HR RISK: Take the High Road without Getting Lost

2013 Wednesday Webinar Series

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Managing HR is Risky Business!

Downside Risks
- Poor morale
- Allegations of wrongful, inappropriate or illegal employment practices
- Dizzying requirements imposed by federal and state agencies: EEOC, DOL, NLRB, state DOL, oh my!
- Need to understand old and recent laws: ADA, FMLA, OWBPA, Lily Ledbetter, ADEA, Title VII... to name a few
- Ensuring compliance feels like a drain on your mission and resources

10 Common HR Mistakes
1. Lack of Clarity on the Launch Pad
   - What are your priorities?
   - Are there opportunities for growth?
   - What is my authority?
   - Do I have discretion?
   - What are my limits
   - How will my “success” be measured?
   - When can I expect feedback, and in what form?

2. Failure to Focus on Fit
   - Fit to culture matters!
   - “Why can’t we all get along?”
   - There’s no “I” in teamwork

3. Training by Manual or Osmosis
   - Here’s the policy manual... just follow it
   - You’ll figure it out over time
   - Watch what everyone else is doing
   - “Most of what we call management consists of making it difficult for people to get their work done.” - Peter F. Drucker

4. Careless Classification
   - Classification matters!
   - Employee, volunteer or independent contractor?
   - Can someone be an employee under one law or regulatory regime, and a volunteer under another?

5. Your Veterans are Restless
   - Was the “team” involved in position design, recruitment and hiring?
   - What are the requirements for training and on-boarding?
6. Stingy Feedback
   - Paid and volunteer staff need constructive feedback to perform well
   - Withholding feedback can negatively impact commitment, and may slow the normal learning curve

7. Sending Mixed Messages
   - “We require efficiency and openness ...thrift and mind-blowing ambition” - Leading in Times of Chaos, Fast Company, November 2012
   - Take risks... but don’t make mistakes
   - Work as a team...but promotions and compensation adjustments are based on individual performance
   - How do you send mixed messages?

8. Ignoring the Obvious (or Controversial)
   - Violations of your code of conduct:
     o Mistreatment of other staff, volunteers or clients/members/participants
     o Uncooperative, unproductive or unsafe behavior
     o Lost the will to work hard

9. Failing to Follow Written Policies
   - Boundaries, out of program contact
   - Confidentiality and privacy
   - Performance management
   - Progressive discipline

10. Terminating without Explanation
    - Notices of Separation:
      o For separation of an indefinite period or more than 7 days
      o Notice within 24 hours after separation
      o Use Notice form supplied by the Department; employer completes information required on the form
      o Notice not required for workers separated from employment for lack of work if the worker has been employed for less than one week.
      o Notice requirement waived if the employer arranged with the Department to submit verification of the reason and date of separation via an electronic transmission, a Mass Separation Notice or a Mail-in Claim.

Managing Your HR Risks
Recognize Anti-Discrimination Risk
- Federal, state and sometimes local laws apply
- Size matters; anti-discrimination laws thresholds-federal thresholds tend to be higher than state thresholds
**Comply with Wage and Hour Laws**
- Overtime pay may be due... even if you can’t afford it!

**Consider Policy and Practice**
- Non-exempt employees must obtain advance permission prior to working overtime
- Employees who work overtime without permission are PAID and subject to discipline, e.g. leave without pay

**Classify Correctly**
- Exempt versus nonexempt
- Employee, Volunteer or Contractor

**Communicate**
- Be generous by sharing information with employees on a “want to know” basis

**Contemplate Employee Separations before they are Imminent**
- Plan separation with care
- Obtain third-party advice and counsel
- Document the reasons
- Tell the departing employee “why”
- **Key Questions:**
  - Are there procedural requirements that you need to follow prior to termination that haven’t yet been followed with this employee?
  - Is there written documentation in employee’s file of reason for dismissal or lay off?
  - How old is employee? Did age play a factor in decision to terminate?
  - Who will replace employee? Is there a pattern that could be described as discriminatory?

- **Termination Checklist:**
  - Was the employee aware that termination was a possibility or was likely?
  - Is there documentation of that awareness?
  - If the discharge is based on failure to follow policy or violation of policy, can you document that the employee was aware of the policy?

- **More Questions:**
  - Does this employee have any expectations, either because of promises made, or because of past practices of the nonprofit, that employment is assured for any specific length of time, or that terminated employees would receive any special treatment, such as severance pay?
  - Have you discharged or disciplined other employees for similar reasons? Was the treatment consistent with this employee’s treatment?
  - Has the employee recently filed a workers’ compensation claim, or a sexual harassment complaint or any other complaint of illegal conduct?
What did the employee’s most recent performance evaluation conclude about the employee’s performance? Does the evaluation support termination?

Final Pay:
- It’s never permissible to withhold a final paycheck as ransom for keys or other property
- If the employee owes you money, you may deduct the amount owed from final pay ONLY if you have received a written authorization to do so from the employee.

Trend Spotter
- Age Discrimination
- Retaliation
- Religious Discrimination

Age Discrimination
- “Whether trying to retain or obtain a job, older workers may find themselves susceptible to unlawful age-based stereotypes and discrimination.” - Acting EEOC Chairman Stuart Ishimaru, at a July 15, 2009 hearing on age discrimination
- “Employers’ conscious or unconscious stereotypes about older workers may cause them to underestimate the contributions of these workers to their organizations. As a result, older workers may be disproportionately selected for layoffs during reductions-in-force.”
- “To then make matters worse, evidence suggests that older workers who lose their jobs may have more difficulty finding another job than their younger counterparts, due to age discrimination.”

Stereotypes about older workers prevail, despite contrary evidence:
- Common negative stereotypes include that older workers are more costly, harder to train, less adaptable, less motivated, less flexible, more resistant to change, perhaps less competent and less energetic than younger employees.

Job Performance and Age: Is there a Correlation?
- “Does job performance decline with age? No! The opposite is actually true. Research shows that performance often improves with age, and, when declines are found, they tend to be small.” - Michael Campion, Purdue University

Managing the Risk of Age Discrimination Claims
- Recognize that most people—including your staff!—hold age stereotypes that negatively influence employment decisions.
- Work to ensure that all employment decisions begin with an analysis of the work to be done, and the knowledge and skills required to perform that work.
- Use only job-related standards to evaluate employees.
- Train employees about the existence and consequences of age stereotypes.
- Monitor the impact of employment decisions on protected groups, including older workers.

**Retaliation**
- What is a retaliation claim?
  - “You fired me because I complained about illegal conduct at the workplace.”
  - “You fired me because I participated in an investigation.”
- The EEOC reports that retaliation charges are at a record high level – second highest category of claims behind race discrimination, more prevalent than gender discrimination.
- Plaintiffs’ attorneys love filing these claims – they are difficult to dismiss because they are so fact sensitive.

**Government Contractors Beware**
- Whistleblowers are often protected in government contracts:
  - Stimulus funds under the ARRA* come with protections for whistleblowers who complain that grant recipients have wasted or misused funds, violated laws or abused authority related to the use of stimulus dollars. (*American Recovery and Reinvestment Act)

**Tips for Avoiding Retaliation**
- Make sure your policies prohibit retaliation
- Make sure that supervisors know that retaliation is against the law and contrary to your policies
- Educate supervisors about what may be perceived as retaliation
- Discipline employees who retaliate!
- Adopt an internal complaint resolution process and communicate information about the process to employees.
- Take complaints seriously; investigate thoroughly.
- Close the loop – communicate the results of the investigation to the complaining party so that he or she doesn’t assume that the complaint was ignored.

**Religious Discrimination**
- Growing area of litigation since terrorist attacks on 9-11; growing sensitivity to religious diversity.
- Federal law: Title VII of the Civil Rights Act of 1964 – applies to employers who have 15+ employees.
- Harassment policy should address religious and race discrimination as well as sexual harassment.
Great Leadership – Tips from Warren Bennis
- Learn to ask people for their opinions before you decide, not after.
- Learn how to help people understand what they need to be thinking about without telling them what to think.
- Especially in times of change, learn to spend as much time working on the organization as you spend working in the organization.

Resources on HR Risk
- US Department of Labor: www.dol.gov/
- US Department of Labor Wage and Hour Division: www.dol.gov/whd/
- National Labor Relations Board: www.nlrb.gov/
- Your State’s Department of Labor and Workforce Development
- Nonprofit Risk Management Center Affiliate Membership: www.nonprofitrisk.org/affiliates/

Thank You!
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