

Employers' Common Mistakes That Encourage Employees to Seek Legal Advice

R. Scott Oswald

The Employment Law Group, P.C.

Introduction: Have you ever wished that you could identify the most frequent reasons that current and former employees seek the advice of outside legal counsel? Here it is. Below is a list of the most common, yet avoidable, mistakes that a human resources department makes that can leave its current and former employees disillusioned and cause them to seek out outside legal advice:

1. *Failing to Provide COBRA Notices* - The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) requires covered employers to permit qualified employees to purchase health care coverage at group rates temporarily. Covered employers must provide notice to qualified beneficiaries of their right to purchase COBRA coverage within thirty days of the occurrence of a qualifying event. 29 U.S.C. § 1166(a)(2). A qualifying event includes, *inter alia*, the death of the covered employee, the termination of a covered employee (unless the employee was terminated for gross misconduct), and the divorce or legal separation of the covered employee from the employee's spouse. 29 U.S.C. § 1163. When employers fail to provide their employees with a COBRA notice in a timely fashion, employees become concerned and seek legal assistance in obtaining the continuation of their benefits.

Employers should maintain form COBRA notices on file so that when they terminate employees, they can send the employee the requisite notice, informing employees of their rights relating to extending their health care coverage, as expeditiously as possible. The Department of Labor provides a comprehensive guide to COBRA on the internet at <http://www.dol.gov/ebsa/pdf/cobraemployer.pdf>.

2. *Failing to Compensate Employee Wages Due* - The Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*, ("The FLSA") and many state wage and hour laws require employers to pay their employees their wages earned on a timely and regular basis. Many states also require employers to pay their employees the balance of their accrued leave when their employment terminates. An employer's failure to pay the employee's outstanding wages and/or vacation time, to the extent required, in a prompt manner often prompts an employee to seek legal assistance in obtaining the compensation owed to them. *See* D.C. Code Ann. § 32-1301(3).

Employers should seek the advice of counsel to determine whether they are required to pay their terminated employees their outstanding leave balances. Employers should then include a statement as to what monies will be paid to departing employees in their employee manual so that all employees are aware, at the beginning of their employment, what will be paid to them when they depart.

Employers also fail to carefully analyze the relevant portions of the FLSA and the Code of Federal Regulations relating to which employees must be paid overtime. Although employers should seek legal advice as to whether they must pay overtime to their employees, the relevant portion of the Code of Federal Regulations is quite thorough. *See* 29 U.S.C. §213, 29 C.F.R. § 778.0, *et seq.*

Employers' Common Mistakes That Encourage Employees to Seek Legal Advice

R. Scott Oswald

The Employment Law Group, P.C.

A complaint for unpaid regular or overtime wages due can be quite costly. Should an employee prevail on such a claim, an employer can be liable not only for the employee's unpaid wages, but also for the employee's reasonable attorney's fees, and an equal amount as liquidated damages. 29 U.S.C. § 216(b).

3. *Ignoring Employee Complaints* - Federal law does not require an employer to establish or to follow its own written protocols relating to receiving and investigating employees' complaints. However, failing to acknowledge or discuss employees' complaints regarding, for example, discrimination, waste, or fraud can demonstrate an employer's bad faith or can constitute admissible evidence in support of punitive damages. If an employer establishes a protocol for handling its employee complaints and follows its protocol, an employer is more likely to avoid a finding of discrimination and to avoid the imposition of punitive damages.

Frequently, employees simply wish to have their complaints acknowledged. If an employer receives an employee complaint, it should acknowledge the employee's complaint, in writing, regardless of the facial validity of the complaint. The employer should also inform the employee of the general actions that the employer plans to take regarding the employee's complaint. When the employer concludes its process, it should inform the employee of the actions it took in examining his or her complaint and of the conclusions the employer has reached. Keeping the employee informed as to the status of his or her complaint will persuade the employee that the employer is taking his or her complaint seriously.

4. *Disregarding Employee Discipline Protocols* - Nor does federal law require private employers to establish employee discipline protocols. Like when his or her employer ignores her complaints, employees feel wronged when employers do not follow their own written protocols relating to discipline of employees.

For example, issuing performance improvement plans when a deficiency is discovered could protect an employer's interest practically and legally. By issuing PIPs, employers could prevent chagrin on their part and on the part of their employees, as well as legal action. Employers could even discover renewed employees by issuing detailed PIPs that clearly lay out their expectations for their employees' conduct and the specific actions that employees may take to meet those expectations. By issuing performance improvement plans when an employee's performance suffers, employers can insulate themselves from retaliation claims should they need to terminate an employee who has engaged in statutorily protected activity.

5. *Delaying Response to Accommodation Request* - The Americans with Disabilities Act permits a qualified individual with a disability to seek an accommodation from his employer that would permit him or her to continue working. The ADA contemplates an interactive process through which both the employer and the employee seek to identify a reasonable accommodation of the employee's disability.

Employers' Common Mistakes That Encourage Employees to Seek Legal Advice

R. Scott Oswald

The Employment Law Group, P.C.

Once an employer learns that an employee requires an accommodation to continue performing his or her job, the employer must engage “in an interactive process with the employee to identify and implement appropriate reasonable accommodations.” *Barnett v. U.S. Air*, 228 F.3d 1105, 1114 (9th Cir.2000). “The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees, and neither side can delay or obstruct the process.” *Humphrey v. Mem'l Hospitals Ass'n*, 239 F.3d 1128, 1137 (9th Cir. 2001), citing *Barnett* at 1114-15; *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir.1996). See also 29 C.F.R. § 1630.2(o)(3), *Crabill v. Charlotte Mecklenburg Bd. of Educ.*, 423 F. App'x 314, 322-23 (4th Cir. 2011), *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 311–12 (3d Cir.1999); *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 165 (5th Cir.1996).

Like the good practice of immediately acknowledging employees' complaints, an employer should immediately acknowledge an employee's request for an accommodation in writing and should inform the employee of what steps the employer will take to address the employee's request. The employer should be sure to meet with the employee to discuss his or her needs even if the employee has already submitted a detailed written request.

An employer's prompt response to an employee's request can preserve the parties' relationship. However, an employer's delay in responding to the employee's accommodation request or in discussing the employee's desired accommodation can lead an employee to seek advice as to his or her rights under the ADA.

6. *Terminating Employee on FMLA Leave* - In addition to providing covered employees up to twelve weeks of unpaid (qualified) medical leave annually, the FMLA also protects employees from retaliation for exercising their rights to request or use that leave. 29 U.S.C. § 2615. An employer's termination of an employee who is currently using FMLA leave can be direct evidence of FMLA retaliation. It would also limit the employer's ability to prove that its reason for terminating the employee was non-discriminatory or non-retaliatory. For example, an employee who is on FMLA leave likely cannot engage in misconduct and cannot demonstrate poor performance.

If an employer finds that it must terminate an employee who is out on FMLA leave, it should ensure that it has an independently confirmable legitimate business reason for terminating that employee. Further, the employer should be able to demonstrate that its legitimate business reason does not in any way relate to the employee's use of FMLA leave, or the circumstances surrounding that employee's use of FMLA leave.

7. *Providing Inadequate Notice of Terminations* - An employer can also cause an employee to seek legal advice when the employer does not notify an employee of his termination in a prompt manner. If an employee learns of his termination through a third party or through the employer's work schedule (i.e., the employee is not scheduled to work), an employee is more likely to seek legal advice regarding his employment rights.

Employers' Common Mistakes That Encourage Employees to Seek Legal Advice

R. Scott Oswald

The Employment Law Group, P.C.

When an employer decides to terminate an employee, it should provide a terminated employee with a written notice of termination as soon as is practicable. The employer should not disclose the fact of or reason for the employee's termination to anyone within the company, unless necessary, to avoid gossip. Further, although employers may not prefer to state a reason for the termination of an employee, the notice of termination should also provide a reason for the employee's termination and should provide the employee's internal appeal rights, if any.

8. *Escorting Employee Off Employer's Premises* - Employees are also prompted to contact employment attorneys after suffering the indignity of being escorted from their employers' premises by security or management. Where an employee is terminated for engaging in severe misconduct, an employer's desire to escort him off the premises is understandable. Nonetheless, the employer should avoid making a spectacle of the employee's termination. The employer should quietly and discretely ask the employee to gather his or her things and to leave the premises, with a manager or security officer following the employee only if the employee has a confirmed or suspected history of violence.

However, in non-misconduct cases, an employee will feel that his reputation has been tarnished if he is escorted from the employer's premises. In non-misconduct cases, to limit an employee's post-termination access to the employer's assets, most employers need only restrict the employee's access to the computer network. Again, the employer should quietly and discretely ask the employee to gather his or her things and to leave the premises.

9. *Giving Negative References* - Employees also seek legal advice when their employer does not have or they do not understand their employer's post-termination reference policy. Employers can push their former employees to seek legal advice if they provide negative references to potential employers.

The employer should incorporate a reference protocol in its employee manual that applies regardless of the manner in which the employee's employment terminates. Negative references could, unfairly, reflect poorly upon the employee and later subject the employer to claims of defamation. Instead, the employer should confirm nothing more than the employee's position, employment status and/or title, dates of employment, and salary.

While the above is not an exhaustive list, by instituting preventive measures to avoid the above mistakes a prudent employer will not only have a happier workforce, but will reduce its risk of costly employment claims.