HR SPECIALIST
Employment Law
The Dirty Dozen: 12 worst manager mistakes that trigger lawsuits … pg. 7
Trusted compliance advice for HR professionals
October 2019 – Special Edition

In The News …

Denying restroom breaks: a manager's $100k mistake

Home Depot agreed to pay $100,000 to settle a lawsuit by a worker who was fired for leaving his post to make emergency runs to the restroom. The employee had an ADA-protected disability (irritable bowel syndrome) that the EEOC said should have been accommodated. How far must you go to accommodate disabilities? Find out at **www.theHRSpecialist.com/ADAlimits**.

I-9 audits rise by 300%; get your forms in order

If you haven't reviewed your organization's I-9 forms and process, now's the time. Immigration and Customs Enforcement (ICE) conducted I-9 audits of 5,981 employers last year, a huge spike from 1,360 in 2017. Related immigration arrests (of employees and managers) jumped by 600%. Access our free report, *I-9 Forms: A Guide to Employment Verification*, at **www.theHRSpecialist.com/I-9report**.

Ignore a DOL inquiry, go directly to jail

The owner of a California drywall company spent time behind bars (and paid a $48,000 contempt penalty) after a federal judge grew tired of his delay tactics. The Department of Labor asked the judge to intervene after the owner refused to provide materials subpoenaed in a wage-and-hour case. *The lesson:* Respond quickly; the law is on their side.

See more news on page 5

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Get FMLA right! HR can be *personally* liable

If you're in charge of FMLA administration in your workplace, beware: HR professionals and managers who bungle an employee's request for FMLA leave could be held *personally* liable for damages. That may mean thousands out of your own pocket!

Why? A handful of federal employment laws—including the FMLA and wage-and-hour law—say that managers can be held personally liable for conduct "in the scope of employment."

Why sue HR and managers? Plaintiff lawyers increasingly believe two pockets are better than one, and they think this "personal touch" may influence a supervisor to advocate settling the case.

Advice: The growing risk of personal liability gives even more incentive to make sure you and your supervisors know exactly how to respond to employees' requests for leave.

Recent case: When Cathleen's son broke his leg and needed surgery, she told HR she needed to be out for about 10 days. For two weeks, Cathleen repeatedly emailed the HR director, asking what information was needed to process the request.

Continued on page 2

Free Report How to Wipe Out Fraud and Abuse Under FMLA

For an 11-step process to thwart employees inclined to "work" the system, download our free white paper, *How to Wipe Out Fraud and Abuse Under FMLA*, at **www.theHRSpecialist.com/FMLAfraud**.

'Body-language bias': Silent, but legally deadly

Sometimes, your managers can cause big legal trouble without even saying a word. Recent court rulings show that a simple sigh, shrug or disappointed look can be enough if the worker on the receiving end perceives the behavior as disapproval.

This can come into play when a supervisor sends such negative vibes in response to an employee's request for legal accommodations or job-protected leave. Take the FMLA, for example. Any message that managers send to discourage employees from taking FMLA leave could be considered interference with FMLA rights.

Any words or actions by a manager that discourage employees from using their legally mandated rights could be proof of retaliation.

Advice: Train supervisors how to handle leave requests in a supportive, positive and upbeat way.

Recent case: A Pittsburgh hospital was having financial trouble and needed to cut staff. The exec team made initial decisions about who to cut—including Lynn, a nursing director—but didn't immediately announce those decisions.

Meanwhile, Lynn put in a request for intermittent FMLA leave to care for her sick father. Her request was approved.

After a few weeks, a supervisor asked Lynn if she could try to schedule her father's doctor visits in the early

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FMLA: personal liability

(Cont. from page 1)

At first, she got no response. Then the HR director sent Cathleen several emails asking her to complete "paperwork" without detailing what information she was seeking. Cathleen asked for clarification, but received none. Cathleen did send in a doctor's note, but was told it was insufficient.

Finally, during the leave, the HR director told Cathleen they needed to meet before she would be allowed back to work. After many attempts to schedule a meeting, HR suddenly informed Cathleen she was being terminated for abandoning her job.

She sued, alleging FMLA violations. She added the HR director as a defendant, arguing she should be held personally liable.

The court agreed. It reasoned that because it was exclusively the HR director who stonewalled Cathleen's FMLA request, ignored responses and ultimately recommended termination, she could be considered her "employer" under the FMLA. (*Graziadio v. Culinary Institute of America*, 2nd Cir.)

'Body language bias'

(Cont. from page 1)

morning. Lynn says this request was accompanied by sighs and body language indicating her boss disapproved of her taking leave.

Soon after, Lynn was terminated as planned. She sued, claiming FMLA interference and FMLA retaliation. She told the court that she felt constrained against taking as much leave as needed because of the boss's demeanor and his request to alter her leave schedule.

The court dismissed Lynn's retaliation claim because the decision to eliminate her job occurred before she requested leave. But the court allowed her FMLA interference claim to go forward, based largely on the supervisor's nonverbal negative response to her leave request. (*Cimino v. Magee-Women's Hospital*, WD PA)

Medical mystery: When can you ask applicants about their health & injuries?

When evaluating applicants, it's legal to ask whether a person can physically perform the job functions. Just make sure your questions are "job-related and consistent with business necessity."

However, you should never factor old injuries or medical conditions into your decision. The Americans with Disabilities Act (ADA) prohibits employers from discriminating against qualified workers based on a "record of disability."

Employers can only consider the applicant's current condition, not any past injuries or illnesses.

Recent case: A Washington state manufacturer refused to hire an applicant because he was injured at a previous workplace more than 10 years before. The man complained to the EEOC, who filed an ADA disability discrimination lawsuit on his behalf.

The company ended up settling the case for $175,000. It also agreed to hire the man and fix its hiring practices.

Know your ADA obligations. The ADA requires employers to:

1. Determine if the applicant has skill and experience to perform the job.

2. If he or she does, the employer may make a conditional job offer pending a physical examination.

3. If the exam reveals any current limitations, the employer must determine whether those limitations prevent the applicant from performing any of the job's essential functions.

4. If so, the employer and applicant must determine if reasonable accommodations would allow the applicant to perform the job's essential functions. Only if no accommodation can be found may the employer refuse to hire.

Online resource For a listing of lawful and unlawful medical-related questions to ask applicants, go to **www.theHRSpecialist.com/medquestion**.

Foul-mouthed worker trashes his boss on Facebook: Can you fire him?

Don't be so quick to fire employees who go online to attack your organization or one of its supervisors. As odd as it may seem, those employees may be protected under federal labor laws that allow workers to collectively discuss—either online or in-person—the company's working conditions.

Recent case: Employees at a New York City catering service were seeking union representation. Two days before the election, a supervisor allegedly chastised workers in front of customers.

An employee posted this gripe about the supervisor on Facebook: "*Bob is such a NASTY MF-er don't know how to talk to people!! F*** his mother and his entire f***ing family!! What a LOSER!! Vote YES for the UNION!!*"

When the employee was fired, the union filed an unfair labor practices charge with the National Labor Relations Board.

NLRB's ruling: The employee's exhortation to "Vote YES for the UNION" apparently made all the difference. The NLRB ruled that the Facebook post was protected activity under the National Labor Relations Act (NLRA) because it was focused on the upcoming union election.

The NLRB said that because similarly coarse speech was commonly used on the job at catering firm, it was not offensive in the context of the Facebook post and did not constitute insubordination.

Online resource For advice on how nonunion employers need to comply with the NLRA, go to **www.theHRSpecialist.com/NLRBnonunion**.

Workplace bullying can spark criminal charges

Need help convincing managers to believe in (or enforce) your workplace civility rules? Then add this to your next training session: Employees who harass and abuse co-workers—and supervisors who turn a blind eye to such bullying—could end up facing time in jail.

Recent case: Kenneth, a 17-year-old high schooler, worked part-time at a Dairy Queen in Missouri. He was bullied at school, and it continued at his job.

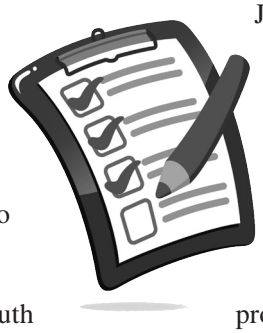
Perhaps the worst offender was his 21-year-old Dairy Queen manager, who repeatedly ridiculed the teen, threw food at him, called him names and made him do tasks that others didn't have to do, including laying on the floor and cleaning it by hand. One day, Kenneth came home from work and committed suicide.

A jury concluded that his death was "due to harassment" and that the DQ manager was the "primary actor." As a result, the manager was arrested and charged with second-degree involuntary manslaughter.

Training handout Download and distribute our Memo to Managers training article, *Avoid the Perception of Bullying: 8 Do's and Don'ts*, at **www.theHRSpecialist.com/bully.**

Create a 'hiring checklist' for your managers

It may be tempting, in some cases, to take shortcuts in your hiring process, but don't do it. Give managers clear, specific hiring procedures to follow for every new position. Make a checklist, if necessary.



Practice the same procedures for internal and external candidates. Match qualifications with job descriptions and be able to defend your decisions.

Recent case: When Joyce applied for promotion at a South Carolina hospital, her supervisor said she probably wouldn't get it because she was rumored to be having an affair with a doctor. Joyce denied the affair and complained.

The hospital CFO took over the selection process. He reviewed Joyce's application but never interviewed her. Instead, he hired a friend's husband who was less qualified.

Joyce quit and sued, alleging discriminatory failure to promote and defamation. A jury sided with her, calling the hiring process "peculiarly informal."

The result: $161,000 in damages. (*Dennis v. Columbia Colleton Medical Center Inc.*, 4th Cir.)

Don't demand '100% healed' before return

Rewrite your policy if it requires that all workers out on leave get a doctor's note certifying that they're completely healed before they can return to work.

Such a "100% healed" rule could run afoul of the ADA or the FMLA. Consider changing the rule to one that allows flexibility for disabled workers as well as those who seek reinstatement after FMLA leave with some medical restrictions.

Recent case: A Las Vegas company that operates casinos will pay $3.5 million to settle an EEOC disability discrimination lawsuit. It claimed that, since 2012, the company has violated federal law with a policy requiring employees with disabilities or medical conditions to be 100% healed before returning to work.

The problem: Such a policy does not allow for the interactive process mandated by the ADA to identify reasonable accommodations that might allow disabled employees to do their jobs. The EEOC also claimed that the company regarded some sick and injured employees as disabled, which also violates the ADA.

Legal Briefs

Exempt or not? 2.5 million reasons to know the rules

Snack food giant Utz Quality Foods agreed to pay $2.5 million to 1,900 delivery drivers to resolve claims that it failed to pay the workers overtime. The company incorrectly designated them as being exempt from the Fair Labor Standards Act.

The lesson: Employees are increasingly aware of their pay rights. Labeling employees "exempt" doesn't make them so—make sure they actually meet the criteria. Find a checklist to determine exempt vs. nonexempt status at **www.theHRSpecialist.com/FLSAchecklist**.

More than $1: Locked exit costs Dollar Tree store $129k

Regularly check all your emergency exit doors to ensure that employees and customers can escape quickly and easily. OSHA recently slapped a Dollar Tree store in Dallas with a $129,336 fine for having its emergency door locked. OSHA arrived for a surprise inspection after receiving a tip from an employee who was claiming unsafe working conditions.

Tip: Also, make sure your doors aren't blocked by boxes or other supplies.

A Swift reaction helps stop employee from embezzling

The finance director at a Minnesota health clinic was charged with stealing $80,000 from the company. Her arrest came after a co-worker wondered why a notation about Taylor Swift concert tickets showed up in the company's account statement. An investigation found 330 personal purchases using the company credit card.

And the Bad Blood between the employer and ex-employee? The company refused to Shake it Off, telling the employee We are Never, Ever Getting Back Together.

The lesson: Spread responsibility for your accounting and transactions so no single employee has unsupervised access to accounts. Find more tips at **www.theHRSpecialist.com/expensefraud**.

Get Legal Advice for YOUR State—FREE Sample

HR Specialist continues to add to its roster of state-specific *Employment Law* newsletters. To view sample issues of all available states, go to **www.theHRSpecialist.com/states**.

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Managers joking about age, disability? That's a million-dollar mistake

Your managers probably know it's unlawful to discriminate in hiring and firing based on a person's age or disability. But they may not realize that same law makes it unlawful to verbally harass workers based on those protected characteristics.

Make clear to supervisors that throwing—or even allowing—such insults in the workplace is subject to discipline, including termination. That's true even if the comments are mad in jest. Juries won't find such comments humorous.

Case No. 1: 'Old' worker comes into new money. A supervisor casually called a 58-year-old female worker various ageist names, including "*outdated*," "*part of the old culture*" and a *"dumb female."* She quit, citing job stress, and was replaced by a 20-year-old man.

She sued for age harassment and won. The jury concluded that the company acted with malice, so it awarded $28 million in punitive damages.

Case No. 2: 'A culture of joking.' Augustine, a prison guard, sued for disability harassment, saying a supervisor often mocked his stutter in front of other guards. On one occasion, the supervisor mimicked Augustine's stutter on the prison's broadcast system right after Augustine made an announcement. A fellow supervisor said there was a "culture of joking" about his stutter in the workplace.

Augustine sued for disability harassment. A jury awarded him $500,000, saying the harassment was severe and pervasive.

Online resource Learn the EEOC's definition of unlawful workplace harassment at **www.eeoc.gov/laws/types/harassment.cfm**.

Remind supervisors: Never make notes directly on résumés and applications

During the hiring process, HR or hiring managers should never note applicants' race, sex, religion, age or national-origin information on their applications or any other pre-offer documents, unless you're required to do so under affirmative action laws.

Even better: Advise hiring managers to refrain from writing anything on applications or résumés. Since you must retain those documents, making notations of any kind—including "secret codes" or private rating systems that identify or categorize recruits—could create a dangerous paper trail that may be tough to explain later.

For example, suppose you circled an applicant's 1981 college graduation date on his résumé. Could that be evidence of age bias? Possibly.

Recent case: After a farming supply company gave applicants written tests, it noted the applicants' race and sex on the test. The well-meaning goal: assess whether the test had a negative impact on minority hiring. A group of applicants sued for hiring bias.

The company argued that it merely "observed" the race and sex. The court didn't buy it.

While the company didn't formally request the data, it still required the information for employment. As a result, the court let the applicant group pursue a class-action suit. (*Modtland v. Mills Fleet Farm*, D. MN)

The 'butter knife candidate'

Here's an example of why it's best to avoid writing any kind of notes on résumés or applications: An interviewer once wrote the words "butter knife" on a person's paper application. It was his personal code term for "a useful tool, but not very sharp." While that may or may not be discriminatory, a court likely won't find it as humorous as the manager did.

$200k lunch? Don't dock pay, assuming no-work break

A Texas hospital must pay $200,000 to settle a lawsuit by dozens of employees who claimed the company deducted 30 minutes from timecards, whether the employees took a lunch break or not. *The lesson:* Timecards must reflect actual work. Managers should track whether workers are completely relieved of their duties during breaks.

Bad weather no-shows: Must you still pay them?

Say bad weather strikes and an exempt employee calls to tell you she can't make it in to work. Can you deduct a full day's pay from her salary? Yes, you can. What if your workplace closes due to bad weather? That's a different story. Download our printable flowchart that helps you decide whether you must pay staff (exempt and nonexempt) for inclement-weather-related absences at **www.theHRSpecialist.com/weather**.

'Anti-American' bias: Fired worker gets $6 million

Most national-origin discrimination lawsuits are brought by foreign-born workers. But in a unique twist, a Pennsylvania man won a $6 million jury verdict, saying he was fired for being "ethnically American." He claimed that his Israeli-based employer favored Israeli-born employees in hiring and promotions. Learn about the case and national origin discrimination at **www.theHRSpecialist.com/Americanbias.**

Must you give access to personnel files?

"*I want to see my personnel file*," an upset employee may ask one day. Are you obligated to show it to him? No federal law guarantees such rights. But some states do spell out the terms under which employees can inspect their personnel files. For information on all 50 state laws on the subject, see our white paper at **www.theHRSpecialist.com/personnel50**.

Policy check: Do you offer parity in parental leave?

Federal law makes no assumptions about women and men having different parental roles. Employers shouldn't either.

Cautionary tale: Cosmetics giant Estée Lauder's policy offered six weeks of paid parental leave to new mothers following birth or adoption. New fathers received only two weeks. They sued and the company has agreed to pay $1.1 million to more than 200 male workers who were discriminated against. Read an EEOC fact sheet on parental leave at **www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#IC3**.

Beware efforts to sell you workplace posters, forms

Various government agencies are warning employers about misleading advertising suggesting that employers must buy certain government posters and forms from private companies. In reality, most forms and posters you need are available free on government websites. That includes the revised version of the Form I-9 (go to **www.uscis.gov/i-9**). *Note*: You can download most at the U.S. Department of Labor's Poster Advisor site, **www.dol.gov/elaws/posters.htm.**

$150k for the hair on his chinny, chin, chin

An employee at a Texas manufacturing plant refused to provide a hair sample from his head for a drug test. *The reason:* His religion bars cutting hair from the scalp. He offered to provide hair from his beard instead, but the company refused and fired him. The EEOC sued on his behalf and he settled for $150,000 (*EEOC v. U.S. Tubular Steel*). **The message:** You must "reasonably accommodate" employees' religious requests. Most accommodations are simple, as in this case.

You be the judge

Employee injured while driving for coffee: Is he due workers' comp?

In most states, employees can earn workers' comp coverage for injuries that occur "in the course of employment." That can be a fuzzy term. You be the judge.

The case: A plumber for a New Jersey plumbing company drove to a work site but the person he was meeting wasn't available for 45 minutes. He decided to drive to a deli five miles away to get coffee. On the way, he was involved in a traffic accident and broke both legs. The workers' comp agency awarded him 100% benefits. The employer appealed, saying the accident didn't arise "in the course of employment." Was he due workers' comp?

The ruling: A state appeals court rejected the company's argument and awarded the benefits. It said the plumber engaged in "exactly the kind of brief activity which if embarked on by an inside employee working under set time and place limitations, would be compensable."

The lesson: When off-site employees are injured in accidents during slight diversions (such as coffee breaks), courts will probably say they're equivalent to on-site worker diversions, meaning they'd be eligible for workers' comp.

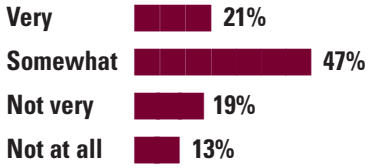
Harassment claim? Give bosses a 3-phrase script

The #MeToo movement has made it vital that managers properly handle sexual harassment complaints. Do role-play training and encourage managers to use a simple three-phrase script:

- *"I'm glad you told me."*
- *"You are very important to us."*
- *"I will help you immediately."*

Then, train managers to report the incident to HR. For tips on sorting out he-said-she-said harassment cases, go to **www.theHRSpecialist.com/credibility**.

How confident are you that your managers would react correctly to a harassment complaint?



Source: HR Specialist survey

Rejection response: The legal way to say 'Thanks, but no thanks'

How you handle the turning down of job candidates can mean the difference between someone leaving with a positive impression of your organization and one who walks directly into a lawyer's office to file a multi-million-dollar lawsuit.

It's important to send a well-crafted rejection letter to candidates who were interviewed. It assures them that they were seriously considered and it keeps you from having to verbally explain why you rejected them. Here are seven tips to creating a polite, legally safe letter:

1. Give a neutral, nonspecific reason. No law requires you to tell applicants why they weren't hired.

2. Make the letter short and direct, gracious and polite. It's OK to use a form letter, but personalize it by inserting the applicant's name.

3. Thank the person for applying. Then wish the candidate good luck in the future. Express thanks for their interest in the organization. Sign the letter "*sincerely*" or "*best wishes*." Include your name and job title.

Give a neutral, non-specific reason. No law requires you to tell applicants why they weren't hired.

4. Don't say you decided to hire someone more qualified or that you received applications from several more-qualified candidates. *Reason*: A lawyer for a rejected employee may ask to see the application of the person who was hired and other top candidates.

5. Don't promise further consideration. Don't say something like, "*We will keep your résumé on file should a suitable opening occur in the future.*" If you later hire someone else less qualified, you could be vulnerable to legal action. Don't suggest applying for future jobs. False hopes are often the precursor to a lawsuit.

6. Avoid phrases such as "*I'm sorry*" or "*unfortunately*." They feed the rejected candidate's negative feelings.

7. Don't delay. Write the letter soon after making a hiring decision. Dragging out the candidates' wait for weeks will only build resentment.

A sample letter

Dear [name],

Thank you for taking time to meet with us to discuss the [position title] at [employer]. I wanted to let you know that we have offered the position to a different candidate.

It was a pleasure meeting you and learning more about your accomplishments and skills. We wish you the best of luck in your job search.

Sincerely,

[Interviewer's name]

The HR I.Q. Test

1. What's the No. 1 reason that employees say they go to work when they're actually sick?
- a. Saving my sick days for childcare/eldercare emergencies
- b. Too much work to do
- c. Other people depending on me at work

2. What does federal law say about extra pay for employees who work weekends, nights or holidays?
- a. It's required at time-and-a-half
- b. It's required at double time
- c. It's not required, but some state laws may apply

3. Percentage of U.S. workers who say they are open about their political beliefs on the job:
- a. 25% b. 52% c. 73%

4. Which types of employees are 2.5 times more likely to access pornographic websites on company-owned computers?
- a. Workers whose monitors don't face the office door
- b. Mobile workers using company laptops
- c. Home-based workers using company computers

5. What are the three fastest-growing occupations, in order, in the next 10 years?
- a. Network/data communications analysts, home health care aides, software engineers
- b. Home health care aides, software engineers, medical assistants
- c. Software engineers, environmental scientists, home health care aides

6. To be eligible for FMLA coverage, employees must have logged at least how many hours with that employer in the previous 12 months:
- a. 1,520 hours
- b. 1,025 hours
- c. 1,250 hours

7. The three most common types of job discrimination complaints filed by U.S. employees (in order) are:
- a. Age, sex, race
- b. Retaliation, sex, disability
- c. Race, age, retaliation

Sources: 1. LifeCare survey; 2. U.S. Department of Labor; 3. Vault.com survey; 4. ScanSafe survey; 5. BLS; 6. U.S. Department of Labor; 7. EEOC.

Answers: 1. c 2. c 3. b 4. b 5. a 6. c 7. b

Dirty Dozen: The 12 worst manager mistakes that trigger lawsuits

Lawsuits by employees against their employers have grown tremendously in the past decade. Sometimes those lawsuits have merit, sometimes they don't. But, either way, those lawsuits cost time and money to fight—money that is better spent on product development, training and raises.

Most lawsuits are not triggered by great injustices. Instead, simple management mistakes and *perceived* slights start the snowball of discontent rolling downhill toward the courtroom.

Here are 12 of the biggest manager mistakes that harm an organization's credibility in court. Use these points as a checklist to shore up your management training on employment-law compliance:

1. Sloppy documentation

Most discrimination cases aren't won with "smoking gun" evidence. They're proven circumstantially, often through documents or statements made by managers. Documents, particularly email, can help the employee show discriminatory intent. *The lesson:* Remind managers to always speak and write as if their comments will be held up to a jury someday.

2. Not knowing policies, procedures

Courts expect supervisors to know their organization's policies and procedures. If a manager admits ignorance, legal experts say juries typically view that as purposeful, not forgetfulness.

That's why it's vital to make sure managers understand company policies. When in doubt, encourage them to check with HR before taking action.

3. Inflated appraisals

Performance reviews are one of the most important forms of documentation, yet managers sometimes inflate the ratings for various reasons. If a manager later tries to cite "poor performance" for that same person's termination or demotion, those overly positive appraisals create a heap of credibility concerns. Reviews must be direct, honest and consistent.

4. Shrugging off complaints

Turning a blind eye to any employee's complaints of unfairness or perceived illegal actions is a guaranteed credibility buster. Supervisors' comments like "*I'm not a baby sitter*" or "*Boys will be boys*" will hurt employee morale and jeopardize the company's standing in court.

5. Interview errors

It may be easy for managers to answer the question, "*Why did you hire that person?*" But they often run into trouble when they have to answer, "*Why did you reject certain other candidates*?" That's because rejection decisions typically aren't well-documented and the decision-maker may not recall the reasons later.

During interviews, managers must stay away from any question that doesn't focus on this central issue: How well would this person perform the job he or she has applied for? Never ask about age, race, marital status, children, day care plans, religion, health status or political affiliation.

6. Changing your story

If an organization changes its reasoning for making an adverse employment decision (firing, discipline, demotion, etc.) in midstream, its credibility is shot. Be straight with employees from the start about reasons for discipline. Don't sugarcoat critiques.

7. 'Papering' an employee's file

Most managers hear the mantra, "Document, document, document." But it is possible to *overdocument*, especially when it occurs right before a firing. Courts will be able to see through a rush of disciplinary actions cited in the days before a termination.

Be consistent in documenting negative and positive performance and behavior of employees. It's best for managers to keep a "performance log" for each employee, regularly making notes in each file.

8. Being rude, mean-spirited

An organization can have the best case in the world, but if the key supervisor comes across as rude, insensitive and mean, the attorney's job of selling the case to the jury will be much harder. Use the golden rule in handling staff.

9. Careless statements to officials

When responding to charges filed with the EEOC or state agencies, employers often have to submit position statements. Managers may be called upon to help provide some of that information. You can bet the employee's attorney will review these statements, particularly affidavits, and introduce them at trial, especially if your story has changed. Keep your story consistent.

Most lawsuits are not triggered by great injustices. Instead, simple management mistakes and perceived slights will start the snowball of discontent rolling downhill to the courtroom.

10. Lack of legal knowledge

Juries will expect—and the plaintiff's lawyer will encourage them to expect—that employers stay abreast of developments in employment law. Refresh your managers regularly on your organization's policies with training and regular e-reminders.

11. Dictating accommodations

Under federal law, employers must make "reasonable" workplace changes to accommodate an employee's disability. How to choose those accommodations? It must be a give-and-take process to reach a solution, the law says. Managers too often try to dictate the solution.

12. Firing too fast

Managers who fire without first trying to improve the worker's performance will appear insensitive and potentially discriminatory in court. Conversely, managers who try to improve things before resorting to firing will stand a better chance of avoiding a lawsuit.

Who pays for uniforms?

Q We require employees to wear uniforms. Can we deduct from their paychecks the money to buy and clean the uniforms? — L.B., Massachusetts

A You can, but with caution. Under federal law, the payroll deductions—whether for the uniform cost, cleaning or both—cannot reduce an employee's wages below the minimum wage. Similarly, the deductions can't reduce the amount of overtime pay due to employees in any workweek. **Note:** Some states require employers to foot the bill for uniforms.

Don't require employees to visit psychologist

Q Can we require an employee to receive psychological counseling or treatment if his behavior has become a hindrance to his job performance? — N.M., Kansas

A No, you can't require employees to receive any medical treatment—psychological or otherwise—as a condition of continued employment. But you're not without recourse. Even if an employee is protected by the ADA (i.e., he or she has a mental condition that rises to the level of a "disability"), that employee is still subject to discipline, up to termination, if he or she violates your policies regarding misconduct. **Final tip:** Remember the "golden rules" of employee discipline: evenhanded enforcement and careful documentation.

Must we post job openings in-house?

Q We rarely post high-level management jobs internally. Must we post all jobs internally so that someone can't file suit claiming "pre-selection" or that he or she never had a chance to apply? — K.L., California

A While no law specifically requires that all vacant jobs be posted in a particular way, the failure to post vacancies internally opens the door to "glass ceiling" discrimination claims. This is especially true if your practice has resulted in a homogeneous group of high-level managers. **Bottom line:** Cut the chances of lawsuits by regularly posting *all* job vacancies.

References: Stick to the facts

Q An employer asked us for job verification on an employee we fired. It has a written consent form from the worker allowing the query. Can I release information regarding the ex-employee's history with us? — R.F., Colorado

A Don't even think about providing a negative job reference before your attorney reviews the release! In recent years, courts have become more and more tolerant of defamation claims based on job references. From a liability perspective, your safest bet would be to provide nothing more than verification of the former employee's job, title and dates of employment.

'Porn spam': Is it sexual harassment?

Q Some of our employees get a lot of spam email that advertises porn sites. I'm concerned that an employee will consider this junk as creating a hostile work environment. What can we do? — M.C., Minnesota

A Yours is a problem facing many employers. To protect your organization, attack it in three ways:

1. Adopt a communications policy that says employees may use computers for business purposes only, and that visiting a website containing sexual material is grounds for discipline.

2. Invest in software that filters and screens your email system based on sexual content.

3. Instruct employees to delete pornographic spam without opening the messages. Employees who get lots of porn spam may be accessing porn sites. Investigate and act promptly.

Run FMLA time concurrently with sick leave

Q We have an employee who is going to be out eight weeks for a qualifying serious health condition. The employee isn't requesting to use FMLA leave because she has enough paid sick leave. Can employees choose *not* to use FMLA leave even though they meet the qualifications? And if they qualify for FMLA leave, can we make them use it whether they want to or not? — C.T., Georgia

A It is the employer's obligation to designate leave as FMLA-qualifying whenever it becomes aware of an FMLA-qualifying event. It's not up to your employees to pick and choose when they want to use FMLA time, even if they have sick time or other forms of paid leave in the bank. You should immediately designate this employee's eight weeks as FMLA time, to run concurrently with her paid sick leave. That way, she'll only have four weeks of unpaid FMLA time remaining for the year after she uses up her paid leave. You also should check your FMLA policy to make sure that it requires employees to use FMLA time concurrently with their sick time.

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