

# Personnel Dos and Don'ts: Limiting Liability Through Sound HR Practices



CONSULTANTS TO MANAGEMENT

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## Introduction



- What is your largest expense?

### EMPLOYEES

- An ounce of prevention is worth a pound of cure
- 5% of employees cause 95% of your problems
- Our people are our most important and expensive resource; however, employers continually neglect maintaining their human resource systems.

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## Employment Laws

- At the Federal Level

- Age Discrimination in Employment Act
- Americans With Disabilities Act, as amended
- Brady Bill
- Civil Rights Act of 1866
- Civil Rights Act of 1871
- Civil Rights Act of 1964
- Civil Rights Act of 1968
- Civil Rights Remedies for Gender Motivated Violent Crime
- Family and Medical Leave Act
- Federal Merit System Standard
- Federal Water Pollution Control Act
- Federal Wiretapping Act
- GINA
- Hatch Act
- H.I.P.A.A.
- Veterans Reemployment
- Vietnam Era Veterans Readjustment Assistance Act
- Clean Air Act
- Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)
- Consumer Credit Protection Act
- Drug Free Workplace Act of 1988
- Employee Retirement Income Security Act of 1974
- Equal Pay Act of 1963
- Fair Credit Reporting Act
- Fair Labor Standards Act
- Immigration Control Reform Act
- Jury System Improvement Act
- Occupational Safety and Health Act
- Older Workers Benefit Protection Act
- Omnibus Transportation Employee Testing Act
- Rehabilitation Act of 1973
- Immigration Control Reform Act
- Violence Against Women Act of 1994

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## Employment Laws

- At the State Level (sampling)

- R.C. 3.06
- R.C. 9.84
- R.C. 102.03
- R.C. 2921.42 (nepotism)
- R.C. 102.03(B)
- R.C. 102.09(E)
- R.C. 117.01
- R.C. 117.28
- R.C. 121.22 (open meetings law)
- R.C. 124.01-124.57 (civil service townships)
- R.C. 149.43 (public records)
- R.C. 153.59
- **R.C. 505.491 (township police discipline)**
- **R.C. 737.12 (suspension procedure)**
- R.C. 1333.81
- R.C. 2716.05
- R.C. 2744.02(C)
- R.C. 2744.03
- R.C. 2921.02, 03, 05, 13, 41, 42, 43, 431, 44, 45
- R.C. 2961.01
- R.C. 3517.092
- R.C. 3599.05
- R.C. 4112 (anti discrimination statutes)
- R.C. 4113.23
- R.C. 4113.52 (whistle blower protection)
- R.C. 4117 (collective bargaining)
- R.C. 5906 (military leave)

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## Essential Terminology

- Exempt / Non-exempt / Non-Covered (FLSA)
- Exempt / Non-exempt (R.C. 4117)
- “At-Will”
- Civil Service (classified/unclassified)

“The civil service of the state and the several counties, cities, civil service townships, city health districts, general health districts, and city school districts of the state shall be divided into the unclassified service and the classified service” R.C. 124.11

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## Limiting Liability

**When** do you start limiting your liability as an Employer?

- (a) When the employee is hired?
- (b) When the employee is fired?
- (c) During employment?
- (d) Before (a), (b), and (c)?

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## Employment Applications

- **DO** use your application process to reduce the time lines for bringing adverse actions by applicants and employees
- **DON'T** ask unlawful questions on you application.
  - House Bill 56
- What is a “Thurman” clause and Why is it Important?

READ CAREFULLY BEFORE SIGNING. . .

I agree that any claim or lawsuit relating to my service with [DaimlerChrysler] or any of its subsidiaries must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. I waive any statute of limitations to the contrary.

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## Limiting Liability

- On the front end
  - *Thurman v. Daimler-Chrysler*
  - *Oswald v. BAE Industries*
- Going out the door
  - *Cole v. Temple Israel, et al.*
  - *Sampson v. Cuyahoga MHA*
  - *George v. Village of Newburgh Heights*

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## Hiring the Wrong Person

- **DO** create an objective, consistent, and uniform hiring system
- **DON'T** let subjective factors control your hiring and selection process
- Hiring and Selection
  - A proper hiring and selection process can streamline all the documentation involved which can sometimes prove to be tedious. Uniform methods can also insulate an employer from possible discrimination claims. Because choosing the “right” candidate is so important in the public sector (hard to get rid of a public employee once they complete a probationary period), it can save money and time on the back end.
- Job Posting Policies – Standard policy for asking candidates to apply for jobs.
- Structured Interviews – Consistent, job-related questions asked to each applicant set (or sub-set).
- Validated Tests and Assessment Centers

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## Probationary/Instructional Period

- **DO** use instructional periods to properly evaluate new employees
- **DON'T** believe an employee's best performance is to come
- A Probationary/Instructional period is an employee's chance to put his/her best foot forward. Behavior and conduct during these periods is the best that an employer can expect to ever get from that particular employee. Accordingly, don't fall victim to the myth that a probationary employee will improve.
- During probationary/instructional periods watch out for the following:
  - Resignation games
  - Probationary periods should apply to days worked not calendar days
  - You are not permitted to extend probationary periods (alternative option is to terminate employment unless employee signs last chance)

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## Performance Evaluations

- **DO** objectively evaluate employees based on the specific functions of their job
- **DON'T** use a “one-size fits all” performance evaluation tool
- Most employers, at least in theory, conduct evaluations on an annual basis, but twice during a probationary period. If followed, this is probably sufficient; however, problems can arise where evaluations are delayed, missed, or where “special” evaluations are ordered.
- Proper Use:
  - Given consistently or pursuant to a performance improvement plan
  - Covers both positive and negative
- Improper Use:
  - Inconsistent or missed entirely (e.g. “special evaluations”)
    - Collins v. State of Illinois, 44 FEP 1549 (1987 – prima facie case of discrimination where employee showed “special” evaluations at 3, 6, 12, and 18 months where other employees only received annual evaluations

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## Position Descriptions and the ADA

- **DO** define job expectations and essential functions
- **DON'T** assume a job description is an accurate reflection of current essential functions
- A position description (PD) is a structured document assigning work to a specific position as it is expected to be performed after customary orientation and training. The PD should accurately and completely describe the essential functions that are assigned and performed
- Position Descriptions Updates/Analysis
  - Adding objective standards for performance (i.e. keystrokes; error rates; etc.)
  - Cutting of the expansion of claims based on:
    - “personality disorder”—ability to work with the public
    - “attention deficit disorder”—ability to work in an area with traffic/distraction
    - Other questionable, nebulous claims
- A reasonable accommodation does not eliminate an “essential function.” *Reeves v. Swift Transportation*, 446 F.3d 6376

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## Employee Handbook/Personnel Policy Manual



- **DO** have a written set of guidelines setting forth the policies and procedures of the employer
- **DON'T** “borrow” your neighbor’s manual
- Employee Handbooks are also often called Personnel Policy and Procedures Manuals. The Handbook/Manual is a statement of the personnel policies of the Employer and how related business is to be conducted. These essential documents serve to set forth an Employer’s expectations for its employees. It is important that your Handbook/Manual be clear and unambiguous as it can serve as “notice” when defending employment actions.
- “Must Have” Policies
  - Disclosures/Disclaimers (e.g. at-will, no authority to bind, complete agreement); Discrimination/Harassment and Reporting Procedure; ADA/Reasonable Accommodation; Workplace Violence; FMLA; Discipline; BWC; Leave/Benefits; Internal Complaint

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## Discipline



- What is the most common EEOC charge among all bases under Title VII of the Civil Rights Act, Age Discrimination in Employment (ADEA), and the ADA?

### Discharge and Discipline

- In other words wrongful termination and disparate treatment
- How do we avoid EEOC charges alleging wrongful termination or disparate treatment?

**We can’t – but we can set ourselves up for a successful defense**

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## Discipline (continued)



### Objectives of Progressive Discipline:

- To inform employee of what is expected
- To instruct employees on unacceptable conduct
- To interpret policies, rules, and regulations
- To ensure employees act in accordance with policies, rules, and regulations

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## Wrongful Termination



- What reasons would make a termination wrongful?
  1. Gender
  2. Race
  3. National Origin
  4. Age
  5. Disability
  6. Military or Veteran Status
  7. Genetic Information
  8. Retaliation (Workers' Compensation, FMLA, whistleblower, etc.)
  9. Public Policy

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## Just Cause



### Seven Tests for Just Cause

1. Notice
2. Reasonableness of Rule
3. Investigation
4. Fairness
5. Evidence
6. Consistency
7. Appropriateness

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## Conducting an Investigation



### Defining the Investigation

- Purpose
- Timeframe
- Management Involvement and Notification
- Interviews
- Relevant Documents
- What Questions to Ask
- Maintenance of Information

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## Conducting an Investigation (continued)



### Garrity (385 U.S. 493 (1967))

An employee:

has the right to remain silent but can be disciplined for failure to answer questions that are material and relevant to his or her job duties

must understand that his or her answers or evidence gained through the answers would not be used against him or her in a criminal proceeding, except for perjury

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## Public Sector Complexities



- Governments are subject to more constitutional restraints than are private sector businesses: 1st, 4th, 14th Amendments
- Must answer to an electorate
- RC 121.22 (opening meetings); RC 149.43 (public records)
- Many public sector employers fail to devote sufficient time and resources to discharge cases; particularly harassment

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## Case Studies



### Case #1

- Jane was the Office Manager for an Employer from September 2009 to May 2010. During that time period Jane investigated two (2) gender discrimination claims. In May 2010, another employee complained that they were not comfortable bringing complaints to Jane because of her relationships with some employees. Additional staff members provided statements with similar sentiment. The staff members also complained of Jane's disruption of the Employer's working environment and failure to act in the best interest of the Employer. The staffs negative reports came within 4 days after Jane discussed her conclusion and recommendation regarding one of the gender discrimination claims. The Executive Director moved to terminate her employment.
- The stated reason for her termination was her alleged failure to treat employees with dignity, courtesy, professionalism and respect, insubordination and not following the oral and written directives of her supervisor, failure to satisfactorily perform her assigned duties, and failure to perform job responsibilities and conduct herself with honesty and integrity.

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## Case Studies



### Case #1

- Outcome - \$195,000 in compensatory damages and \$105,000 in punitive damages from the Executive Director.

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## Case Studies



### Case #2

- Jane was the Executive Director for an Employer for two months before being terminated. Jane had worked for the Employer for just over a year prior to being hired as Executive Director. Jane alleged that she was tasked with cleaning up 30 years of issues. Immediately after starting her new job her confrontational style began to create friction.
- The Employer terminated Jane's employment for failure to work effectively with her subordinates and commissioners. Jane sued for race discrimination.

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## Case Studies



### Case #2

- "Employer has presented voluminous evidence to support this contention."
- "Given these admissions and the clear record, Jane cannot now reasonably argue that Employer's justification for firing her has no basis in fact. In other words, she cannot show that 'the proffered bases for [her] discharge never happened.'"
- The Employer terminated Jane's employment for failure to work effectively with her subordinates and commissioners. Jane sued for race discrimination.
- Outcome – Employer won on summary judgment

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## Case Studies



### Case #3

- Jane was hired by an Employer as part of its executive level staff. Jane was recruited to fill the position. Jane worked with the Employer for eight years. During her eighth year, Jane was informed that she was terminated due to her position being eliminated. Jane alleged that there were vacant positions open at the time of her termination that she was qualified for and she was not offered any of them. The Employer had a two step grievance procedure for hearing employee disputes. Jane alleged the grievance procedure was reserved for employees who were terminated for unsatisfactory performance. Nearly two years later, Jane sued for wrongful termination and other claims.

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## Case Studies



### Case #3

- “Since we find [Jane] failed to exhaust her administrative remedies and that such exhaustion would not have been futile, we affirm the trial court’s judgment granting summary judgment in favor of the Employer.”
- Other defenses? Remember Thurman

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## Checklist

- Employers often are their own worst enemy when it comes to handling discipline which results in allegations of discrimination. Prior to and while issuing discipline follow this checklist:
  1. Cool Off
  2. Mentally prepare yourself to be in the right frame of mind
  3. Seek privacy
  4. Listen to the employee
  5. Act and think objectively
  6. Assume responsibility for Employer rules (do not apologize for what is being done)
  7. Recognize the probable effect of your actions on this employee and other employees
  8. Explain the consequences of a future violation
  9. Encourage self-discipline
  10. Encourage the employee to relate his understanding of the decision
  11. Seek help – if necessary
  12. Prepare a written summary

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## Tips and Best Practices

1. Provide copies of all work rules, ethics laws, etc., in an “orientation” package; obtain a signed receipt from new hires
2. Conduct initial and ongoing employee training concerning rules and policies; maintain copy of handouts, records of dates of training, and sign-in lists to document who attended
3. Conduct annual “survival training” for all staff; helps provide evidence of the fact that employee was “on notice”
4. Review PPMs and work rules being sure to reflect that sex on duty, solicitation of sex, sexual harassment, sexual activity, possession of pornography on duty, sending sexually explicit email or Internet information, etc., are all termination level offenses; consider a policy prohibiting or limiting office romances, especially where one party supervises the other

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## Tips and Best Practices

5. Early in process, prior to any formal predisciplinary conference, call employee in to a meeting and explain that nothing, to date, is yet in writing, but Notices of Predisciplinary Conferences and Removal Orders are “public records,” and offer employee the chance to resign before a paper trail is created
6. Beware of how disciplinary charges are worded; borrowing terminology and/or phrasing from criminal code can impose a higher standard of proof
7. Nail down the guilty employee’s story at the earliest possible point in time prior to hearing, then offer evidence, at the appeal hearing, of how the story has changed as the case has unfolded
8. If case is worth winning, then it is worth the cost of having a court reporter and transcript; actual quotes can be deadly in a brief and be of exceptional value in collateral litigation

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## Tips and Best Practices

9. Take time to perform a post-hearing “autopsy,” asking:
  - What did we learn from this case?
  - What worked; what didn’t?
  - Are there past practices that we now need to eliminate?
  - Did items come to light that we now need to fix?
  - Are there work rules or contract provisions that proved to be problematic?
  - Were there witnesses who betrayed us or waffled on critical testimony
10. Consider using a specialist to investigate or present the case

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Questions?



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