsive customer service
  - Loss of key and unique services
  - Increased burdens on coworkers
  - Cost, alone, is NOT undue hardship



# Take Away

- Consider securing medical certifications along the way
- Consult counsel on difficult leave issues
- Document factors that support existence of undue hardship
- Be consistent in application among employees
- Ensure all decisions are based on defensible and objective grounds



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