

# Employee Relations

## LAW JOURNAL

### **A Common Sense Approach to Reducing Liability in Today's Workplace**

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*This article provides strategies for human resources and management to help mitigate potential liability in organizations. While the focus is often on compliance with the myriad of rules and regulations imposed on the workplace by federal, state, and local laws, the author believes that creating policies is not enough to minimize organizational risk. The organization needs to take a comprehensive look at its workplace challenges and work tactically to ensure that these practices and policies are applied consistently, effectively, and in a timely manner.*

As human resource professionals work diligently to comply with the unyielding rules and regulations impacting today's workplace and create policies that mitigate liability risks in their organizations, they are often left with feelings of fear, confusion, and out and out frustration when the organization is faced with a potential lawsuit.

Ironically, while they focus on compliance with the Americans with Disabilities Act, the Equal Employment Opportunity Act, and other federal, state, and local laws governing harassment, sexual harassment, and discrimination, an equally pressing and important challenge can take a back seat. Comprehensively defining and effectively mediating the day to day workplace conflicts that prevail in the organizational landscape must also be viewed as insurance against liability.

While conflict is a natural occurrence that exists in all systems, organizations struggle with the concept of workplace conflict and can be resistant to creating a road map to hone in on problematic areas. In this perfection-driven society, conflict is seen as an evil word. It implies failure, lack of control, and pushes the button that says we're not good enough. We want to avoid it at all costs and avoid talking about it.

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Organizational conflict may be covert, overt, or ignored, but it's there. While workplace lawsuits abound, lawsuits are not necessarily societal demons. They're often a wake-up call that forces organizations to be more vigilant in the ways they respond to employee grievances, handle accommodations, communicate change, and conduct business.

It seems a common sense approach would do well. Yes, compliance is necessary. But instead of the focus being the burden of compliance, it's important to look beyond that to the reason these regulations were started in the first place. For example, comprehensive sexual harassment training shouldn't only be done because it would make the organization less negligent if there was a lawsuit. Sexual harassment prevention should be part of the vision and integrity of an organization. Providing a reasonable accommodation for someone with a mental illness shouldn't be implemented solely for the purpose of meeting some imposed standard. It's the right thing to do. It makes good business sense to embrace workplace issues with open arms and it makes even better sense for human resources and senior management to partner in the creation of practices and procedures that ensure these issues are responded to quickly, consistently, and effectively.

## **THE ROLE OF HUMAN RESOURCES**

Organizations usually wait for a crisis to occur before they tackle an issue head on. There are many reasons for this. Human nature is one of them. As previously discussed, conflict avoidance is a common phenomenon in most organizations. HR being stretched in many directions is another. Whether implementing global strategies, investigating a sexual harassment complaint, or making sure everyone gets paid on time, human resource professionals don't always have the time to be proactive rather than reactive. In addition, most are not formally trained in conflict resolution and are often sought out by managers needing their advice and guidance in this area. Today's workplace demands that human resource professionals have excellent employee and human relations skills, a solid knowledge of employment law, and a common sense approach to workplace challenges. Following is a toolkit of strategies and suggestions for meeting some of the challenges that could potentially cause liability.

### ***Sexual Harassment***

It's a gamble to think that policies and thorough investigations are enough to reduce an organization's risk for sexual harassment. All managers and general employees should be trained on a regular basis and the training should also include harassment based on all legally protected categories. Managers must be instructed to take all complaints seriously and respond immediately. Most cases reported to the EEOC fall under "hostile workplace environment" and often reflect the

confusing, gray areas of sexual harassment. Employees are less familiar with behaviors that fall into this category and need to be educated as to appropriate and inappropriate conduct. It's advisable to do regular temperature checks of the organization. Do female employees make jokes about how the males always get promoted? Does the culture frown on those who don't go with the flow? Take these situations seriously and respond quickly and strategically to complaints about bully bosses and co-workers. Human resources should also strive to maintain positive, open relationships with managers so that HR is called in to advise on all incidents. This guidance can also mitigate against actions and decisions that could be considered retaliatory.

### ***Downsizing***

In these turbulent, ever-changing economic times, many organizations have made major cutbacks in order to reposition themselves in the competitive marketplace. This trend is not likely to decelerate any time soon and can have far reaching impact on those downsized, those who remain, and the internal and external reputation of the organization. While it's necessary, of course, to ensure that these changes are made without discrimination, it is imperative that the emotional impact on human lives be equally considered. The ways in which organizational change is communicated plays a vital role in the success of this process and the organization's ability to recover and move forward. Minimizing or denying this impact is a mistake. While facts and data need to be an ongoing part of the communication, the organizational message needs to acknowledge the hardship this may be causing employees and make every effort to ease the process. Faulty, inconsistent communication encourages rumors, gossip, and low morale. It can also create an environment of fear, mistrust, and unrest causing employees to quit prematurely.

Generous severance packages, career counseling services, and stay bonuses are important but human resources and management might consider taking a more comprehensive, creative approach. Paul Falcone suggests that management help employees leaving to refocus on the organization's changing needs, their necessary role, and their careers. This can be achieved in several ways. In addition to allowing time off for interviews, management should also allow for open discussion so that employees can vent their frustration, anger, and disappointment. This will help foster a cooperative attitude where employees will stay focused on their tasks and help out doing what needs to be done.<sup>1</sup> The strategy behind this idea is that employees being downsized will maintain good relationships with those who are potential references, be committed to the organization until the end of employment, and will interview better after experiencing the layoff process in a more positive light. Not only will this make them more marketable, they will leave with a good feeling about the organization and are less likely to pursue legal action.

### ***Domestic Violence***

Every year, thousands of employees are impacted by domestic violence. Frightening stories about threats, stalking, and violent death are in the news on a regular basis. Organizations lose billions of dollars in absenteeism, productivity, health care costs, low morale, and bad publicity. In addition, the added costs of poor security, inadequate safety, and liability can be insurmountable. According to the Department of Labor/OSHA, 5.3 million women are abused yearly and 74 percent of these women are harassed at work by their abuser.

Human resource professionals should be aware of the signs of domestic violence in the workplace and understand the laws that impact domestic violence as they pertain to discrimination, safety, leave policies, accommodation, flexible use of benefits, and confidentiality. For example, an employee involved in domestic violence is placed in a shelter because her life is in danger. She is aware that the organization does not allow employees to work from home, but asks human resources to make an exception as she has no remaining paid leave and needs the income. In this case, it would make sense to allow the employee to work from the shelter due to extenuating circumstances. This employee's safety, as well as the safety of all employees in the organization, should be top priority. It would be beneficial to have a relationship with community resources and local law enforcement.

Not only should there be policies related to domestic violence, but managers and human resources should be trained on the best ways to handle these situations. Consider creating a crisis management team that includes security, human resources, legal, management, union representatives, and other key staff. If the organization has an employee assistance program, make sure it has adequate procedures to respond quickly and effectively to domestic violence situations.

Attorney Ann Kaminstein says that organizations need to look at their general human resources policies such as recruitment, attendance, compensation, and job promotions to see if they inadvertently discriminate against victims of domestic violence.<sup>2</sup> It is also advisable to do a risk analysis of the organization and evaluate safety and security plans.

### ***Termination***

Terminating an employee is always a stressful event. Human resources and management can be the target of the employee's anger, frustration, and hopelessness. While not always possible, its best if the employee leaves on good terms. An open, honest approach is best. Remain calm, non-defensive, and let the employee, within reason, vent his or her anger, shock, and hurt. Don't cut the conversation short or interrupt. Plan for the meeting and be careful not to patronize or infantilize. The tone of meeting should be professional and respectful.

Before terminating an employee, it's important to look at what type of feedback the employee has been receiving all along. Bill Frumkin, a partner at Sapir & Frumkin, LLP, says it extremely important that employers regularly document job performance problems, utilize progressive discipline, and perform frequent performance appraisals. He also stresses the importance of keeping email trails. Also, Frumkin says that employers put themselves at risk when they allow managers to keep a separate file on employees. He advocates that all employee documents be filed with human resources and that employees be informed on every write up and copied on it.

If the employee being terminated has a history of aggression, has made a threat, or is a safety concern, take this very seriously and prepare accordingly. Understand that, despite the facts, this employee feels unfairly treated and humiliated. While it is important to provide severance, job counseling, and referral to the employee assistance program, if available, it is also best not to terminate this employee at an offsite location or handle it alone. If possible, have plainclothes security around and keep the office or meeting room free of any items that could be used to cause harm. Try to hold the meeting near an exit and let senior management know that this is occurring. Don't allow this meeting to take place in a remote area of the building. When meeting with this individual, try not to argue, question their integrity, accuse, or speak in condescending tones. Find something good to say about their contribution to the organization. This will help to allay safety risks for the individuals involved and the organization at large.

### ***Americans with Disability Act***

Most human resource professionals understand the guidelines for reasonable accommodation under the Americans with Disabilities Act (ADA) as they pertain to physical limitations. The process, however, gets more complicated and intimidating when mental illness and substance abuse are the issue. There may be several reasons for this. Fear, lack of knowledge, and unrelenting taboos play a part, but an even bigger issue relates to the fact that these employees may not be aware of the extent of their illness or its impact on their productivity and work environment. Many, of course, are getting the proper care and treatment and are able to lead productive personal and professional lives. The challenge comes when there are significant job performance problems. In these situations, it is important for managers and human resources to document and address the specific job performance issues.

Let the employee know what behaviors are appropriate and inappropriate in the workplace, expectations for performance, and specific consequences. Be careful not to diagnose, counsel, or put this process completely aside if the employee asks for an accommodation. Management and HR certainly need to move to provide resolution for the

work-related challenges this employee is facing, but the employee can also be held accountable on some level. The ADA states that an employer can discipline and discharge the employee as long as the employer would impose the same action on an employee without a disability.

If the employee asks for an accommodation, employers, barring any undue hardship, are required to provide reasonable accommodation and should check periodically to make sure that the accommodation is working and still necessary. The request for an accommodation does not have to be in writing and can be in "plain English." Some accommodations in this area may include time off for therapy and rehabilitation, modified supervision (more face-to-face meetings, more detailed instruction on tasks), room dividers to reduce noise and distraction, and flexible work hours. The ADA also states that the employer may require reasonable documentation that the employee has a disability within the meaning of the ADA.<sup>3</sup> The ADA can provide employers with medical requests forms. Contact the ADA's Job Accommodation Network for advice and guidance.

## **TRENDS**

As organizations become more strategic in the ways they address workplace conflict and assess their risks, some trends have emerged. Employment Practices Liability Insurance (EPLI), mandatory arbitration, and internal conflict resolution programs are becoming more and more popular.

### ***Employment Practices Liability Insurance***

With the increase in lawsuits related to intentional discrimination and unlawful harassment, more organizations are purchasing EPLI. Bill Frumkin finds that smaller organizations that have sexual harassment policies and training, and haven't been sued in five years, can possibly get coverage. The insurance costs could be prohibitive for larger organizations, and these organizations usually have in-house counsel. Frumkin feels this could force small businesses to take a closer look at their employment practices. Joseph Yastrow suggests that human resources provide preliminary research before advising on the purchase of EPLI. This research should include an audit of the organization's employment practices and policies, review of recordkeeping and notification practices, a review of past claims and corrective measures, related organizational training programs, turnover statistics, and the effectiveness with which the organization is able to receive and internally resolve employment law complaints and problems.<sup>4</sup>

### ***Mandatory Arbitration***

Some organizations are requiring that all employees agree to arbitrate. Due to a US Supreme Court ruling, organizations can require employees

to sign a waiver and rights to trial as a condition of employment. This may be a cost effective way to avoid litigation, but it's not without problems. For example, issues arise when employees, who may be an integral part of the organization, refuse to sign the agreement.

### ***Internal Conflict Resolution Programs***

Many organizations are implementing comprehensive onsite conflict resolution programs. These programs can include peer review panels, single adjudicators, and mediation. If the employee is not satisfied with the process, arbitration can be requested.

One of the most important steps when considering an onsite program is to look at the culture of the organization to test what people are willing to accept. Proponents feel these programs can defuse workplace conflict before it escalates to lawsuits and reduce interpersonal problems that result from strained relationships in the workplace.

### **CONCLUSION**

Workplace conflicts arise because employees have different needs, values, goals, perceptions, and motivation. Employees compete for power and status, the manager's time, recognition, and overall limited resources. If conflicts are ignored or not managed well, morale and productivity suffer and the organization is more vulnerable to liability. Organizational conflict should be viewed as an opportunity to problem solve with a solution that respects the interests of all parties involved.

### **NOTES**

1. Paul Falcone, "In the Face of Adversity," *HR Magazine* (Sept. 2006): 137–142.
2. Ann Kaminstein, Esq., "Implementing A Workplace Domestic Violence Program," (Jan. 2004), [www.dvinitiative.com](http://www.dvinitiative.com).
3. US Equal Employment Opportunity Commission, "The ADA: Your Responsibilities as an Employer," (Last modified Mar. 21, 2005), <http://www.eeoc.gov/facts/ada17.html>.
4. Joseph H. Yastrow, "The Promises and Pitfalls of Employment Liability Insurance: Practical Advice for HR Professionals," *SHRM Legal Report*, (Jan.–Feb. 2004, Last reviewed Dec. 2006), [http://www.shrm.org/hrresources/lrpt\\_published/CMS\\_007251.asp](http://www.shrm.org/hrresources/lrpt_published/CMS_007251.asp).

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