

Manager's Legal Bulletin

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Q&A

Can I make an employee cover up her tattoos?

Q. *An employee with tattoos on her upper arms usually wears long sleeves, but not in summer. Can I require her to cover the tattoos? We don't have a dress code.*
— J.N., Pennsylvania

A. Employers are free to adopt a policy addressing tattoos, piercings and other personal appearance issues as long as it doesn't unlawfully discriminate against one protected group (age, race, religion, sex, etc.) more than another. So it's important to be consistent when applying such a rule. It is legal to impose greater restrictions on employees who have direct contact with customers.

Also realize that while much body art is simply for decoration, it could have religious implications. If so, federal anti-discrimination law may require you to offer a "reasonable accommodation" to this religious practice.

Must we pay an employee who works through lunch?

Q. *We have an hourly employee who voluntarily works through his unpaid lunch break a few times each week. Do we have to pay for that time?* — A.T., Ohio

A. The Fair Labor Standards Act (FLSA) is clear: It requires employers to pay an employee for all the time he or she is "suffered or permitted to work." The U.S. Department of Labor says that means, "Time spent doing work not requested by the employer, but still allowed, is generally hours worked, since the employer knows or has reason to believe that the employees are continuing to work ... It is the duty of management to exercise

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The 25 off-limits interview questions

Job interviews present a minefield of legal problems for supervisors. One wrong question could spark a discrimination lawsuit by a rejected candidate.

That's why managers should never "wing it" during interviews. Instead, it's best to create a list of interview questions.

Every question you ask should somehow relate to this central theme: "How are you qualified to perform the job you are applying for?" Managers usually land in trouble when they ask for information that's irrelevant to a candidate's ability to do the job.

Federal and state laws prohibit discrimination on the basis of an applicant's race, color, national origin, religion, sex, age or disability. Some state laws also prohibit discrimination based on factors such as marital status or sexual orientation. Asking questions relating to any of these topics is legally dangerous.

To avoid the appearance of discrimination during interviews, do not ask the following 25 questions:

1. Are you married? Divorced?
2. If you're single, are you living with anyone?
3. How old are you?
4. Do you have children? If so, how many and how old are they?
5. Do you own or rent your home?
6. What church do you attend?
7. Do you have any debts?
8. Do you belong to any social or political groups?
9. How much and what kinds of insurance do you have?

The following questions relating to a person's health could result in a lawsuit under the Americans with Disabilities Act (ADA) or state disability law:

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How to react to employees' requests for leave

When an employee asks for time off for medical reasons, how do you respond?

You may be annoyed that the absence will cause scheduling and workload problems. But it's vital not to show any negative reaction to requests for medical leave.

That's because such leaves of absence may be covered under the federal Family and Medical Leave Act (FMLA). And if the employee is later disciplined or terminated, she may try to prove that her FMLA leave was the real reason for the action—and the supervisor's angry reaction was proof.

Consider this recent court case: When an employee asked for a leave of absence for medical reasons, her boss said in an annoyed manner, "What am I going to do while you are gone?" When she returned from her leave, she received a negative

review and was fired soon after. She sued.

The verdict: The court sided with the employee, saying the supervisor's negative reaction was evidence that the FMLA leave was the real reason for the firing. (*Villalon v. Del Mar College*)

How does the FMLA work?

The Family and Medical Leave Act (FMLA) says eligible employees—those with at least a year of service—can take up to 12 weeks per year of unpaid, job-protected time off work for the birth (or adoption) of a child or to care for themselves or a sick child, spouse or parent who has a "serious health condition." The FMLA applies to organizations with 50 or more employees. Online resource: www.dol.gov/whd/fmla.



Legal Briefs

Praising off-the-clock work? Then plan to pay for it

A group of Los Angeles public safety employees sued for unpaid overtime. The hourly workers claimed they hadn't been paid for time spent before and after their shifts checking e-mail and completing reports. The county claimed it had no idea about the work ... but performance reviews regularly praised employees for their extra (unpaid) work. That was enough for the court to side with the employees. (*Vallerand, et al., v. County of Los Angeles*)

The lesson: Managers should be careful about praising hourly employees for their off-the-clock efforts. Workers can use those comments in an overtime-pay lawsuit as proof that the company not only knew of the extra hours, but also condoned them.

Lesson from the 'I'm too sexy for my shirt' case

Rudolpho Lamas complained to a company boss that a female co-worker was making unwanted sexual advances. But the boss told Lamas he should be happy and walk around singing "I'm too sexy for my shirt." After he was fired, Lamas filed a sexual harassment case. A court sent the case to trial, saying men are equally entitled to Title VII protection from a sexually hostile work environment. (*EEOC v. Prospect Airport Services*)

The lesson: Don't shrug off female-on-male harassment. The percentage of sexual harassment claims filed by men has doubled from 8% of all claims to 16% in the past decade.

Free Report

10 Secrets to an Effective Performance Review

Find tips on how to write and conduct an employee performance evaluation, plus sample performance reviews and employee evaluation forms in our free special report, available at www.theHRSpecialist.com/EPR1.

Terminations: Follow the 2-and-1 rule

Unfortunately, lawsuits often come down to one person's word against another's.

For that reason, it's always best to have at least two representatives from management anytime a manager is handing out discipline or conducting a termination. That way, the fired employee can't make exaggerated claims about what happened during the meeting.

Also, in terminations, managers should establish one solid reason for the discharge ... and stick with it. Giving contradictory explanations later makes it far easier for a court to decide that the real reason for the firing was some sort of discrimination.

Case in point: James Woolsey, a

national sales manager for a manufacturing firm in Texas, was called into the company president's office and given a letter stating he was being terminated for poor performance.

Woolsey sued for age discrimination, alleging that during his termination meeting, the president said Woolsey was no "spring chicken." The president denied making the comment. Later, in court filings, the company offered additional reasons for the termination.

The court sent the case to trial, saying the president's comment, if true, was evidence of age discrimination. So were the shifting reasons. (*Woolsey v. Klingspor Abrasives*)

No 'gut decisions': Interview job candidates

Supervisors may think they know all the candidates for promotion so well that they can save time by making the choice without conducting interviews.

Case in point: Defense Department employee Barry Bartlett was 58 years old when he was passed over for a promotion in favor of a 39-year-old woman.

Bartlett had a bachelor's degree, advanced coursework and 34 years of experience at his agency. Still, the supervisor selected the female candidate who had

just eight years of experience and no college degree.

No interviews were conducted. *Reason:* The supervisor said she already knew enough about the candidates.

Bartlett sued for age discrimination. The court sent the case to trial, noting that the supervisor didn't seem to know the experience or education level of any of the candidates.

That cast a huge shadow over the selection process. (*Bartlett v. Gates*)

E-mail can become smoking-gun evidence

E-mail has been around for a while. But too often, managers still play fast and loose with their e-comments. As a result, e-mail messages are increasingly finding their way into employment-law court battles.

So it's typically better to pick up the phone or walk down the hall to discuss a candidate than it is to send an e-mail.

Case in point: A woman who was rejected for a job with the city of Pittsburgh sued for race and sex discrimination.

As part of her discovery request before the trial, she was able to access hiring managers' e-mail discussions concerning

her application.

"Don't interview her. She is bad news," one wrote. "She sued a former employer and has all kinds of financial problems," another wrote.

The court sent the case to trial. (*Salisbury v. City of Pittsburgh*)

Final note: Remember, employers aren't allowed to simply wipe away their incriminating e-mail tracks. Whenever an employer believes litigation is "reasonably anticipated," federal law requires it to place a "litigation hold" on any electronic communications that relate to any potential key players.



Dirty Dozen: The 12 manager mistakes that spark lawsuits

Lawsuits by employees against their employers have grown tremendously in the past decade. Sometimes those lawsuits have merit, sometimes they don't. But, either way, they cost time and money to fight—money that is better spent on product development, training and raises.

Even worse, some laws—including federal overtime law and the Family and Medical Leave Act—allow employees to sue their supervisors directly, meaning a manager's personal bank account could be at stake.

Most lawsuits are not triggered by great injustices. Instead, simple management mistakes and perceived slights start the snowball of discontent rolling downhill toward the courtroom.

Here are 12 of the biggest manager mistakes that harm an organization's credibility in court:

1. Sloppy documentation

Most discrimination cases aren't won with "smoking gun" evidence. They're proven circumstantially, often through documents or statements made by managers. Documents, particularly e-mail, can help the employee show discriminatory intent. *Advice:* Always speak and write as if your comments will be held up to a jury some day.

2. Not knowing policies, procedures

Courts expect supervisors to know their organization's policies and procedures. If a manager admits ignorance, legal experts say juries typically view that as purposeful, not forgetfulness.

That's why it's vital to make sure you understand company policies. Don't make decisions based on a vague memory of a policy. Double-check it or check with HR before taking action.

3. Inflated appraisals

Performance reviews are one of the most important forms of documentation, yet managers sometimes inflate the ratings for various reasons. If a manager later tries to cite "poor performance" for that same person's termination or demotion, those overly positive appraisals create a heap of credibility concerns.

Be direct, honest and consistent.

4. Shrugging off complaints

Turning a blind eye to employees' complaints of unfairness or perceived illegal actions is a guaranteed credibility buster. Comments like "I'm not a baby sitter" or "Boys will be boys" will hurt employee morale and jeopardize your standing in court.

5. Interview errors

It may be easy to answer the question, "Why did you hire that person?" But managers often run into trouble when they have to answer, "Why did you reject certain other candidates?"

That's because rejection decisions typically aren't well-documented and the decision-maker may not recall the reasons later. During interviews, never ask about age, race, marital status, children, day care plans, religion, health status or political affiliation (*see page 1*).

6. Changing your story

If an organization changes its reasoning for making an adverse employment decision (firing, discipline, demotion, etc.) in midstream, its credibility is shot. Be straight with employees from the start about reasons for discipline. Don't sugarcoat your comments.

7. 'Papering' an employee's file

Most managers hear the mantra, "Document, document, document." But it's possible to overdocument, especially when it occurs right before a firing. Courts will

be able to see through a rush of disciplinary actions cited in the days before a termination. Be consistent in documenting negative and positive performance and behavior of employees. It's best to keep a "performance log" for each employee, regularly making notes in each file.

8. Being rude, mean-spirited

An organization can have the best case in the world, but if the key supervisor comes across as rude, insensitive and mean, the attorney's job of selling the case to the jury will be much harder. Use the golden rule in handling staff.

9. Careless statements to feds

When responding to charges filed with the Equal Employment Opportunity Commission (EEOC) or state agencies, employers often have to submit position statements. Managers may be asked to help provide some of that information. You can bet the employee's attorney will review these statements, particularly affidavits, and introduce them at trial, especially if your story has changed. Keep your story consistent.

10. Lack of legal knowledge

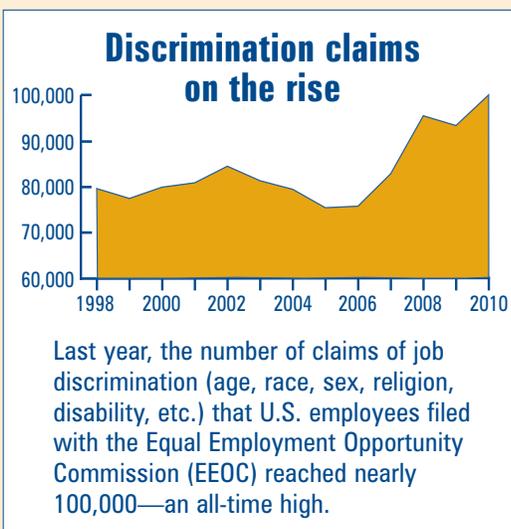
Juries will expect—and the plaintiff's lawyer will encourage them to expect—that employers stay abreast of developments in employment law. Refresh yourself regularly on your organization's policies, read communications sent from HR and, when in doubt, ask questions.

11. Dictating accommodations

Under federal law, employers must make "reasonable" workplace changes to accommodate an employee's disability. How do you choose those accommodations? It must be a give-and-take process to reach a solution, the law says. Managers too often try to dictate the solution.

12. Firing employees too fast

Managers who fire without first trying to improve the worker's performance will appear insensitive and potentially discriminatory in court. Conversely, managers who try to improve things before resorting to firing will stand a better chance of avoiding a lawsuit.



Make sure evaluations don't contradict your reasons for discipline, termination

control and see that work is not performed if the employer does not want it to be performed."

Note: Employees who continue to work unscheduled hours even after being told to stop should not be punished through their paychecks.

Using a lottery to set the vacation schedule: Is it legal?

Q. *We've had conflicts between employees over who could take vacation during summer and holiday breaks. I want to use a lottery system to allocate vacation time. Is this legal? — G.J., Florida*

A. This would be fine in most states as long as the organization doesn't have a collective bargaining agreement or some other contract that imposes restrictions on how vacations are to be determined. *Reason:* Most states recognize vacation benefits as voluntary, so employers are free to define the policy to their liking.

Can we terminate a worker after he gives 2-week notice?

Q. *I'm concerned that after a worker gives his two-week notice, he may tamper with our systems. I'd prefer to terminate workers right after they give a two-week notice. Is that OK? — T.L., Nevada*

A. Absent an employment agreement or a collective bargaining agreement, nothing precludes an organization from firing workers immediately after they give two weeks' notice. In such cases, some employers choose to pay the employee for the two weeks, but you are not required to do that. However, it's wise to consider how such action could affect employee morale.

Nothing raises suspicions among employees (and juries) more than effusive praise followed by a pink slip.

So here's a tip that will make courts more likely to uphold your discipline and termination decisions: Make sure whatever reason you use to justify your actions also shows up in past performance evaluations.

Case in point: A female employee at a Texas university received great performance reviews.

Recent comments from supervisors said her work was superior and exceeded expectations.

Then a new supervisor arrived. He hired a male and terminated the female worker for her "attitude and demeanor."

She sued, alleging gender discrimination. She said no one had complained about her attitude and demeanor before.

The court sent the case to trial, saying that because her evaluations lacked any negative information, a jury should decide whether citing "attitude and demeanor" was just an excuse to get rid of a woman and retain a man. (*Wolf v. Texas A&M University System*)

Final note: Always beware subjective assessments when suggesting

terminations. Give specific examples that support your assessments. You need something more substantial than generalities on which to hang a termination.

7 questions to ask before a termination

If you answer "yes" to any of the following questions, the risk of a lawsuit increases because the person will likely be included in a job-protected category under non-discrimination laws.

1. Is the employee over age 40?
2. Is the employee disabled in any way?
3. Has the employee been injured on the job or filed a workers' comp claim?
4. Is the employee a minority or a woman with a possible discrimination claim?
5. Is the employee able to claim any discrimination based on religion, national origin, ethnicity, sexual preference or other grounds?
6. Has the employee filed a discrimination or harassment suit in the past?
7. Has the worker been a whistleblower?

Off-limits questions

(Cont. from page 1)

10. Do you suffer from an illness or disability?
11. Have you ever had or been treated for any of these conditions or diseases?
12. Have you been hospitalized? What for?
13. Have you ever been treated by a psychiatrist or psychologist?
14. Have you had a major illness recently?
15. How many days of work did you miss last year because of illness?
16. Do you have any disabilities or impairments that might affect your performance in this job?
17. Are you taking any prescribed drugs?
18. Have you ever been treated for

drug addiction or alcoholism?

Many companies ask female applicants questions they don't ask males. Not smart. Here are some questions to avoid with female applicants:

19. Do you plan to get married?
20. Do you intend to start a family?
21. What are your day care plans?
22. Are you comfortable supervising men?
23. What would you do if your husband were transferred?
24. Do you think you could perform the job as well as a man?
25. Are you likely to take time off under the Family and Medical Leave Act?

Final point: If a job candidate reveals information that you're not allowed to ask, don't pursue the topic further. The "she brought it up" excuse won't fly in court, so change the subject right away.

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