Navigating Through Employment Laws and Difficult Employee Relationships

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Topics To Be Covered

• Discussion Focusing on Managing Difficult Working Relationships
• Explain the Proper Documentation Process
• Identify and Discuss Common Management Mistakes in Employment Law
• Explain What the ADA Interactive Process is and How to Apply it
• Understand what FMLA Abuse is – What Can You Do to Curb it?
• Interplay Between ADA, FMLA and Workers’ Compensation
Discussion Question #1

One of your long term employees has really declined in their performance. You have spoken to him about it and he improves for a short period but then falls back into poor performance. What steps should you take?
How to Manage Difficult Employee Relationships

- Have you properly coached/trained?
- Have kind but direct conversation with employee.
- Set specific duties and deadlines.
- Hold accountable with consequences.
- Reward employees when they meet deadlines/do a good job.
- Monitor or supervise them consistently.
Coaching and Corrective Action
Coaching and Corrective Action

*Educate, Motivate & Rehabilitate!*

- Coaching
  - Verbal Counseling
  - Written Warning
- Final Written Warning / Suspension
- Termination
Importance of Documentation

Why Does It Matter Anyway?

- Documents support events.
- Documents refresh memories.
- Documents should leave no room for misunderstanding.
When to Document

- Poor performance or exceptional performance
- Incidents that may require discipline
- Annual performance evaluations
- Investigations
Documenting Performance

• BAD: Chris has performance issues.
• BETTER: Chris is not meeting productivity goals.
• BEST: Chris missed 5 of the January deadlines I provided to him.
Documenting Performance

• What NOT to write
  – Do not write conclusions
    • “Anne is a slow worker.”
  – Do not write assumptions
    • “Bill is probably drinking again because he’s late to work a lot.”
What Should Be Contained In A Disciplinary Memo

- Date
- Specific Violation
- Mention Any Prior Related Discipline
- If No Improvement- What Will Happen?
- Employee Response
- Employee Commitment
- Signature of Employee
- Supervisor’s Follow Up
Performance Evaluations
Performance Evaluation Form

• **High Performers:** Employee accomplishments have a significant impact on the organization. Employee exceeds position requirements and/or factor standards even in the most difficult and complex parts of the job, or the factor. He or she utilizes initiative in the development and implementation of work goals.

• **Meets Expectations:** Employee is doing a complete and satisfactory job. Performance is what is expected of a fully qualified and experienced person in this factor.

• **Needs Improvement:** The employee is doing the overall job reasonably well. However, performance in this factor is less than standard.
Conducting Performance Evaluations

1. Review only work-related characteristics
2. Be accurate
3. Be consistent
4. Be thoughtful
5. Do not do an evaluation while you are angry or unusually happy
7. If you do not understand a portion of the appraisal form, learn it before evaluating any employees.
8. Take the time to explain thy numerical ratings.
Common Management Mistakes

• Unintentional favoritism/special treatment.
• Failing to address deficiencies when they occur.
• Inaccurate performance reviews.
• Progressive discipline not followed.
• Not keeping disciplinary actions private.
• Unsigned discipline records.
Americans with Disabilities Act Amendments Act (ADAAA)
ADAAA Litigation/Charges

• Increase In Accommodation Litigation

• FY Ending September 30, 2013:
  – 25,957 EEOC charges alleging failure to accommodate in violation of ADA
At The Top Of The EEOC’s Strategic Enforcement Plan (SEP)

- Disability Cases
- Pregnancy Discrimination
Discussion Question #2

Barry reports to you. Over the last year, he has become significantly withdrawn and unfocused. As a result, he continues to fall behind at work. When you have spoken to Barry, he has become very defensive and offended. Recently, Barry told you he is seeing a doctor for depression. You have work that Barry needs to do but you are hesitant to pressure him. What should you do?
Disability Defined

• Physical Or Mental Impairment That “Substantially Limits” Major Life Activity;  

• Record Of Such An Impairment; or  

• Regarded As Having Impairment.
“Substantially Limited”
Under ADAAA

• “Substantially Limited” means can’t do what the general public can.

• Only one “Major Life Activity” need be limited.

• Episodic impairments, or impairments in remission are still “substantially limiting”.

• “Good” mitigating measures are not to be considered (i.e. medication).
“Major Life Activities”

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Walking
- Speaking
- Breathing
- Learning
- Working
“Major Life Activities” Continued

All of those, *plus*

- Eating
- Sleeping
- Standing
- Lifting
- Bending
- Reading
- Concentrating
- Thinking
- Communicating
...And The New Regulations Add

• Sitting
• Reaching
• Interacting with others
“Major Bodily Functions”

Completely new
• Immune system
• Normal cell growth
• Digestive
• Bowel
• Bladder
• Neurological
• Brain
• Respiratory
• Circulatory
• Endocrine
• Reproductive
...And The New Regulations Add

- Special sense organs
- Skin
- Genitourinary
- Cardiovascular
- Hemic
- Lymphatic
- Musculoskeletal
Important Note!

- EEOC’s regulations provide that these are NOT all-inclusive lists
Employer’s Duties Under the ADAAA

• To provide reasonable accommodations for known disabilities
• Who are otherwise qualified to perform the essential functions
• Unless the employer can demonstrate that doing so would create an undue hardship
Informal Interactive Process

• **Request** by individual for reasonable accommodation is **first step** (unless you know this to be an issue).

• Engage in **informal process** to clarify needs and identify appropriate accommodation.

• The employer may **ask relevant questions** that enable an informed decision.

• Employer may require employee to see **doctor** for **review/information**.

• Employer can **ask** what type of reasonable **accommodation** is **needed**.
EEOC’s “Reasonable Accommodation” Priority

1. Try to accommodate employee in his or her regular job
2. Try to move employee to different job that is similar to regular job in terms of duties, pay, and status
3. Try to move employee to different job, including part-time job (with part-time pay and possible loss of benefits)
4. Place employee on medical leave
5. Terminate employee
Undue Hardship

- An action that requires significant difficulty or expense in relation to the size of the employer, the resources available and the nature of the operation
- Must consider individual circumstances on a case-by-case basis
- Burden is on employer
Reasonable Versus Unreasonable
Job Restructuring

- Employee who hurts back at work
- Light duty – limited lifting
- Worker’s Compensation
- Shared Lifting

Reasonable or Unreasonable?
Schedule Modifications

• Medical condition requires morning therapy
• Clinic opens at 8
• Sue works from 8-4
• As an accommodation, Sue wants to report to work at 10:00 a.m.

Reasonable or Unreasonable?
Lowered Requirements or Performance Standards

- Continuing Education Requirements needed for employee
- Fails 2 times to get needed hours because of health issues
- Asks for more time to take tests

Reasonable or Unreasonable?
Change in Supervisor

- Accounts Receivable employee
- Investigated for misconduct
- Post traumatic stress and anxiety
- Wants to be moved to another supervisor

Reasonable or Unreasonable?
Working From Home/Telecommuting

• Employee with irritable bowel syndrome
• Works in Accounts Payable
• Wants to work from home 4 days a week

Reasonable or Unreasonable?
Discussion Question #3

Jill has been with your institution for over ten years and has been a “marginal” employee. She has recently been out on FMLA leave and her twelve weeks is about to end. She asks for additional time off beyond FMLA. The doctor has not provided an expected return date. What should you do?
Leave of Absence
Leave of Absence

- *Brangman v. AstraZeneca*
- Company granted leave and two extensions; rejected third extension.
- Court found that 3rd request unreasonable because employee could not show she would eventually return to work.
Family Medical Leave Act (FMLA)
Two Sentences To Compliance

• Eligible employees of covered employers who have a qualifying event and provide appropriate notice and requested certification(s) are entitled to at least 12/26 weeks of health insurance continuation and job protected leave per defined twelve-month period.

• Covered employers must post appropriate notices, have a comprehensive leave of absence policy and develop a standard notice/certification procedure to ensure compliance.
FMLA Qualifying Leave

- Birth or placement of child
- To care for spouse, child, or parent with serious health condition
- Employee’s own serious health condition
- Qualifying exigency (Military)
- Military caregiver leave
Serious Health Condition Defined

• Inpatient treatment
• Incapacity of three consecutive full calendar days with:
  – Treatment 2 or more times \textit{within 30-days} of first day of incapacity (extenuating)
    • 1\textsuperscript{st} treatment: in person \textit{within 7 days} of incapacity
    • HCP decides if 2\textsuperscript{nd} visit is necessary
  – One treatment plus a regimen of continuing treatment
Serious Health Condition Continued

- Pregnancy/prenatal
- Chronic conditions
  - Periodic visits (at least twice per year)
  - Continue over extended period
  - Episodic incapacity
- Permanent/long-term: no changes
- Condition requiring multiple treatments
Treatment does not include routine physicals, eye examinations, or dental examinations, and at home treatment by itself is not sufficient.

Cosmetic not covered unless inpatient/complications.

Ordinarily, common cold, flu, ear aches, upset stomach, minor ulcers, headaches other than migraines, routine dental or orthodontia, periodontal disease not covered absent complications.

Substance abuse treatment covered, but can apply “established policy” to use of illegal drugs.
Job Restoration Rights
- Reinstatement § 825.215-825.216

• Same or equivalent position:
  – Reinstated to the same or equivalent position
  – With equivalent pay and benefits
  – Position employee held when the leave began

• Qualifications:
  – An employee must be given a “reasonable opportunity” to fulfill the qualifications of a job upon return to work

• Right to reinstatement:
  – No greater right to reinstatement than would exist if the employee had been continuously employed
FMLA Abuse –
What Can You Do To Curb It?

1. Calculate FMLA leave using a “rolling” 12 month period. (Except for leave to care for service member)

2. Require employees use all paid leave prior to taking unpaid FMLA.

3. Require medical certifications to be returned within 15 days.
FMLA Abuse – What Can You Do To Curb It?

4. Require employees to provide thirty (30) days notice for foreseeable FMLA leave. Gives you the luxury to plan around the absences, which increases productivity and minimizes abuse.

5. Require employees schedule medical treatments around operations.

6. Establish and enforce reasonable attendance and call-in rules for all leave.
FMLA Abuse –
What Can You Do To Curb It?

7. Assign employees taking foreseeable intermittent leave to alternative positions that cause less disruption, if possible.

8. Require “fitness for duty” certifications for employees returning to work. Require employees to submit a recertification every thirty (30) days.

9. Require second and third opinions.
FMLA Abuse –
What Can You Do To Curb It?

10. Have a policy prohibiting employees from working second jobs while on leave (of any type).

11. Use private investigators to prove FMLA fraud.
Interplay With Workers’ Compensation

- Workers’ Compensation - Compensates employees who cannot work based on a work related injury.
- ADA - Protects qualified individuals with disabilities.
- FMLA - Provides job protected leave.
Workers’ Compensation 101: What Constitutes A Compensable Work Injury

- Employer/employee relationship
  - For example, not independent contractors
  - Undocumented status does not affect this analysis
- Injury by accident
  - Mental vs. physical
- Arising out of employment
  - Connection to the job
- In the course of employment
  - Time, place or circumstances surrounding the accident
Injury vs. Disease

- Occupational Injury: Sudden events, accidents, spills or unexpected exposure to an injurious risk at work.
- Occupational Disease: A disease caused by the usual, gradual and expected exposure to an injurious risk at work.
  - Higher burden of proof: Direct causation; disease was a natural progression of the exposure; disease is not commonly contracted outside the specific work environment; the disease is not an ordinary disease of life; and the disease originated from a risk at work.
What are the “Benefits”

- **Income Benefits**
  - Temporary Total Disability (400 weeks)
  - Temporary Partial Disability (350 weeks)
  - Permanent Partial Disability

- **Medical Benefits**

- **Rehabilitation Benefits** (sometimes)
Interplay With ADA/FMLA

• Simply because an employee is eligible for workers’ compensation does not affect their eligibility for ADA and FMLA protection.

• For example, a workers' compensation injury that requires hospitalization or incapacitates an employee for more than three days and requires continuing treatment by a healthcare provider generally qualifies as a serious health condition under the FMLA. If the injury causes a mental or physical impairment that substantially limits a major life activity, that same employee could be entitled to additional leave as a reasonable accommodation under the ADA.
Interplay With ADA/FMLA

Basic Steps

1. Determine **which laws apply to employees as a group**.

2. Determine **which laws cover the particular employee's situation**.

3. Is the injury work related? (Workers' Compensation)

4. Does the employee have a serious health condition? (FMLA)

5. Does the employee's condition meet the definition of disability? (ADA)
Interplay With ADA/FMLA
Basic Steps

6. Determine the employee's benefits and/or entitlements under the relevant laws. As described above, when more than one law applies, employers must provide leave under whichever law provides the greater rights and benefits to employees.

7. Evaluate whether the employee is entitled to reinstatement once able to return to work.

8. Evaluate whether the return to work poses a direct threat to the health or safety of the employee or others in the workplace.
Final Thoughts

- It Starts At Home

I always wondered why somebody didn't do something about that, then I realized I'm that somebody.

- Lilly Tomlin
Questions?