

In The News ...

Can you ask employees if they got the COVID vaccine?

The EEOC says employers can legally ask employees about their COVID vaccination status without violating labor laws. But avoid follow-ups like “Why haven’t you gotten the shot?” or “Did you have side effects?” Those could identify a disability and, thus, violate the ADA’s limits on medical inquiries. Any medical questions must always be “job-related and consistent with business necessity.”

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. Employer I-9 audits conducted by the Immigration and Customs Enforcement (ICE) spiked by over 300% the past three years. 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.

Remote terminations: Call or Zoom?

Terminating in person is always best, but if that’s not possible these days, do it via a phone call, not a videoconference chat. One reason: Employees may be able to record the termination talk. Even if you have nothing to hide, it’s not a good thing to display to a jury. For tips for legally safe terminations, go to www.theHRSpecialist.com/zoomfire.

See more news on page 5

In this issue

This month’s employment law cases and advice 1-4
News: Breaks, weather, bias, leave, posters, files5
 The legal way to say ‘Thanks, but no thanks’6
Nuts & Bolts: 12 mistakes that spark lawsuits.....7
Mailbag: Your questions answered8

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 the added complexity of leave issues is increasing your chances of a costly FMLA mistake.

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.

The COVID-19 employee lawsuits: Top 5 threats

First came the virus ... then came the lawyers.

Even as the pandemic eases, employers are facing a wave of legal complaints from employees. Here are the most common claims and tips on avoiding them:

1. Retaliation, wrongful termination/whistleblowing. Many lawsuits allege employees were terminated or retaliated against for raising COVID-related safety concerns. *Example:* In Kentucky, a worker claims he was fired for complaining about a lack of safety masks. Remind managers that employees have a legal right to voice their safety concerns.

2. Return-to-work / unsafe conditions. Employees are claiming

they want to stay remote or not return to the workplace due to unsafe conditions or other concerns. Know the law about when you can require an employee to return—and

when you must accommodate.

3. Discrimination and harassment. Employers may think they are “protecting” vulnerable people—older workers or those with preexisting conditions—by terminating them or refusing to hire them. But that could violate anti-discrimination laws. In New York, a man sued, saying he was laid off during the pandemic based solely on his age. Other suits claim disabled or pregnant staff were singled out for discharge.

Continued on page 2

Coronavirus-related claims	
Type of employee complaint	% of claims
Retaliation/wrongful discharge	40%
Unsafe work conditions	23%
Disability discrimination	15%
FMLA/Families First leave law	12%
Wage and Hour	6%
Other	4%

Source: Ogletree Deakins study

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.)

COVID-19 lawsuits

(Cont. from page 1)

4. Employee leave. While the emergency paid sick leave and FMLA leave in the Families First Coronavirus Response Act has expired, the legal claims have just begun. Damages could be doubled. Encourage your managers to bring leave-related questions to HR.

5. Wage-and-hour. With the spike in remote work, employers are seeing a rise in employee lawsuits for overtime, off-the-clock work and wage claims over time spent completing health screenings and temperature checks. If you’re doing layoffs or closings, give enough advance notice to comply with federal or state WARN Acts.

Online resource For more on COVID compliance, visit our portal page at www.theHRSpecialist.com/corona.

In COVID era, understand new rules of hiring, inquiries, privacy, accommodations

COVID may be easing, but the legal side effects will linger for a while. It’s important to continue to follow EEOC guidance on key HR issues:

Hiring. You can screen job applicants for COVID symptoms and ask if they’ve been vaccinated after making a conditional job offer, as long as you do so for all new hires in the same job type. However, it’s not permissible to delay a start date, refuse to hire or terminate a person because he or she falls into certain at-risk COVID-19 populations, such as older, pregnant or disabled. That remains an ADA violation.

Medical questions. During the pandemic, employers can ask questions about vaccination status or to determine if employees pose health risks at work. Taking an employee’s temperature and testing for COVID-19 is permissible, and if employees show symptoms at work, you can send them home to ensure co-worker safety.

Confidentiality. Employers should store all medical information related

to COVID-19 in existing medical files, which the ADA requires that you store separately from other HR files. Employers may disclose to health authorities the names of employees who test positive for COVID-19.

Accommodations. As always, the ADA says employers must offer reasonable job accommodations to disabled workers during the pandemic. That may include providing extra leave, temporary restructuring of job duties, transfers to different positions or modified work schedules.

In addition, if your organization decides to mandate that employees must get the COVID vaccination, the EEOC says you must provide exemptions or accommodations to workers who have religious objections or workers who have disabilities or other medical reasons that prevent such shots.



Online resource Read this and other EEOC guidance at www.eeoc.gov/coronavirus.

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.



Unchecked manager racism: a \$1M mistake



Recent racial justice protests forced many employers to reevaluate the treatment of their minority employees and provide fresh training on unconscious bias.

Now's the time to reiterate your anti-discrimination policies to employees and to remind managers about the harsh consequences of violating those rules.

Turning a blind eye to racist managers and then punishing employees who speak up about in-house racism is a costly error. It lowers morale, increases turnover and allows a malignant culture to grow. It also can lead to huge legal judgments.

Recent case: The EEOC sued a Houston oil company, saying its managers often hurled racial slurs at black employees and assigned black workers to lower-paying jobs. Retaliation also flourished. When a black employee reported a racist social media post shared by employees, he was fired.

Before the case went to a jury, the company settled, agreeing to pay nine black workers a total of \$1.2 million. (*EEOC v. Nabors Corporate Services*)

Online resource Read the EEOC's Q&A on race-discrimination compliance for employers at www.tinyurl.com/EEOCrace.

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 Medical*, 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.



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.



ADVISORY BOARD

ALABAMA: Paul Myrick, The Kullman Firm
ALASKA: Elizabeth Pifke Hodes, Davis Wright Tremaine
ARIZONA: L. Eric Dowell, Ogletree Deakins
ARKANSAS: Dan Herrington, Friday, Eldredge & Clark
CALIFORNIA: Joseph Beachboard, Ogletree Deakins
CONNECTICUT: Pamela Moore, McCarter & English
DISTRICT OF COLUMBIA: Nancy Delogu, Littler
FLORIDA: Ralph Peterson, Beggs & Lane
GEORGIA: R. Read Gignilliat, Elarbee Thompson
HAWAII: Jeff Portnoy, David Banks, Cades Schutte
IDAHO: James C. Dale, Stoel Rives LLP
ILLINOIS: David Ritter, Barnes & Thornburg
INDIANA: Charles Baldwin, Ogletree Deakins
KANSAS: Kathy Perkins, Kathy Perkins LLC
KENTUCKY: William Becker, Frost Brown Todd
LOUISIANA: Michelle Craig, Transcendent Legal
MARYLAND: Mark Swerdlin, Shawe Rosenthal
MASSACHUSETTS: Jonathan Keselenko, Foley Hoag
MICHIGAN: Fred Batten, Clark Hill
MINNESOTA: Susan Fitzke and Sarah Gorajski, Littler
MISSISSIPPI: T. Michael Cronin, Adams and Reese
MISSOURI: Ira Blank, The Enterprise Law Group
MONTANA: William J. Mattix, Crowley Fleck PLLP
NEW JERSEY: Sandro Polledri, Adams Stern Gutierrez & Lattiboudere LLC
NEW MEXICO: Whitney Warner, Moody & Warner
NEW YORK: Louis DiLorenzo, Bond, Schoeneck & King
NORTH CAROLINA: Stephen Dellinger, Littler Mendelson
NORTH DAKOTA: William J. Mattix, Crowley Fleck PLLP
OHIO: Jon Hyman, Meyers Roman
OREGON: Jathan Janove, Janove Organizational Solutions
PENNSYLVANIA: Susan Lessack, Troutman Pepper
SOUTH CAROLINA: David Dubberly, Nexsen Pruet
TENNESSEE: Jeffrey Smith, Adams and Reese
TEXAS: Michael Fox, Ogletree Deakins
UTAH: Justin B. Palmer, Stoel Rives LLP
VERMONT: John Musacchio, Towne Law Firm
VIRGINIA: Declan Leonard, Berenzweig Leonard
WASHINGTON: Steven Winterbauer, Winterbauer & Diamond
WEST VIRGINIA: Roger Wolfe, Jackson Kelly

Find all attorney contact information at
www.theHRSpecialist.com/Attorneys.

STAFF

Editor: Anniken Davenport, Esq.,
HREditor@BusinessManagementDaily.com

Editorial Director: Patrick DiDomenico, (703) 905-4583,
pdidomenico@BusinessManagementDaily.com

Senior Editor: John Wilcox,
jwilcox@BusinessManagementDaily.com

© 2021. Volume 51, Issue 1. HR Specialist: *Employment Law* (ISSN 1934-1652) is published monthly by Business Management Daily, a division of Capitol Information Group, Inc., 7600A Leesburg Pike, West Building, Suite 300, Falls Church, VA 22043-2004, www.theHRSpecialist.com. Customer service: customer@BusinessManagementDaily.com, (800) 543-2055. Printed in the U.S.A. at \$299 per year.

For permission to photocopy or use material electronically, please visit www.copyright.com or contact the Copyright Clearance Center Inc., 222 Rosewood Dr., Danvers, MA 01923, (978) 750-8400. This publication is designed to provide accurate information. It is sold with the understanding the publisher is not engaged in rendering legal service.

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.





Political talk at work: Where can you draw a line?

America's hyperpolarized culture has opened the doors to more co-worker political talk—and conflicts. More than half (56%) of workers say political discussions at work have become more common in the past four years, according to a new SHRM survey. One in 10 say they've experienced "differential treatment" at work because of their political views. For five tips to create a policy that minimizes distraction, plus advice on creating a voting-leave policy, go to www.theHRSpecialist.com/politics.

\$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.

When to deliver final paycheck: State law chart

With layoffs on the rise, you need to know what goes into that final paycheck and when to pay it. Best practice: If you have offices in several states, apply the most stringent state law, which is to pay right away. Also, you can usually take all the regular deductions from a final check. Find a chart of state laws on timing of last paychecks, including whether you must cash out accrued vacation days, at www.theHRSpecialist.com/finalpay.

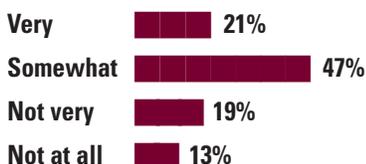
Harassment claim? Give bosses a 3-phrase script

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

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.

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.

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 Workplace Poster site, www.dol.gov/general/topics/posters.

Most of your managers still don't understand the basics of the FMLA

Less than half (46%) of managers can name the benefits that the FMLA provides, and even fewer (42%) know how long employees can be absent while on FMLA leave, according to a survey by ClaimVantage. Three-quarters of those managers said they had received FMLA training in the past.

Advice: Managers are on the front lines of employee leave decisions. To make sure they understand the law, send them this simple two-page FMLA manager training document, available at www.theHRSpecialist.com/FMLAtrain.

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



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

their interest in the organization. Sign the letter “*sincerely*” or “*best wishes.*” Include your name and job title.

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, disability, race
 - 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



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.

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.

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.



Worker doesn't feel safe returning: What to do?

Q We're bringing back more staff who we laid off during start of the pandemic. An employee said she wasn't comfortable returning to work, so we allowed her to stay away. But if we need to call her back to work and she's still not comfortable coming back, what can we do?

A Assuming you are dealing with employee preference here—and not someone who is following medical advice not to come to work—you should first ask the employee why she is reluctant to return and try to reassure her of the steps you are taking to create a safe workplace.

If the employee is still not convinced, then you can decide whether to allow the employee to stay out, but require her to use available PTO/vacation balance. Or you can tell the employee that if she refuses to come to work, she will be considered to have resigned. You need not permit an employee to take time off unpaid in this instance. In any case, be mindful of the precedent being created, and be aware of discrimination concerns.

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.

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.

Can we rehire laid-off employees at a lower rate?

Q If we laid off certain employees and want to hire them back, can we do so at a lower rate of pay than they previously earned?

A You can, but be aware that this will hurt morale and cause those returned workers to dust off their résumés. Also, if your company has taken out a PPP loan that you want forgiven, the amount forgiven will be reduced by the amount of employees' reduced pay. You must also be cognizant of any union rules, if they apply.

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.

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.



Yes, I want to receive my subscription to HR Specialist: Employment Law for only \$97 per year (almost 67% off the normal price).

Name _____

Company _____

Address _____

City, State, ZIP _____

Phone _____ Email _____

Payment Method:

Credit card VISA/MC AMEX Discover *Fax this coupon to (703) 905-8040*

Card # _____ Exp. date _____

Signature _____

Check/money order Bill me *Mail to: Employment Law, P.O. Box 9070, McLean, VA 22102-0070*

Contact Customer Service Center at (800) 543-2055, M–F, 8:30 am–6 pm ET, or customer@BusinessManagementDaily.com

SIS0621

Subscribers can fax a question to **HR Specialist: Employment Law** at (703) 905-8042 or email it to HREditor@BusinessManagementDaily.com.