

The number of employment charges and lawsuits filed continue to be on the rise. It is not unusual for these cases to comprise 60% or more of the federal court docket. Furthermore, two of three workplace related lawsuits go to trial and are won by the employees. When juries find for the plaintiff, they hand out sizeable damage awards.

Whether you ultimately win, lose or settle an employment case, you will incur large expenditures of time, money and other resources. Courts are allowing evermore discovery- investigation into employers' practices, procedures, personnel, and business information- to assist plaintiffs in developing their cases.

Employers who do not think proactively about ways to avoid being drawn into the world of employment litigation do so at their peril.

Here are six practical steps any employer should consider implementing:

### **1. Have an outside professional conduct a periodic employment audit.**

**For example, how current and effective are your:**

- Employment applications?
- Employee handbook or personnel policies?
- Hiring processes?
- Job evaluation and salary determination procedures?
- Lateness, absenteeism and leave of absence policies?
- Pay practices (overtime, travel time, bonuses, etc.)?
- Classifications of exempt and non-exempt jobs?
- Affirmation Action plans?
- Record keeping and retention practices?

### **2. Improve your documentation.**

- Adopt a standard and uniform method for documenting personnel actions and investigations.
- Use standard forms that are well thought out and that will prove useful later.
- Ensure that your disciplinary action forms and performance evaluation forms contain a section for employees to acknowledge the discipline or evaluation and to offer their comments if they desire. This affirmatively provides employees an initial "outlet" to respond, and their comments could alert you to a potential problem you can address sooner rather than later.

### **3. Recognize and deal with “problem” supervisors.**

- Supervisors who frequently have problems take the “bull by the horns” and address those.
- Sometimes, employers allow these shortcomings to go unchecked because, for example, the supervisor is achieving maximum production levels. Turning a blind eye because of other positives is a big mistake.
- One of the worst bits of evidence that can come into a discrimination trial is that the employer has done little or nothing to try and correct similar problems in the past.

### **4. Regularly train your supervisors.**

- Most employment lawsuits are based on the actions, comments, or inactions of supervisors.
- Supervisors also need to understand that they may well be named in employment lawsuits and, in some instances, can have personal liability.
- Not only is training a sound and responsible practice, but federal courts make clear that employers who do not regularly train their supervisors do so at their peril.

### **5. Adopt a sound process of progressive discipline.**

- Dot the “I s” and cross the T s”.
- Check out the employee’s story.
- Consider how similar situations have been handled in the past.
- Gather any additional evidence.
- Clarify uncertainties.
- Consider extenuating or mitigating circumstances.
- Take a second look at each situation before you take action.
- When an employee enters in to a progressive disciplinary process, one of two scenarios is most likely. First, the employee “shapes up” and is no longer a problem, or secondly (and more likely), they will err again and you will have a more factually airtight case supporting termination.

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## **6. Have an effective and well publicized**

### **Internal complaint process.**

- The United States Supreme Court has recognized that an employer who has internal processes and procedures employees can use to raise discrimination or harassment issues provides an affirmative defense that can defeat the claim.

### **In Summary:**

- Eliminate potential problems.
- Put mechanisms in place that will allow you to learn of potential problems before they become external
- Put procedures in place establishing that you will be viewed as a fair and responsible employer.
- Provide a solid foundation of positive answers to the critical legal question:
- “Did the employer treat the employee fairly?”