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GOOD PRACTICES ARE THE BEST DEFENSE

By Thomas O. Magan

Every employment decision involves a tangle of competing laws, regulations and policies. At the point of decision it is often difficult to foresee how your decision might be challenged by a disaffected employee.

The best defense is for executives to take seriously the development, dissemination and implementation of good practices in these five categories.

1. Policy and Procedure

Policy and procedure making is the starting point. Well-conceived, carefully developed policies and procedures guide your decisions and should offer a defense to any challenge. Such policies and procedures should be in writing.

Of course, it is important that the policies and procedures are actually followed. Employers should not merely pass out the policies repeatedly and insist that supervisors use them in making decisions. Supervisors must be trained and have their training refreshed regularly. Active discussions of case studies applying the policies are best. From time to time, the employers should conduct top-to-bottom policy and procedure reviews.

2. Selection

Selection decisions are another critical point that could provoke litigation. Who is to be hired ? Who is to be promoted ? Who is to be laid off in a business downturn ?

It is important to first understand what the job is. Good written job descriptions, which describe in detail the physical requirements of the work, are necessary tools.

The employer should state in writing the decision making criteria to be used in assessing who can do the job. Possible criteria include seniority, qualifications, ability, attendance, and disciplinary actions. Using the established criteria in the selection decision makes it easier to explain the decision if challenged later.

3. Evaluation

Evaluations can help an employee understand the employers expectations and provide insight for growth and development. The evaluation should be timely and should candidly address the employee's strengths and weaknesses. And, of course, the evaluation should be documented and acknowledged. Most supervisors do a poor job of evaluating employees. If anything, they are too complimentary. Evaluations should be truthful and, when called for, tactfully critical of an employees performance.

4. Discipline and Discharge

Discipline and discharge lead to most employment litigation. It is important to have well-conceived rules that supervisors are willing to enforce. To be sure they are willing to enforce the rules, supervisors should be consulted regarding work rules and trained on the application of these rules to various situations.

In investigating a case whether disciplinary or discharging an employee is necessary, it is important to gather all the facts from witnesses and to let the employee tell his side. Of course, statements should be taken to document the basis for any adverse decision.

For most litigation concerning discipline and discharge, the employer must articulate a legitimate business reason for the decision and link the current decision to prior decisions and its policies and procedures. Demonstrated concern for the employee being disciplined or discharged is helpful before a judge or jury.

5. Employment Conflict

When a former employee files suit, it is prudent to spend some time and resources at the outset exploring whether you want to defend the case or settle it. For most employers, it is more important to spend time and money shaping the future than explaining the past. Litigation is typically about the past. Engaging in a cost-risk analysis early on helps one to understand whether it is better to litigate or to settle promptly before investing management time and incurring substantial attorney's fees and discovery costs.