Best Practices for Effectively Addressing Workplace Issues

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Why Are We Here Today?

- Employment law cases are on the rise.
- Knowing how to have difficult conversations in a direct but respectful manner goes a long way toward preventing legal issues and defending your organization if legal action occurs.

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Why is it Critical to Effectively Address Workplace Issues?

- Failure to address workplace issues affects employee morale.
- Problem and incompetent employees cost time, energy and productivity.
- Failing to effectively discipline often leads to legal issues.

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Why Don't We Effectively Address Workplace Issues?

- We don't know how to do it
- We avoid confrontation
- We don't have time
- We fear the legal risk of stirring the pot

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- No employee should be _____ when they are terminated.
- Today's session reviews (1) WHY you need to address workplace issues effectively and (2) HOW to do it effectively

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BASIC FRAMEWORK OF DISCRIMINATION CLAIMS

We are an at-will employment state, but at-will employment has its limits!

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BASIC FRAMEWORK OF DISCRIMINATION CLAIMS

- Framework of a discrimination claim:
  - Employee has initial burden of making a *prima facie* case of discrimination.
    - Employee is a member of a protected class
    - Employee was meeting employer's legitimate expectations
    - Employee suffered adverse employment action
    - Employee as treated less favorably than similarly situated individuals outside the protected class.

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BASIC FRAMEWORK OF DISCRIMINATION CLAIMS (cont.)

- If employee can establish a *prima facie* case, the employer must produce legitimate, nondiscriminatory reasons for the adverse job action.
- If employer produces legitimate, nondiscriminatory reasons, then the employee must be able to prove that the employer's explanation was "pretextual" or untrue.
- Having contemporaneous, written proof of your reasons goes a long way to prove that your reasons are legitimate and valid.

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Addressing Workplace Issues

- When you should begin addressing workplace issues takes judgment and depends on the severity of the issue and related circumstances.
- Various levels of addressing an issue can be used
  - Coaching
  - More formal coaching/performance meeting
  - Performance improvement plans
  - Disciplinary write ups/warnings

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Disciplinary and Discharge Meetings

- Don't address performance issues casually or in the hallway.
- Should you have a witness?
- Prepare talking points or a script if necessary.

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Disciplinary and Discharge Meetings

- Be extremely clear in stating:
  - What the problem is
  - What your expectations are
  - What the consequences are of failing to correct the issue

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Disciplinary and Discharge Meetings

- Have a PIP or disciplinary write up prepared in appropriate situations. The write up should:
  - ❖ Stick to the facts – leave out emotion, opinion and speculation.
  - ❖ State the problem, expectations and possible consequences. State that further incidents/performance issues will lead to discipline, including and "up to immediate termination." Do not limit future discipline to further "similar" instances of performance or conduct.
  - ❖ For performance (and some conduct) issues, state "we must see immediate and sustained improvement."
  - ❖ Include references to previous discipline or counselings the employee has received.

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Disciplinary and Discharge Meetings

- If applicable, documentation should demonstrate the company's efforts to support the employee in improving performance, such as training or extra supervision offered, etc.
- Have the write up (and your script) screened by Human Resources and possibly legal counsel if it concerns a legally sensitive issue. For instance, the employee has a health issues that might be impacting their performance.
- The employee should review, sign and date the document. If the employee refuses to sign, then note that the employee refused to sign. Do not include a written statement such as "Your signature does not signify your agreement to this document, but rather confirms your receipt of the document."

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Disciplinary and Discharge Meetings

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- Start with the premise that the employee does not dispute the criticism. They can always write a rebuttal to be maintained with the write up if they choose.

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Disciplinary and Discharge Meetings

- Special points for Performance Improvement Plans:
  - Ensure that you retain at will employment through the term of the PIP
  - You can include timeframes for review (we will check in every 15 days), but do not imply that employment is guaranteed until the PIP has expired (The PIP is in place for 60 days. Once the PIP has been completed, we will assess your employment status at that time.)
  - Instead state something like: You remain employed at will during the PIP and may be terminated at any time.
  - Do not agree to exclude the PIP from the employee's personnel records if the employee successfully corrects the issues. It should remain part of the file.

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Disciplinary and Discharge Meetings

- If you do not believe a formal "write up" is warranted or productive, then follow up the meeting with an email to memorialize what was said at the meeting.
- Be prepared for the unexpected in any disciplinary or PIP meeting.

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Disciplinary and Discharge Meetings

- Common scenarios that make performance or conduct discussions difficult:
  - The "I should have done this a long time ago" situation
  - The "I'm a new manager with new expectations" situation
  - The "I really don't want to do this because you're going to be defensive and even more difficult to deal with" situation
  - Others???

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Documentation Issues

- What is "good documentation?"
  - There is a fundamental difference between a manager's own documentation of performance or conduct issues that the employee never sees versus write ups and emails that are delivered to employees in honest conversations.
  - Go back to the basics "An employee should never be _____ when they are terminated."

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Documentation Issues

- Document all significant employment issues, but do not set the employee up to fail.
- Contemporaneous documentation is best.
- While contemporaneous documentation is best, documentation of an event or conversation after the fact is often effective and is far better than having no documentation.

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Documentation Issues (cont.)

Example of after-the-fact documentation: September 28, 2022. Joe, there have been several recent incidents where you have used our email for inappropriate purposes or excessively. In July, I received complaints that you were sending significant numbers of email jokes to your co-workers and were disrupting their work. On August 18, I spoke to you about excessive use of personal email when you told your supervisor that you were too busy to take on additional work, but were found to have been emailing about your Fantasy Football team. Just this week, I again found that you were sending multiple emails about Fantasy Football. This behavior is unacceptable and will not be tolerated. We expect you to use email for business purposes and only sparingly for personal reasons. Further abuse of the email system will lead to further discipline including and up to termination.

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Documentation Issues (cont.)

- Record facts, not unsupported opinions or speculation.

Example:

Joan, even though you called in sick on Friday, Steve saw you out at a bar this weekend and thought you might have had too much to drink. We've been concerned about your habits and want you to ask yourself if you might have some issues to deal with. We all care about you and just want to help if we can.

Versus

Joan, because you called in sick on Friday, I specifically asked you to come into the office on Saturday if you were well enough to complete the monthly report. You did not come in, but an employee saw you out at a bar that night. It was inexcusable for you not to come in to complete your work if you were well enough to do so.

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Documentation Issues (cont.)

- Remember that most of what you document will be subject to discovery if there is a lawsuit. Watch those E-MAILS!
- Draft documentation that will make sense to a third person years from now.
- Think about whether you want the employee to have access to the documentation you are creating. Consult with legal counsel regarding attorney-client privilege before creating documentation.

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Documentation Issues (cont.)

- Having legal counsel review key documentation that might have serious legal consequences.
  - FMLA/WC/ADA/leaves of absence. (Communicating to a disabled employee about their status during a lengthy leave of absence).
  - Disciplinary paperwork in high-risk situations. (Informing 30-year employee who regularly states that he gets no respect for how long he's been with the company that his interpersonal interactions are not acceptable).
  - Performance evaluations in high-risk situations. (Addressing an employee's lagging productivity when he has been out on health-related leave for 16 weeks of the year).
  - Termination paperwork. (You need to be cautious in stating the reason(s) for termination).
  - Separation agreements.

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Questions?

Thank you!

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