

Handling the Problem Employee

Presented for:
2019 PACAH Spring Conference

April 26, 2019

Presented by:
G. Edward Schweikert, IV
Tara A. Burns

gschweikert@eckertseamans.com
717-237-7170

Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101

*No Statements made in this seminar or in the written materials/PowerPoint should be construed as legal advice pertaining to specific factual situations.

Common Mistakes

1. The Bad Employee Starts With A Bad Hire.
2. Timekeeping.
3. The Consequences of Off-Duty Conduct.
4. I Have To Show Up To Work?
5. You Stink. Performance Evaluations.

Ten Common Issues

6. I'm Back For More Cash. Injured Employees and Return to Work.
7. #Ihatemyjob—Social Media.
8. Boom Goes The Dynamite-Discipline.
9. You're Fired!
10. Sequel to Your Fired!—The Aftermath

Mistake No. 1

The Hot Mess In The Cubicle Next To Me

Stop Hiring Mistakes

How'd We Hire *That* Guy?

Failure to Set Qualifications:

Under all federal and state laws, the employer has the right to set qualifications. Those usually come through job descriptions which need to be updated and clear.

How'd We Hire *That* Guy?

The Consequences of Failing To Set Qualifications:

- If the bar is too low, everyone is qualified.
- ADA Implications – job descriptions not specific enough.

How'd We Hire *That* Guy?

Looking at the job description:

- Does it capture the technological part of the job?
- Does it capture the physical nature of the job?
- Does the yearly evaluation of the employee track/measure the essential functions of the job (more on this later)?

How'd We Hire *That* Guy?

Background Checks:

Do we have a release and what does that really cover?

- Word of Mouth
- Use of Social Media

How'd We Hire *That* Guy?

Cannot Consider:

Race, creed, color, religion, gender, age, medical condition or disability, national origin, marital status, child bearing plans, child care arrangements, injury or workers compensation history.

How'd We Hire *That* Guy?

Wait, what about:

- Prior arrests (versus convictions)?
- Financial condition (type of job)?
- Lying on the application packet?

How'd We Hire *That* Guy?

Best Practices:

- Qualifications reviewed and in writing.
- Maintain applications for two years.
- Standardize interview questions.
- Two people involved in all interviews.
- Document background checks and interviews and follow all legal requirements for background checks.

Mistake No. 2

I Owe You What?

Timekeeping Issues

Timekeeping

The Fair Labor Standards Act of 1934 covers:

Minimum wage

Recordkeeping

Break time

Meal periods

Overtime

Enforcement

Compensatory time

Timekeeping

Can the employer set the work week?

Time of Correction (regulations provide for a reasonable time).

Threshold for overtime – 40 hours – remember you can give your employees more than the minimum.

What does “working” really mean?

All hours “permitted” to work or “suffered” to work.

Timekeeping

Are these “on the clock”?

- Volunteer time
- Employee who fails to put in their hours worked
- Using mobile device off of work
- Medical attention during work hours
- Prep time/training

Timekeeping

Compensatory time

Limits: 480 uniformed/240 non-uniformed

Rate reimbursed – it's overtime

Use – should be regulated by employer?

Can it be forfeited?

Timekeeping

Best Practices:

Clear policies on timekeeping.

A clear understanding of exempt and non-exempt.

Training supervisors about time worked.

Controlling compensatory time.

Mistake No. 3

Well, Based on the Facebook Pictures,
It Must Have Been A Great Party

Off Duty Conduct and its Consequences

Off Duty Conduct

A public employee holds a position of public trust and is accountable for a higher standard of conduct than a private citizen.

Off duty conduct can be a basis for discipline depending on the facts

Off Duty Conduct

Garrity vs. State of New Jersey

Garrity Rights protect public employees from being **compelled to incriminate** themselves during investigatory interviews conducted by their employers.

However, they cannot refuse to answer a lawful question regarding their conduct that has a nexus to work by asserting the Fifth Amendment.

Off Duty Conduct

Best Practices:

No rumor—just facts.

What is the nexus with work?

Independent investigation.

Have a clear vision on how this impacts the workplace.

Mistake No. 4

I'll Be Off Next Week,
Forward My Mail To Ibiza

Attendance Problems

I Have To Show Up To Work?

An employer has the right to expect an employee to show up to work as scheduled and as directed.

However, the employee has the right to leave under certain federal statutes and the right to use the leave time afforded by the employer.

Attendance And Productivity

All lost time is connected. Lost time includes absences due to on-the-job injury, short-term disability and family or medical leave, as well as absences that are only a few days in duration.

Employees who have frequent intermittent absences appear to be three to four times more likely be out on short-term disability. In addition, employees who leave the organization on short-term disability are more likely to use group health benefits.

Attendance And Productivity

Now what do we do? Some common approaches to absence management include:

- Taking disciplinary action for excessive absenteeism.
- Verifying illness after a specified period of time.
- Using PTO banks to help reduce unscheduled leave.
- Focusing on personal recognition for employees with positive attendance records and behaviors.

Traps

Bad contract language:

- Language which allows people to stitch together leave (*e.g.*, FMLA at the end of all paid leave)
- Light duty language unless properly managed
- Unlimited or unregulated leave of absence language

Traps

Bad supervisors:

- Past practices – supervisors can create these
- Bad solutions – not fixing problems
- Unwillingness to manage

Options to regulate employee attendance

Reward:

Bonus days, increased payout, incentivize managers, link attendance with promotion; earlier call in—no violation.

Punish:

Stricter discipline, closer reviews, checking on "sick" employees, audits.

I Have To Show Up To Work?

If an employee is not showing up to work as scheduled, what do we do?

First, determine whether or not the employee has a “serious health condition” covered by the Family and Medical Leave Act.

If so and you are a covered employer, you are required to provide notice of FMLA leave which protects an employee from termination and discipline while on FMLA qualifying leave.

I Have To Show Up To Work?

If an employee is not covered by the FMLA or is simply late repeatedly, then what?

Question 1: Are your attendance rules and policies clear and written down?

Question 2: Does the employee know about these rules and policies?

Question 3: Can you prove violations of those rules and policies? Document!!

I Have To Show Up To Work?

How do we prove non-compliance?

- Video
- GPS
- Time clocks
- Personal observation
- Swipe records

I Have To Show Up To Work?

I got him, now what?

Patience and progressive discipline.

Can we terminate for the first violation?

What if we have a attendance policy?

I Have To Show Up To Work?

Best Practices:

Proof

Constant documentation and correction.

Progressive discipline.

Demonstrate why the absence hurts the business.

Mistake No. 5

When I Say “Meets Expectations,”
What I *Mean* Is You’re Awful

Evaluations and Why We Hate Them

You Stink. Evaluating Performance

A performance evaluation can help or hurt you. It *must*:

- Explain to the employee how his/her yearly performance is viewed by management.
- Alert the employee to performance deficiencies.
- Provide a strategy for improvement.
- What if it doesn't?

You Stink. Evaluating Performance

Can you trust managers and supervisors to do this well without training? Must that training be repeated?

Is there a “right” or “perfect” evaluation?

Evaluations must be tied to the requirements of the job and should flow from the job descriptions.

Every evaluation should be reviewed and, hopefully, be consistent.

You Stink. Evaluating Performance

Use of labels versus actual documentation in a narrative.

Can supervisors be judged on their evaluations?

Can employees be required to sign off on the evaluations? What if they refuse?

You Stink. Evaluating Performance

What if we don't do them? What good are they?

What does the personnel file say about the employee?

The power of writing versus the power of testifying.

You Stink. Evaluating Performance

Best Practices:

All evaluation criteria must be within the control of the employee.

Must match up with job description.

Must be reviewed with the employee and retained.

Should not be a surprise (they don't have to like it) to the employee.

Mistake No. 6

Its Just A Flesh Wound

Returning The Injured Employee to Work

I'm Back For More Cash. Injured Employees and Return to Work

When an employee is injured, the employer should have policies requiring documentation of the injury.

I'm Back For More Cash. Injured Employees and Return to Work

Manager/supervisors need to have a fundamental understanding of their right to ask questions about a person's ability to come to work and to attend work.

That means employing an appropriate level of skepticism.

That means not allowing an injured employee to dictate the terms of engagement with an employer.

I'm Back For More Cash. Injured Employees and Return to Work

If a non-work related injury, then use of leave time is implicated.

What about short-term and long-term disability insurance?

I'm Back For More Cash. Injured Employees and Return to Work

What can I ask an employee to document?

Aren't I violating HIPPA?

Do I have to give an employee light duty? What if I don't want to?

The benefits of having a light duty policy.

I'm Back For More Cash. Injured Employees and Return to Work

Do I have to allow an employee to return to work?

What if I don't agree with or don't understand his doctor's note?

What if I think the job to which the employee is returning to is too much for the employee?

What if the employee is not fully released to duty?

Attendance and Productivity

Supervisors/managers should understand that:

A medical excuse is not holy writ.

A medical excuse does not automatically eclipse the essential functions of the job (ex. Mandatory overtime).

Documented communication is key.

I'm Back For More Cash. Injured Employees and Return to Work

Best Practices:

Document, Document, Document.

Demand proof where unclear.

Send for RTW exam where necessary.

Have Light Duty policy.

Clearly communicate regarding essential functions, restrictions and position to which an employee is being returned.

Mistake No. 7

Yes, That Is My Picture on Facebook and
No, I Don't Remember Having It Taken

The Weird World of Social Media

#Ihatemyjob—Social Media

Every employer must have a social media policy that provides, at a minimum, that there is:

- No expectation of privacy.
- Reserve the right to monitor.
- Reasonable personal use of the network and Internet-related systems is permitted at the discretion of the employer.
- Harassment and other conduct policies apply at all times.
- Abuse can lead to discipline, up to and including discharge.

#Ihatemyjob—Social Media

If an employer wants to regulate the use of social media, the employer's policy should:

- Define whether blogging and/or social networking is permitted during work hours.
- Provide clear guidelines about your expectations and what types of posts are appropriate and what are not.
- Reaffirm policies on ethics and business conduct, privacy, confidentiality and harassment.
- Remind employees to adhere to copyright, fair use and financial disclosure laws.
- Mandate that employees clearly convey when they are posting on their own behalf and when they are posting on behalf of the company.

#Ihatemyjob—Social Media

The National Labor Relations Board has held that an employee's Facebook posts about work can be protected conduct.

Also, what about First Amendment issues for posting about matters of public concern?

Should/Can you take employment action based on social media posts?

#Ihatemyjob—Social Media

Best Practices:

Must have an electronic use/social media policy.

Must make sure that your use of/monitoring of electronic communication and social media does not violate someone's rights.

Should always make sure that the conclusions you are drawing about electronic communications are reasonable ones.

Cannot make illegal decisions about employment based on someone's social media postings.

Mistake No. 8

Boom Goes The Dynamite

Disciplining The Hard Case Employee

Boom Goes The Dynamite—Discipline Issues

Two kinds of employees:

"Just Cause": must be significant deficiencies in performance or behavior (usually following progressive discipline).

"At will": can terminate:

- At any time
- For any or no reason
- With or without prior notice

Boom Goes The Dynamite—Discipline Issues

The foundation of any discipline for a unionized/ statutorily protected employee is the seven step test for just cause set forth originally in *Enterprise Wire*, 46 LA 359 (1966).

- *Notice*
- *Reasonable Rule or Order*
- *Investigation*
- *Fair Investigation*
- *Proof*
- *Equal Treatment*
- *Penalty*

Boom Goes The Dynamite—Discipline Issues

A unionized/statutory employee has the right to a Weingarten representative, Garrity warnings and before he is deprived of property—before he loses money—a Loudermill notice.

An at-will employee is not entitled to any of these protections.

A Loudermill notice includes:

- Notice
- Explanation of the Evidence
- Opportunity to Respond
- Can be conducted face to face or in writing

Boom Goes The Dynamite—Discipline Issues

What are the questions that an arbitrator will ask – Enterprise Wire?

Was there progressive discipline or was the offense significant enough that serious discipline is warranted the first time?

- Is the offense correctable?
- Was it because of lack of training?
- Was it negligent or deliberate?
- The ultimate question: Is the employment relationship salvageable?

Boom Goes The Dynamite—Discipline Issues

Best Practices:

Meet *Enterprise Wire* every time—both for unionized and non-unionized workers.

Go slow, gather evidence and do it right the first time.

Understand what an arbitrator/a Judge or Jury will think—is it fair? Is it consistent?

Understand discipline is a process.

Mistake No. 9

This Hurts You More Than It Hurts Me

Firing Employees

You're Fired

The Termination Decision.

After a reasonable period of progressive discipline.

If you can demonstrate willful misconduct of an important work rule.

One of the deadly sins—sleeping, theft, fighting.

What about repeated violations of a lesser rule?

You're Fired

Termination considerations.

Where? When? How many People? Safety exit?

How to document?

What to say?

What never to say and why that is.

Mistake No. 10

I Said, *Buh-Bye*

Post Termination Issues

Your Fired—The Aftermath

Severance packages.

Resignation in lieu of termination. Resignation after the fact.

Neutral letter of references.

COBRA obligations

Cessation of medical coverage.

Your Fired—The Aftermath

Unemployment compensation:

- Irrevocable resignation
- Willful misconduct
- Involuntary quit
- Necessitous and compelling reason for quitting.

Thank You!