

Ten Employment Law Related Mistakes That Can Make You a Star in an Employee's Lawsuit

The following simple and easily (or unknowingly) enacted mistakes can provide you with the chance to observe the American justice system "up close and personal." Or, at the very least consume a lot of your time and make your life miserable. Most of us would prefer to enrich our lives in other areas.

1. **Timing Is Everything.** Avoid even the appearance of retaliation. Too many companies win discrimination suits only to lose an employee's charge of retaliation. Managers should stay far clear of the "retaliation line." Don't terminate, discipline, or transfer someone who has recently made an allegation of discrimination, filed a complaint, or exercised a legal right.
2. **The Problem Manager.** Many discrimination cases aren't about discrimination. They're in response to perceived unfair, demeaning, or unprofessional treatment. A manager who yells, is abusive, uses obscene or inappropriate language, or is just plain mean is a liability you can't afford.
3. **Just Kidding.** Failing to address teasing, jokes, "harmless fun," or horseplay which may not be illegal, but is probably inappropriate, may lead you somewhere you don't want to go. Many organizations have implemented zero tolerance policies regarding inappropriate workplace behavior, fearing that such actions will escalate if not addressed.
4. **Office Romance.** Relationships in which supervisors date their subordinates often end badly. A consensual relationship can morph into a charge of harassment quite easily.
5. **See No Evil.** Ignoring (or failing to understand) an employee's rights regarding legally required leave such as military, FMLA, jury leave, etc. can make him or her mad; maybe mad enough to pursue an action against you.
6. **But I Thought You Knew.** Failing to train managers regarding employees' rights under the ADA, Title VII, the ADEA, FLSA, etc. certainly can add some excitement to the office. How many managers understand requirements regarding religious and ADA accommodations? Do they follow your policies? Training should be regular and ongoing.
7. **Technology Traps.** Neglecting to establish and implement effective workplace communication policies (e.g., regarding use of email, Internet, computers, voicemail, instant messaging, etc.) is the equivalent of a neon bull's-eye for plaintiff's attorneys. Harassment, discrimination, privacy, and confidentiality issues are likely to rear their ugly heads.
8. **I Know I Wrote It Down Somewhere.** Poor recordkeeping, failing to keep thorough performance appraisals, corrective action documents, records related to accommodations, leave, etc. leave you in a weak position. Plaintiff's attorneys avoid well documented cases that will be difficult for them to win. Juries expect sound documentation.

9. **I Really Was Going To Do It.** Lack of follow through and failing to act on an employee's complaint or concern destroys credibility, probably violates your own policies, and makes you very vulnerable to later employee complaints.

10. **Compensation Roulette.** Failing to establish and regularly update an objective, nondiscriminatory compensation system decreases morale, weakens employee trust, and certainly increases your odds of an employee action.

Eliminate the stress of potential legal action by regularly reviewing the items on this list and relating it to your current workplace environment. Managers and supervisors need to understand that in addition to "the company", employee lawsuits often name individual managers or supervisors as defendants. Being aware and informed of problem areas is a good strategy to stay on the right side of any legal entanglements.

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A Top Ten Hot Issues In Employment Law - 2008

As always there is a lot going on in the world of employment law, consequently there's a lot to choose from when you're constructing a top ten list. Many good list candidates are lurking out there.

Taken together, the list shows that it is a tough, challenging legal compliance world right now for the business community.

Here's the list:

1. Big verdicts, big settlements – for example:

<u>COMPANY</u>	<u>AMOUNT</u>	<u>REASON</u>
Starbucks	\$100 million	Tips improperly paid to supervisors (California)
Walgreens	\$25 million	Race bias in promotions
New York Knicks (NBA)	\$11 million	Sex harassment
National law firm	\$27.5 million	Age discrimination (mandatory retirement)
Sheet Metal Worker's Union	\$6.2 million	Race and natural origin discrimination in job placement

These cases involve a lot of "big names." But big (relatively and otherwise) settlements hit smaller organizations too. A little prevention avoids a lot of litigation. Train your managers. Implement your policies.

2. Discrimination charges increased significantly in 2007 over 2006 totals (from Equal Employment Opportunity (EEOC) reports):
 - Total claims: up 9% (largest % increase since 1993)
 - Race: up 12% (highest level since 1994)
 - Sex: up 7% (highest level in six years)
 - Age: up 15%
 - Disability: up 14%
 - National origin: up 12%
 - Religion: up 13%

The discrimination charges are increasing at an even greater rate in 2008 and may set a new record. New online filing forms at the EEOC make it easier for employees, and recessions, historically, have brought increases in charges. We're still a very litigious bunch of people. Consequently, examine key HR actions, such as terminations, promotions, and corrective action. Do they meet EEO standards?

3. Retaliation claims are easier to win...more filed with the EEOC -- up 18% (record high level). Remember that a company can win its discrimination case only to lose on the retaliation claim because of something said or done. Make clear that you don't discriminate or retaliate against those who file claims or against witnesses to possible discriminatory acts.
4. Family and Medical Leave Act (FMLA) expansion now covers leave to care for family members injured in active military duty or to assist family members when preparing to go on active military duty. The final regulations should be available in the next few months. Be prepared to update your policies and forms.
5. Immigration enforcement has stepped up – more raids and I-9 audits (new form). There are higher penalties, greater scrutiny by the government, and a Utah HR person has even been charged with criminal harboring of illegal workers.
6. Minimum wage is at \$5.85/hour, and moves to \$6.55/hour on 7/24/08 and, \$7.25/hour on 7/24/09. This may create wage problems even regarding more highly paid members of your workforce as wage compression may result. Such increases also raise media attention, regarding wage and hour issues, and generally make employees more sensitive to overtime and other claims.
7. Wage, break, overtime pay, and other compensation-related class action suits against employers continue to be significant, resulting in large attorney fees, use of time resources, and exposure to liability. Consider taking the time to regularly audit your compliance with the Fair Labor Standards Act and related state law.
8. There is increased legislative activity – proposals include: expand FMLA; expand ADA; add to list of protected classes (genetic status; sexual orientation); prohibit employment arbitration; mandated paid leave; and reduced abuse of independent contractor status.
9. Technology is a growing issue for employers. Dealing with internet use, email, and cell phones while driving remain a challenge. Camera cell phones at work, employee blogs, and video resumes are the newest issues.
10. FMLA/ADA/Worker's Compensation day-to-day compliance and staying out of the "Bermuda Triangle" of employment law is an oldie but a goodie that remains a nightmare for most HR people. The law keeps changing as the case law keeps evolving

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Personnel 101

How to Handle Human Resource Challenges While
Keeping Your City Working

Brenda Hancock
Utah League of Cities and Towns
Annual Conference
September 10, 2008

To manage people wisely,

remember the basics:

- Treat employees and volunteers with respect and dignity.
- Tell staff what result you expect and let them decide how they will do the job.
- Catch employees doing something right and show your appreciation.
- Model good behavior, including ethics, customer service and productivity.
- Explain why a task or project is needed—better customer service, improved safety, more attractive community, etc.
- Be consistent don't play favorites.
- Provide employees with the resources they need to succeed: training, equipment, job aids.

Today we will focus on these guidelines:

- Have clear policies.
- Hire wisely.
- Use the probation period wisely.
- Provide fair pay and benefits.
- Discipline carefully.
- Provide an appeal process for punitive discipline.
- Avoid retaliation.

Have clear policies:

- Policies should be up-to-date
- Policies should be short, simple, clear
- Policies should be reviewed annually
- Employees should have a copy or a summary and should be able to access the policies easily

- Anti-harassment, not just sexual harassment
- Use of city equipment, e-mail, internet, cell phone
- Ethics and conflict of interest
- Attendance and punctuality
- Overtime and compensatory time, including accurate time records and supervisory approval
- Prohibition of verbal and physical violence
- Importance of non-retaliation

- Follow merit principles when required.
- The best predictor of what an employee will do is what they have done.
- Hire based on skills, competencies and experience related to the actual job.
- Do not consider race, gender, religion, age, national origin, or disability or any other irrelevant criteria, unless you are trying to increase the diversity of your workforce.

- Don't hire your relatives (unless there are special circumstances). Utah Code 52-3-1
- Set clear job expectations about both *performance* and *behavior*.
- It's easier to hire right the first time than to have to hire all over again.
- If you hire right, you will seldom need to fire.

Use the probation period wisely.

- Provide good, fast training and evaluation.
- Watch for personality disorders and get them out of your workforce fast.
- Give new employees a reasonable chance to succeed; if they don't, terminate them.

Pay people appropriately and fairly.

- Aim for labor market fairness; compare your salaries to other cities and towns and to the appropriate private labor market.
- Make sure you have classified people correctly; are they exempt or nonexempt relative to the Fair Labor Standards Act? Almost all will be nonexempt.
- If employees are not exempt from the FLSA, make sure they keep accurate and complete time logs or time cards.
- Remember that benefits are part of pay and benefits should be fair too.

Discipline wisely.

Consider the types of discipline.

- Counseling
- Coaching
- Corrective training
- Verbal/oral warning
- Written warning
- Suspension (with or without pay)
- Demotion
- Termination

Tips for effective discipline:

- Focus on performance and behavior, not personalities.
- Investigate before you act.
- Consider the Family and Medical Leave Act, if this act applies to you.
- Document, document, document.
- Use the probationary period wisely.

Document, document, document

- Document both good and bad performance.
- Document performance for all, not just problem people (though amount of documentation may differ).
- Write honest performance evaluations.
- Document all disciplinary actions, even oral warnings.
- Documentation can often be an e-mail or calendar note or two-part form.
- Documentation only counts if the employee is aware.

Have a fair and objective review process

- Cities and towns must have an objective review process for punitive discipline (termination, demotion or suspension without pay for more than two days). Utah Code 10-3-1106
- The review board may be made up of employees and/or citizens, and it may be the city council.
- The review process should focus on whether facts clearly and accurately support the city's conclusions, and whether the punishment fits the crime.

Retaliation is Forbidden

- There are severe penalties for retaliating against an employee who appeals or an employee who provides information or testimony in an appeal, even if the employer prevails in the original case.
- Retaliation claims are the new legal issue: claims are up 18%.

- If you hire right you will fire less.
- Use probation periods wisely.
- Documentation pays.
- Rewards usually work better than discipline.
- Employees can grow and improve.
- Treat others as you would want to be treated.
- Never, never retaliate.