In the last three years, allegations of employment discrimination filed with the Equal Employment Opportunity Commission have risen, particularly in the area of retaliation, which has shown eye-opening, record-setting increases. Overall, discrimination charges rose to an unprecedented 95,402 filings in fiscal year 2008, an increase of 15 percent from the prior year alone. In an environment where a greater number of discrimination allegations are filed each year, and following a year in which several significant employment laws have been passed and wide-sweeping agency regulations issued, it is a good time to examine the preventative strategies your company has (or should have) in place.

The costs of employment-related litigation are both direct, in the form of the actual expense of litigating a case and potentially paying damages to the employee litigant; and indirect, from the impact of the litigation on administrative time, employee morale and job satisfaction. Developing and implementing strategies for minimizing these costs is time and money well spent. The most effective ways to avoid employment-related litigation are to proactively evaluate and align your employment practices to remove the sources of conflict in the workplace, establish procedures and processes for documenting employee relationships, and proactively resolve discrepancies and disputes before they lead to litigation.

By Cathi J. Hunt, Eric W. Iskra and Richard M. Wallace
Although each employee-plaintiff’s motives for filing a lawsuit are different, there are often systemic issues within a company that cause employees to seek resolutions to their problems through the legal system. The two most common systemic issues that must be identified (and subsequently addressed) to prevent employment litigation are:

A. Actual violations of the law

The most obvious reason an employee may file a lawsuit is that an employer has violated one or more employment-related laws. Unintentional violations may occur because of a supervisor’s or manager’s lack of knowledge of the law, or incomplete or insufficient training of front-line leaders on company policies and procedures designed to ensure legal compliance. To prevent these unintentional violations, employment policies and handbooks must be kept current, managers must be trained and able to effectively implement those policies, and managers must know the limitations of what they can and cannot, do under the relevant state and federal law. Even the best policies are effectively worthless for preventing or defending employment litigation if they are not actually followed.

B. Dissatisfied or disgruntled employees

In many cases, employees resort to litigation as a result of their personal fundamental and pervasive dissatisfaction in the workplace. These cases often are less about the specific legal claim asserted by the employee than about the employee’s response to general dissatisfaction with his or her job or treatment at work. Keeping employee satisfaction and morale high by proactively identifying and addressing “problem areas” has many organizational benefits, including higher productivity, reduced turnover and a greater likelihood that your employees will not turn to the judicial system.

The “Top Ten” Proven Strategies that Your Company Can Implement to Avoid Employment Litigation

The ability to identify potentially significant systemic problems that may exist in your workforce is the crucial first step to addressing these issues and effectively implementing strategies to prevent employment litigation. These strategies, in “Top Ten” format, are:

10. Hire the Right People.

Employers can avoid much of the potential liability and expense of employment-related litigation by taking steps to screen out obviously unqualified applicants and those whose conduct may create problems for other employees or the organization’s customers.

Your first and best line of defense in the hiring process comes from the information you seek in the application form. Generally, every application form for employment should require information sufficient to allow confirmation that the applicant meets the qualifications for the position in question. Employment history information, including the names and addresses of previous employers, job titles, dates of employment, job responsibilities, supervisor references and reasons for leaving, is essential. The application form may also contain a question about whether the individual has ever been convicted of a serious criminal offense, and if so, request the applicant to identify the date, place and nature of the crime, along with a disclaimer that a criminal conviction will not automatically disqualify the applicant from consideration for employment.

Information indicating that the employee has been discharged from prior employment or convicted of criminal activity may imply that the person could be a problem for your organization down the road. An employer’s failure to examine an applicant’s relevant criminal history can result in liability through negligent hiring claims, respond, superior allegations, or violations of federal and state laws prohibiting employment of applicants with certain convictions into certain roles (such as in the financial services, health care, insurance, childcare and transportation industries).

Contacting former employers that the prospective employee has identified on the application may lead to
valuable information about the prospective hire, including his/her truthfulness regarding work history and information about any prior workplace misconduct. For some jobs, such as positions involving corporate financial data, trade secrets or other sensitive and confidential material, a more extensive background investigation may be advisable. Likewise, you may reasonably want to conduct more extensive investigations of persons who will have access to customer funds or other valuable materials or property. A survey of 22 large retail companies found that one in every 30 employees was apprehended for theft from their employer in 2008. On a per case average, these employees steal a little more than seven times the amount stolen by shoplifters. Applicants for managerial, supervisory or policy-making positions should also undergo a more rigorous background investigation due to their anticipated value to your organization and the greater potential for damage arising from wrongful conduct on their part.


Adopting a well-drafted employee handbook can protect your organization from a wide range of employee-related problems. Unfortunately, many companies fail to update their handbooks on a regular basis. As a result, the handbook becomes outdated, is inconsistent with the actual policies and practices of the company, or (in a worst case scenario) is actually contrary to existing employment laws. Accordingly, employee handbooks need to be reviewed once a year and revised as necessary to keep up with the latest policies, practices and laws.

Additionally, there have been several significant changes in employment law in the past year that must be reflected in your policies. The new laws and regulations call for immediate review of your handbook, and the need to update to reflect the changes. A few of the laws passed last year with significant impact on employment policies and practices include:

a. Family and Medical Leave Act

New FMLA regulations took effect on January 16, 2009. Among other modifications, the new regulations change some of the notice requirements, medical certification standards and methods of accounting for FMLA leave. FMLA notice forms including the Notice of Eligibility, Rights and Responsibilities Notice and Designation Notice should be updated, and there are four new mandatory notices that employers must issue during the FMLA process. All of these forms are available to download from the US Department of Labor website (www.dol.gov/esa/WHD/fmla/index.htm). The regulations also provide guidance on two new types of FMLA leave available known as “qualifying exigency” and “military caregiver” leave. These two types of leave have been expanded further by the 2010 National Defense Authorization Act, which passed on October 28, 2009. Finally, you should also review your handbook to ensure that other employment policies, such as paid leave, bonus policies and attendance awards are consistent with the new FMLA regulations.

b. ADA Amendments Act

On January 1, 2009, the ADA Amendments Act (ADAAA) took effect. The ADAAA expands the definition of “disability” and broadens the class of employees who are protected by the ADA. Employers need to review disability and reasonable accommodation policies and practices to ensure compliance with the ADAAA. For example, because the definition of “disability” has been broadened, a policy that defined “disability” prior to the ADAAA must be updated.

c. Lilly Ledbetter Fair Pay Act of 2009

The Lilly Ledbetter Fair Pay Act was signed into law on January 29, 2009, and effectively extends the statute of limitations applicable to claims of pay discrimination under Title VII and other federal anti-discrimination laws. As a result, you should review your pay policies, particularly policies related to starting pay, merit pay increases and
promotional pay increases. Employers may want to consider implementing formal pay grades for certain positions because managerial discretion in setting an employee's pay could turn into liability for the organization many years later under the Lilly Ledbetter Fair Pay Act.


Employers often find themselves faced with claims of wrongful termination or employment discrimination by employees who were justifiably terminated for legitimate, non-discriminatory business reasons. Unfortunately, many employers find themselves in a position where it is difficult to defend against such claims because of incomplete, inaccurate, or "sugarcoated" evaluations of the employee's performance during his or her tenure of employment. Accordingly, it is imperative that your managers and supervisors honestly, accurately and fairly evaluate your employees' conduct and performance. And equally importantly, those evaluations must be thoroughly documented. "Evaluation inflation" that does not accurately reflect substandard employee performance creates a false picture that will likely be presented to a jury in the event the employee resorts to litigation. When this occurs, and there is subsequent litigation, an employer can face a difficult burden in attempting to contradict or explain inaccurate and overly favorable employee evaluations. Absent consistent documentation justifying an employee's discipline or discharge, any subsequent dispute results in a "he said/she said" debate, which is likely to be a losing proposition for the employer.

Performance evaluations are also an important tool from a personnel administration standpoint. If conducted properly, such evaluations ensure that management's assessment of a particular employee's performance is communicated accurately. Evaluations advise employees of whether they are meeting performance standards and help identify problems. Evaluations also encourage employees to improve without the imposition of discipline. In writing evaluations, it is critical that the evaluator present an objective and accurate analysis of an employee's performance and resist the temptation to give false praise. Teach your supervisors to make evaluations "fact-oriented," objective and not overly conclusive. For example, rather than stating an employee is "a bad employee," a more clearly stated assessment might be: "the employee fails to arrive at work on time and is less productive than other employees working in the same position on the same shift."

Even the best policies and procedures addressing employee complaints will be useless in preventing employment litigation if supervisors or managers retaliate against the employee for making the complaint.

Employee performance creates a false picture that will likely be presented to a jury in the event the employee resorts to litigation. When this occurs, and there is subsequent litigation, an employer can face a difficult burden in attempting to contradict or explain inaccurate and overly favorable employee evaluations. Absent consistent documentation justifying an employee's discipline or discharge, any subsequent dispute results in a "he said/she said" debate, which is likely to be a losing proposition for the employer.

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7. Provide a Mechanism for Employees to Lodge Complaints and Immediately and Thoroughly Investigate.

There is not necessarily a hard and fast rule requiring that a company must have a written policy detailing appropriate workplace conduct and a mechanism for lodging complaints for inappropriate behavior like sexual harassment. However, having this type of policy and complaint procedure is wise. One law review article analyzing the subject found that where no policy was in place, plaintiffs succeeded about 71 percent of the time in subsequent lawsuits. Your organization is best served by:
1. having a process in place that allows employees to lodge complaints;
2. ensuring that employees know this process; and
3. educating your managers about how to respond to such complaints.

Upon receiving a complaint from an employee, it is critically important to promptly initiate an investigation, regardless of whether the complaint appears to have any basis in fact. Failure to investigate may allow a jury to impose liability on the employer. Therefore, it is important to conduct an investigation even if the employee filing the complaint requests that you not investigate matter. A prompt, thorough, and well-documented investigation is a key step in helping a company shield itself from future liability should litigation later ensue.

How an employer chooses to approach an investigation depends, by and large, on the nature and severity of the allegation and the people involved. If the complaint appears to be "run-of-the-mill," most likely involving employee-to-employee conduct, then keeping the investigation in house is a good option; allow human resources or another designated body to conduct the workplace investigation. In contrast, if the allegation appears severe or pervasive on its face, high-level management is implicated or the company foresees a reasonable likelihood of liability exposure in litigation, the company may want to consider hiring an outside party, such as an attorney or consulting firm that specializes in workplace investigations, to conduct the investigation.

In conducting investigations, employers must be careful

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to protect the privacy rights of the accuser, the accused and any witnesses. Workplace investigations should remain confidential. Disclosure of information obtained from the investigation should only be dispensed on a “need to know” basis; however, because some information may need to be disclosed on a limited basis for purposes of a thorough and accurate investigation, the investigator should not promise complete confidentiality to any party in the investigation. Although it is likely that most witnesses will not “need to know” the results of the investigation, the results of an investigation can, and should, be shared with the employee who raised the issue. The information shared, however, should be limited to:

- The investigation is complete;
- Each issue raised has been addressed; and
- Appropriate action has been taken.


Even the best policies and procedures addressing employee complaints will be useless in preventing employment litigation if supervisors or managers retaliate against the employee for making the complaint. There has been an explosion in the number of lawsuits involving claims of retaliation. For example, in its 2007 fiscal year, the EEOC reported a record high 26,663 charges alleging retaliation, an 18 percent increase from the prior year. And in 2008, 32,690 were filed, a 23 percent increase from 2007 and nearly triple the number of retaliation charges filed 15 years earlier. Finally, 33,613 charges were filed in fiscal year 2009, making retaliation the most common allegation brought to the EEOC.

An employer may not fire, demote, harass or otherwise “retaliate” against an individual for engaging in protected activity, which includes making a complaint of discrimination, participating in a discrimination proceeding or

“The best way to ensure consistency and discharge decisions is to implement a system of progressive discipline.”
otherwise opposing discrimination. Last year, the Supreme Court expanded this protection to include an employee who experiences retaliation after speaking out about discrimination, not on her own initiative, but while answering questions during an internal investigation.\(^{10}\)

The same laws that prohibit discrimination also prohibit retaliation. Retaliation occurs when an employer takes an adverse action against an employee because he or she engaged in a protected activity. Examples of adverse actions include:

1. employment actions such as termination, refusal to hire, and denial of promotion;
2. other actions affecting employment such as threats, unjustified negative evaluations, unjustified negative references or increased surveillance; and
3. any other action such as an assault or unfounded civil or criminal charge that is likely to deter reasonable people from pursuing their rights.

Post-complaint actions that are retaliatory in nature will transform what may have been a meritless complaint by the employee into a potentially large jury verdict. A review of the 54 EEOC reported settlements of charges involving allegations of retaliation for the period between January and December 2009, revealed an average settlement of $309,714. The reported settlement amounts ranged between $14,500 and $8.9 million. Consequently, it is important to ensure that employees who use complaint procedures to address issues of discrimination, harassment or other misconduct, are treated even-handedly and fairly. Supervisors and managers must be trained and versed in the law governing retaliation and instructed to avoid behavior that may be interpreted as retaliatory in nature.


Identification of systemic human resource problem areas in your organization (which oftentimes are not apparent or obvious) is essential to implementing effective strategies to avoid employment litigation. In short, you must know what you don’t know. Periodic audits of your organization’s human resources processes can identify systemic compliance and morale issues; they can help ensure human resources operate to reduce litigation risk, by ensuring consistency and compliance. Additionally, compensation audits specifically can give the employer the opportunity to correct discrepancies for which a business justification is not clear, before commencement of a claim or government audit, such as a Department of Labor glass ceiling audit or Lilly Ledbetter pay discrimination claim. This type of audit also allows for job reclassification of positions before FLSA violations for failure to pay overtime are raised. The opportunity to address these issues on a proactive basis is invaluable in preventing employment litigation. While a company may have the appropriate internal personnel to conduct a human resource audit, many of the topics covered by the audit will require legal analysis. With legal counsel conducting or directing the audit, the company is in a better position to protect the legal analysis, recommendations and conclusions provided by the attorney or auditor — even if the facts discovered during the audit and actions taken as a result of the audit are subject to discovery in litigation.

4. Watch the Clock on Nights and Weekends.

In this time of continued belt tightening and limited resources, employees, like their employers, are asked to do more with less. This, combined with the ubiquitous high-tech tools now available — cell phones, BlackBerrys® and remote email access, in particular — exacerbates the potential for employees to work at night and over the weekend, or at other times they are not scheduled to work. The Pew Internet & American Life Project reported in 2008 that 50 percent of US employees who use email for their jobs check their work email on weekends and 34 percent check while on vacation.\(^{11}\) For employees whose jobs are classified as non-exempt under the Fair Labor Standards Act or state law, an employer can be liable for overtime pay for this extra time worked, even if the employer did not give the employee approval to work after hours. By way of example, a class action is currently pending in the Eastern District of New York against one employer whose former sales representative employees contend they were forced to reply to work email messages, texts and telephone calls after hours.

Unreported after hours usage is difficult to track, difficult to plan and budget for, and difficult for an employer to control. The safest course of action is not to provide non-exempt employees with BlackBerrys® or other PDAs. Absent a realistic ability to do this, employers should set clear expectations and guidelines, ideally in an employee handbook policy, which defines "after hours work," explains the approvals necessary prior to engaging in this work, outlines how to report the time worked and states that performing after hours work without pre-approval may result in disciplinary action.
3. Consistency is the Best Prevention.

This strategy is short and sweet: be consistent in disciplinary and discharge decisions — similar infractions generally should receive similar punishment. When employees who have engaged in similar conduct are treated differently by their supervisors, the organization may find it has left itself open to a subsequent claim of discrimination. In some circumstances a valid reason exists for a difference in discipline; but in situations when managers make exceptions, such as when one employee has previously received discipline for this type of misconduct, or a manager and a non-manager employee engage in the same kind of misconduct, managers should consider the basis for the differing treatment and document the reasons for the decision.


The best way to ensure consistency in your discipline and discharge decisions is to implement a system of progressive discipline. Progressive discipline, which involves a series of increasingly more formal and more severe disciplinary penalties, both prevents the filing of some discrimination lawsuits and offers a defense against such claims when they are made. An employee is much less likely to resort to litigation when he is on notice that his performance or conduct does not meet expectations, and he is given opportunities to correct the problem prior to a decision to discharge him.

In fact, the primary purpose of progressive discipline is to assist the employee in understanding that a performance problem or other need for improvement exists. The progressive discipline process features increasingly formal efforts to provide feedback to the employee so he can correct the problem. It is important to note that not all types of performance problems or misconduct lend themselves to a progressive discipline approach; the more severe
nature of some infractions warrants immediate discharge as a necessary and appropriate response. But in most cases, progressive discipline enables your organization to fairly, and with substantial documentation, discharge an employee who was ineffective or unwilling to improve after receiving the opportunity to change. Typical steps in a progressive discipline system may include: oral warning, written warning, suspension and discharge.

1. When in Doubt, Let Fairness Be Your Guide.

Fair treatment wins cases. Above all else, juries decide employment cases based on whether they feel the employer treated its employee fairly. Like it or not, the appearance of fairness is more important than the law or any argument that counsel could make. If the jury believes the employment decision was fair, you are likely to prevail in the litigation no matter how harsh the penalty received by the employee. Conversely, if the jury perceives the employee was treated unfairly, you will have a problem at trial regardless of how well justified you may have been in your decision. Thus, when considering a disciplinary decision (or any other employment decision), let fairness be your guide. Ask your managers to consider whether a juror will believe that your decision was fair. If your managers can reasonably answer that question in the affirmative, your organization will be well down the road towards avoiding an adverse verdict in any subsequent employment litigation.

Have a comment on this article? Email editorinchief@acc.com.

NOTES
1 EEOC Press Release 10-01-09.
3 www.hayesinternational.com/thft_srvys.html.
5 See e.g., Malik v. Carrier Corp., 202 F.3d 97, 105 (2d Cir. 2000).
6 See e.g., Torrese v. Pisano, 33 F.3d 625 (2d Cir. 1997).
7 EEOC Press Release 11-10-08.
8 EEOC Press Release 5-14-09.
9 EEOC Press Release 1-6-10.