

Workplaces that Work: Positive People Management

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What's *Not* Working in Your Workplace?

- Unreliable
- Unwilling to accept direction
- "Bad attitude" and bad behavior
- Rule bending
- Poor work product
- Here today, gone whenever
- Excuses, excuses, excuses . . .



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"Management Phobia"

- man'ājē-ment phō'bi-a, *n.*, a persistent, excessive, irrational fear of employment litigation that prevents managers from holding employees accountable for job quality, work rule compliance, and attendance.

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Creating a Culture of Compliance and Accountability



Using your eyes and ears
 Performance management
 Work rule enforcement
 Leave management

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Preaching to the Choir Co-opting Line Managers

Corporations do bad things to employees through managers

- Imputed liability
- Individual liability in some cases
- The "Good Guys"
 - Importance of demonstrating your entity's commitment to safeguarding employee rights

A critical piece of a broader compliance program

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Managerial Training: The "Panacea"

In addition to EEO and sexual harassment topics, managerial training should also focus on:

- ADA/FMLA "Triggers"
- FLSA Concept of "Compensable Time"
- Interviewing skills and selection criteria
- Performance management strategies
- Workplace policies
- Documentation practices

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Screening Clues

Open-ended Interview Questions

- “Tell me about a difficult situation you had at work or with a supervisor and how you resolved it.”
- “What did you like/dislike about your current or previous job, supervisor?”
- Expectations of position/duties

Blogs and webpages—Facebook?

Work history

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Performance Management

Every plaintiff-employee performed satisfactorily absent documentation to the contrary

To overcome jury bias, the employer's documentation should demonstrate

Employer made employee aware of expectations and deficiencies

Employer gave employee a reasonable opportunity to improve performance

Employee failed to rehabilitate performance

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Step One: Acknowledge and Confront

The Rule: Every good deed will be punished

How “good guy” supervisors confront performance problems

- Focus on behavior in discussion with employee
- Explain the difficulties caused by behavior
- Discuss consequences of failing to correct
- Identify attainable short-term goals

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Step Two: DOCUMENT

The Rule: She who has the most paper wins

- Today's tedious paperwork could be tomorrow's key evidence
- If it is not written, it did not happen or was not a problem
 - “unblemished record”
 - “an excellent employee who was never disciplined”

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Good Documentation

Is specific

- “John has a bad attitude”

Contains all relevant information

—e.g., date, time, individuals present, purpose

Demonstrates the employee is aware of issue

—i.e., signing disciplinary warning

Discusses consequences for failure to correct problem

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Step Three: Incorporate into Performance Evaluations

The Rule: All plaintiffs were excellent employees

Be firm, fair, consistent and timely

Be candid

Discuss any discipline or performance deficiencies during the evaluation period

Administer evaluations when you say you will

Avoid vague, subjective terms—focus on job tasks and behaviors

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Step 4: Use Performance Contracts

Place onus on **employee** to rehabilitate job performance

- Identify deficiency
- Ask "what will you do to fix this problem?"
- Document the employee's improvement plan
- Clarify managerial expectations, set timetable for review
- Have both the manager and employee sign the document

Document compliance/non-compliance consistently

Follow through . . .

Pull the trigger when necessary

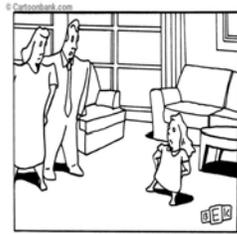


Work Rule Enforcement

Firm, fair and consistent

Employees keep score:
comparators

Losing control



Step One: Review Relevant Documents

Employment Agreement(s)

- An employment agreement requires "cause" for terminations

Employee Handbook / Work Rules

- Did employee commit "terminable" offense based upon conduct rules?
- Does progressive discipline policy preserve employer's right to terminate without adhering to disciplinary "ladder"?

Counseling Memos and Investigative Notes

- Was employee previously warned?



Step Two: Investigate
(Build a Record to Support a Defensible Termination)

Consider suspending pending investigation	Commit all notes to summaries signed by witnesses (if possible)
Get employee's side of the story	
Confer with supervisors and managers	Review findings with counsel
Interview potential witnesses	Commit findings to writing

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ADA Management

Do NOT "pathologize" bad behavior or poor performance!

- The ADA does not excuse bad behavior or poor performance
- Focus on performance, behavior!



On September 3, 2008, the EEOC issued new Enforcement Guidance entitled "The ADA: Applying Performance and Conduct Standards to Employees with Disabilities"

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EEOC's Guidance on Performance/Conduct Standards and the ADA

Important reminders:

- An employer may apply the same qualitative/quantitative standards to an employee with a disability
- An employer should apply the same evaluative criteria to an employee with a disability
- An employer can enforce the same conduct rules with respect to both disabled and non-disabled employees
 - Conduct rule must be job related and consistent with a business necessity

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Blame the disability

First disclosure of potential disability in response to discipline or poor evaluation should trigger

- Request for medical documentation
- "Interactive process" to determine reasonable accommodation

Request for reasonable accommodation during discussion of performance problem does NOT require employer to

- Tolerate or excuse performance
- Withhold discipline
- Raise performance rating
- Give "inflated" evaluations

What reasonable accommodation would enable the employee to meet the performance or conduct standard?

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Attendance Requirements and the ADA

An employee who is not eligible for or has exhausted FMLA leave may still be entitled to leave as an ADA "reasonable accommodation"

Not a "carte blanche" for employees

- EEOC's Guidance recognizes that chronic, frequent and unpredictable absences can cause an "undue hardship."
 - Staffing to accomplish work, failure to meet work goals or serve customers/clients, overburdening other employees, significant increased costs due to overtime or temporary workers
- If "undue hardship" and the employee cannot be reassigned to a vacant position, the employee may not be "qualified."
- Indefinite leave = undue hardship (not even *reasonable*)

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Leave Management

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Abuse of FMLA Intermittent Leave

April, 2008 HR survey:

Abuse of FMLA intermittent leave is HR's greatest concern about FMLA administration

Top 3 "serious health conditions"

- Cancer
- Elder Care
- Migraine Headaches



"I've transferred all my vacation time into absurdly long coffee breaks."

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Accounting for Intermittent Leave

- Use time increment of no more than shortest period of time *used to account for other forms of leave* (provided it is not greater than an hour)
- May use different increments at different points
- Weekly hours may vary – use 12 month average

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The PAID Leave Carrot

- Employers can have PAID leave requirements that differ from FMLA leave entitlements
- Employers can require that employees satisfy procedural requirements of paid leave policy to receive paid leave (e.g., PTO that must be taken in full-day increments)
- Employees remain entitled to unpaid FMLA leave if they don't satisfy paid leave requirements
- When agreed, paid leave may supplement STD, worker's comp, etc.

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The “Alternate Position” Option

- Temporary: employee must be restored to same or equivalent job when need for leave ends
- Must have equivalent (virtually identical) salary and benefits
- Employer can offer part-time employment with equivalent hourly rate/benefits, so long as employee is not forced to take more leave than necessary
- Employer can proportionately reduce pay/benefits to coincide with part-time schedule
- Not be used punitively (e.g., white-collar worker to laborer job)

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Not “Light Duty”

- “Light duty” is not an “alternate position” - W/C, reduced wage
- Does not count as FMLA leave
- Acceptance of light duty does not waive FMLA reinstatement rights
- In such cases, employee’s restoration right ceases at end of applicable 12-month leave year

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FFD’s and Intermittent Leave

Cannot require for each intermittent absence

CAN require every 30 days if:

- Employee has used such leave during that period and
- “reasonable safety concerns exist” regarding ability to perform job

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Curbing Abuse of Intermittent Leave

- Enforce employee notice requirements
- Expressly prohibit any work while on FMLA leave in FMLA policy
- Recertify to ensure that intermittent leave is “medically necessary”
- Provide attendance records to HCP to ask whether need for leave consistent with employee’s SHC
- Surveillance?

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Employee-perceived “Immunities”

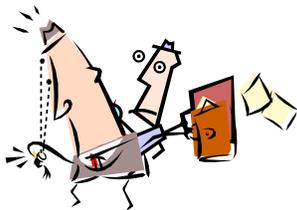
- Complaints/Charges of Discrimination
- ADA Reasonable Accommodation Requests
- FMLA Leave or Requests for Leave
 - Job stress
- Workers’ Compensation Claims



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Managing “Untouchable” Employees

- Consistent documentation
- Performance management
- Well-publicized complaint procedures
- Managerial training
- Attendance tracking
- Involvement of line managers
- Culture of compliance



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Final Questions?

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