

10 Things Every Manager Should Know

#1 Understanding Managerial “Agency”

- #1: Managers are agents of the employer.
- #2: Liability is often triggered by the employer (or its agents) having knowledge of a problem.



TIP: Once you know or have reason to suspect a problem, go get help!

2 Understanding Discrimination Claims



The Protected Classes

- Race
- Color
- National Origin
- Religion
- Sex
- Age
- Disability
- Genetic Information
- Military Status
- State and Local Protected Classes

How Are Appearances of Discrimination Created?

Favoring Those Most Like Ourselves



Poisoning The Well



Poisoning The Well

- “We could hire two good young managers for what we’re paying Charlie.”
- “At least your husband has a good job.”
- Use of racially offensive language
- Military service was “bull----” and “a bunch of smoking and joking” and “a waste of taxpayer’s money”
- COO referred to employee as an “old, gray-haired f---.” (rhymes with “tart”)



TIP: The Key to Preventing Discrimination Complaints

1. Be **fair** (use legitimate, business reasons)

1. Be **consistent**

#3 Retaliation Claims: Recognizing Warning Signs

WARNING

EEOC Charge Statistics for 2015

- **Retaliation 39,757 (45%)**
- Race 31,027 (35%)
- Sex 26,396 (30%)
- Disability 26,968 (30%)
- Age 20,144 (23%)
- Nat'l Origin 9,438 (11%)
- Religion 3,502 (4%)
- Color 2,833 (3%)
- Equal Pay Act 973 (1%)
- Genetic Info 257 (.3%)

Total Charges: 99,412

#3 Retaliation Claims

1. The employee engages in a “protected activity”
 - Complained about legal rights being violated
 - Exercised a legal right (FMLA leave)
 - Acted as a witness
2. Employee suffers a “harm”
3. Causal link between #1 & #2 is found



***TIP:* Talk to HR ASAP if an employee complains to you about legal rights!**

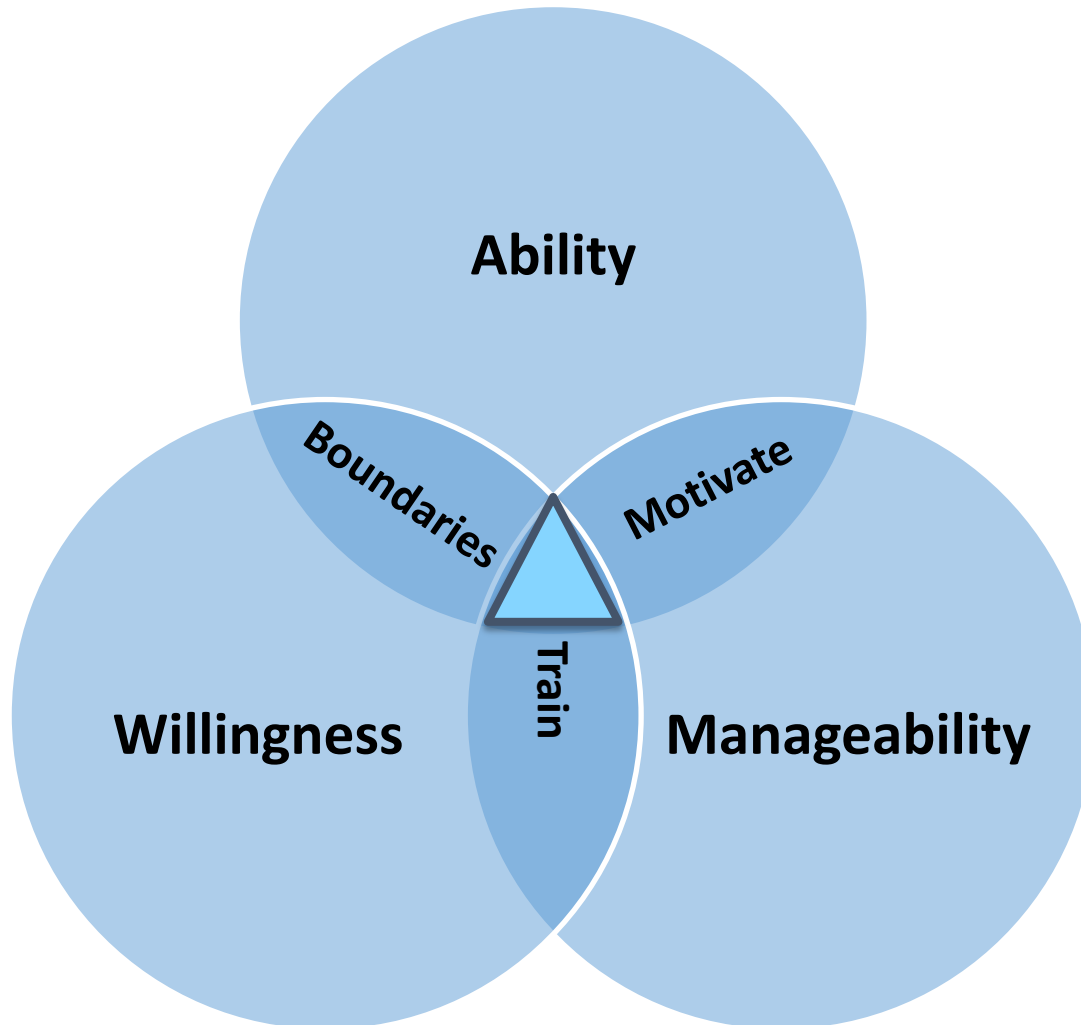
#4 Job Interviews: Set the Stage for Success

1. Make no inquiries into protected class status/arrest records
1. Ask only for *relevant* information
1. Ask every applicant the same set of questions



TIP: It is worth the time to do thorough job interviews... *that are also legally compliant!*

#4 Job Interviews: Set the Stage for Success



#5 Disability Claims: Accommodating Disabled Employees

- Main objective: be able to recognize disability issues and go get help!
- It doesn't take much to be "disabled":
 - Many conditions lasting 3 months+ are disabilities
 - Most common mental health issues are covered
- The right to be accommodated is extensive!

Designing Reasonable Accommodations

Interactive Dialogue
Process is Required!

To What Extent Must Employer Accommodate?

- **Employer:** Must provide reasonable accommodation when requested by employee
 - JAN - Job Accommodation Network - askjan.org
- **Employee:** With reasonable accommodation, the employee must be able to perform the essential functions of the position



TIP: Be very respectful when speaking with disabled employees. Negative comments from the manager often generate discrimination claims.

#6 Wage and Hour Issues: The Great Underappreciated Area of Risk

- **All work hours for non-exempt employees must be tracked!**
 - No working “off the clock”
 - No sloppy time keeping practices
- **Time Worked**
 - **Not required to pay for time that direct care workers are completely relieved of their duties. (Must be 30+ minutes.)**
 - Long enough for a worker to use the time effectively for his or her own purposes.

#6 Wage and Hour Issues: The Great Underappreciated Area of Risk

- **Sleep Time**

- Shifts of less than 24 hours
 - Must be paid for all time, including sleep time
- Shifts of more than 24 hours
 - Employee and Employer may agree that sleep time is not paid under the following conditions
 - No more than 8 eight hours is counted as sleep time
 - Adequate sleeping facilities are furnished
 - The employees time spent sleeping is usually uninterrupted
 - There is an expressed agreement to exclude sleep time.

#6 Wage and Hour Issues: The Great Underappreciated Area of Risk

- **Prop 206**

- Proposed Minimum Wage Increase
 - \$10.00 per hour in 2017
 - \$10.50 per hour 2018
 - \$11.00 per hour in 2019
 - \$12.00 per hour 2020
- Mandated Sick Leave
 - 1 hour of paid sick leave for every 30 hours worked

Overtime Pay

- *OT pay* = one and a half times the “regular rate” for time worked over 40 hours in workweek.
- *Work week* = any 7 consecutive days set by employer
- If employee works unauthorized OT:
 - Employee must be paid OT
 - Employee may be disciplined for violating OT policy



***TIP:* Don't get casual about complying with W&H laws!**

#7 Employee Classification

Exempt vs Non-Exempt

- Non-Exempt Employees are “not-exempt” from MW and OT requirements
- Any employee can be non-exempt
- Exempt Employees are “exempt” from minimum wage and overtime requirements
- Only those employees who meet requirements can be exempt
 - Homecare & Companionship exemptions do not apply
 - **New FLSA exempt threshold \$47,476 – 12/1/2016**

1099 vs Employee

IRS and DOL Enforcement

- **Factors to Consider**

- The extent to which the work performed is an integral part of the business.
- The workers opportunity for profit or loss
- The extent of relative investment of employer and worker
- Whether the work performed requires special skills and initiative
- The permanency of the relationship
- The degree of control exercised or retained by the employer.

Check State Laws

#8 NLRA Rights: Employees Can Say A Lot Of Bad Things!

Sec. 7. of the National Labor Relations Act:

“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, **and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.**”

NLRA “Concerted Activity” Rights

- Employees have the right to act *in concert* with each other regarding working conditions

Examples:

- Signing a petition about working too much OT
- Complaining about working conditions on Facebook

Not permitted:

- Disclose employer trade secrets
- Bash employer products or services

This is an area of increased enforcement activity!



TIP: Check with HR before taking action!

#9 Notes, Warnings, Performance Evaluations: Avoiding Common Mistakes



How to Create Documentation

- **Document the facts**
 - Date, who, what, where, when, etc
- **Common Documentation Mistakes**
 - Using labels without providing examples
 - Using absolutes
 - Not completing timely
 - **Everything you write can be subpoenaed!**

How to Write Warning Letters

1. Clearly **identify** the problems
1. Describe the **impact** of the problems
1. Set future **expectations**
1. Clearly **warn** of consequences
1. Have employee **sign** letter

More Tips on Warning Letters

- **Don't** make it **personal**
- Have **someone** else **review** letter
- Incorporate **verbal warnings**
- **Avoid** spelin and garametical **erors!**

More Tips on Warning Letters

ASSOCIATE COUNSELING FORM

Associate Name: Ozzy Jagger

Date: 12/1/2016

Manager: Steven Cooper

Date of Incident: 11/30/2016

Dates of Previous Warnings:

Description of Issue:

Ozzy is scheduled to arrive at 8:00 am. On 10/6/2016, 11/10/16 and 11/12/16 he arrived at 8:20 am. He received a verbal coaching on 11/10/16 and 11/12/16 that he needed to arrive at 8:00 am. Ozzy agreed to this.

Goals/Correceptive Behavior: Ozzy needs to arrive at 8:00 am going forward.

Employee Comments:

You are formally being warned to brig the severity of this situation to your attention. Failure to correct this behavior and/or further violations of Company policies will result in additional disciplinary action up to and including discharge. Your signature does not necessarily mean that you agree to the contents but that you acknowledge the discussion between yourself and your manager has taken place.

Associates's Signature

Manager's Signature

Date: _____

Date: _____

#10 Terminations: How You Do It Makes All The Difference

“It’s not just *what*, but *how*”

- **Reasons:**

- A legitimate, honest, documented reason(s) should always exist
- “At-will employment” should never be a reason

- **Prior warnings:**

- Unless something egregious happens (theft), best to issue written warning prior to termination
- Unemployment office will require a written warning in most situations

Termination Meetings

1. Should be carefully planned out with HR

- Time and located carefully selected

2. At least 2 employers present

- Immediate supervisor should usually be spokesperson

3. Tone: firm and clear, but respectful

4. Exiting employee out

- Minimizing humiliation
- Security issues



TIP: Clear communication with employees about concerns prior to termination will result in less traumatic terminations.

Questions?

Thank You!

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