Immersion Session

PROACTIVE AND PREPARED

MAKING YOUR COMPANY EMPLOYMENT LITIGATION-READY

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Proactive and Prepared: Making Your Company Employment Litigation-Ready

Presenters
Paul Lancaster Adams (Philadelphia), Michael R. Buchanan (Dallas), Tamsen L. Leachman (Portland, OR), and Christopher E. Moore (New Orleans/Houston)

Moderator
Lisa C. Hamasaki (San Francisco)
TOP 10 WORKPLACE MISSTEPS

10. Poorly Worded Documents and Emails
9. Inadvertent Destruction of Records
8. Policy Problems – Either Not Having Them or Not Following Them
7. Failure to Understand and Properly Use Privileges & Protections
6. Failure to Train Managers

TOP 10 WORKPLACE MISSTEPS

5. Improper Handling of Complaints & Investigations
4. Failure to Properly Handle Accommodation Requests & the Interactive Process
3. Choosing the Wrong Storyteller (or Not Having a Storyteller)
2. Failing to Learn From Past Mistakes
1. Ignoring Your Lawyer’s Advice
Poorly Worded Documents and Emails – 4 BIG IDEAS About Documentation

BIG IDEA NUMBER ONE:

Gather all the information before making a decision.
Warren Peace goes out on workers’ compensation leave at your manufacturing facility in Oklahoma City.

Your company has a neutral absence control policy. Regardless of the reason (on the job or off the job injury), the Company terminates employees after they have been gone from work for 13 weeks. Company does make exceptions under the ADA if a return to work is reasonably certain in the near future.

Warren has been off work for 13 weeks. His latest medical indicates that a return to work date is at best “indefinite.”

OK to terminate?

- Possible Issues:
  - FMLA?
  - ADA?
  - Other?
The Company terminates Warren with the following notation in his personnel file:

“The Company is terminating Warren because he was unable to return to work after 13 weeks absence and his doctors are unable to project a return to work date.”

Oklahoma City we have a problem!!

Oklahoma’s anti-discrimination statute:

“No employer may discharge an employee during a period of temporary total disability for the sole reason of being absent from work....”
OPTICS

Suppose Warren’s daughter just died.

Suppose Warren’s daughter just came down with cancer and Warren will lose his group coverage because – without a job – he will lose family medical coverage.

BIG IDEA NUMBER TWO:

If words need to be used to describe an employment decision, we might as well be smart in our use of words.

Our words should communicate two essential messages:

1. The Company tried to make it work.
2. The Company treated the employee with respect.
The Problem:

Jim Shus is a go-getter. He wants to advance in the Company and is eager to please his front-line supervisors and managers. As a result, the Company promotes Jim to Line Supervisor. Jim is the first African American Line Supervisor in Company history.

Jim has never managed people before. He supervises a diverse group in terms of age, gender, and ethnicity. In his eagerness to please his bosses, he drives his subordinates harshly.

If subordinates do not perform to Jim’s standards, he negatively motivates with comments like:

- “You know you can be replaced with younger, cheaper people” AND
- “If you complain about me to my bosses, you can plan on cleaning out your locker.”
Three employees complain to HR about abusive conduct by Jim...

Another two call the Employee hotline to voice complaints about alleged “age” comments.

The Company likes Jim’s drive, but recognizes his warts.

**How to document?**

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**One option:**

To: Jim Shus  
From: Company  
Re: Written Warning

Jim, 5 employees have complained about your behavior in the past 2 weeks. If anyone else complains, we will have no choice but to terminate your employment. Shape up or ship out.
A better option?

To: Jim Shus  
From: Company  
Re: Developing Leadership Skills

Jim, we believe in your potential. Because of your commitment to the job, we promoted you to supervisor. As you have discovered, leading a group of diverse personnel requires good people skills. Recently, we’ve received several complaints about your management style. Specifically, some have complained about negative motivation to this effect: “You can be replaced by younger and cheaper workers.”

Others have complained that you have urged them not to complain to HR if they have concerns. We believe in your potential but also need for you to realize that positive – not negative – motivation gets the best results.

For the next week or so, we are assigning you to shadow Jerry Manders on line one to observe how Jerry positively motivates co-workers. In addition, HR is available as a resource to you to talk through any problems you may have with co-workers.

With the help of Jerry’s example and coaching from HR, we believe you will succeed.

The Twist:

Jim becomes frustrated by the belief that a Hispanic American co-worker did not execute an order quickly enough. Jim explodes at the co-worker, dressing her down in front of others and demeaning her intelligence with:

“Did you even go to school in Mexico??”
The Company fires Jim and Jim brings suit claiming race discrimination, pointing out that white Line Supervisors have been given 6 months to work through problems.

- Which documentation would you rather defend?
- Which counseling memo evidenced an attempt to salvage Jim?

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BIG IDEA NUMBER 3:

As an HR Professional, insist on honest performance evaluations.

Top 10 Comments That You Wish You Could (But Should Not) Put on Performance Reviews

10. “Since my last report, this employee has reached rock bottom and has started to dig.”
9. “You are the weakest link. Goodbye.”
8. “I would not allow this employee to breed.”
7. “Works well when under constant supervision and cornered like a rat in a trap.”
6. “When he opens his mouth, it seems that it is only to change feet.”
Top 10 Comments That You Wish You Could (But Should Not) Put on Performance Reviews

5. “This young lady has delusions of adequacy.”
4. “This employee is depriving a village somewhere of an idiot.”
3. “She doesn’t have ulcers, but she’s a carrier.”
2. “I would like to go hunting with him sometime.”

Top 10 Comments That You Wish You Could (But Should Not) Put on Performance Reviews

1. “Some drink from the fountain of knowledge, he only gargled.”
Trial Lawyer’s Challenge:

Company has fired Jim Shus.

- Trial lawyer asks why?
- **Company correctly reports:** Jim was well-intended but he lacked people skills.
- Trial lawyer asks for and receives personnel file.

Most recent performance evaluation rates Jim “excellent” in people skills....

.... because either:

1) Manager did not consult with HR and was unaware of Jim’s performance issues.

   **OR**

2) Manager does not like confrontation and decided to give Jim an inflated people skills rating.
The Problem:

- The performance evaluation may be enough to defeat summary judgment.

BIG IDEA NUMBER 4:

Before termination, make sure the left hand knows what the right hand is doing.
Example: Jim Shus applies for unemployment.

What is dilemma for employer?

Legal standard to oppose unemployment is “misconduct.” In general, poor performance ≠ misconduct.

Often times when opposing unemployment, the Company pushes the ex-employee into the arms of discrimination/wage and hour lawyer.

What is another example of left hand not knowing what the right hand is doing?

The reasons given for termination at unemployment hearing are not the same as given to EEOC.
EXAMPLE: At unemployment hearing, Supervisor testifies that Jim Shus was terminated for attendance issues.

At EEOC, Company states that Jim Shus was terminated because of poor people skills and abusive behavior.

Problem: Jurors expect companies to tell a consistent story based on the truth.

Solution: Make sure there is coordination between left hand and right hand so that full, consistent story is told.

4 BIG IDEAS:

1) Make decisions on basis of complete information.
2) Document so that it is clear Company tried to salvage – not fire – employee.
3) Honest performance evaluations.
4) Make sure left hand knows what right hand is doing.
Inadvertent Destruction of Records – AKA How to Lose a Case Without Really Trying

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Spoliation

- A party having control over evidence had an obligation to preserve it
- The documents were destroyed with a culpable state of mind
- The document was relevant and would support a claim or defense
What are the Consequences?

- Monetary penalties (attorneys’ fees, costs, restoration of data, and other monetary sanctions);
- Exclusion of evidence and testimony;
- Adverse jury instructions;
- Dismissal or default judgment;
- Criminal penalties (if document destruction is designed to obstruct litigation);
- Tort cause of action for spoliation;
- Cause of action for violation of the Corporate Fraud and Abuse Act, 18 U.S.C. § 1030

To avoid spoliation...

- Create and disseminate a comprehensive document retention policy;
- Recognize the scope of documentation, especially electronically stored information;
- Understand the duty to preserve and notify all impacted employees when the duty to preserve applies.
When is the duty triggered?

- “…when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.”

- The duty “… arises not only during litigation but also extends to that period *before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation*.”
  - *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001)
Obligations – generally (*Zubulake*)

Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a “litigation hold.”

Anyone who anticipates being a party or is a party “must not destroy unique, relevant evidence that might be useful to an adversary.”

A party must preserve what it knows (or should know) to be relevant, to be reasonably calculated to lead to the discovery of relevant evidence or is likely to be (or has been) requested in discovery.

Obligations – Back Up Tapes

- Generally, a litigation hold does not apply to inaccessible backup tapes kept for disaster recovery;
- **But**... if the company can determine where electronic data for “key players” is located on backup tapes, they should be preserved...
Policy Problems – Either Not Having Them or Not Following Them

Policy Problems, continued

- Some states and federal laws and regulations require employers to publish and maintain certain policies (CA – Anti-harassment and Anti-retaliation; Federal FMLA – Notice of basic rights in handbook or materials regarding Leave/Benefits)
Policy Problems, continued

- **Policy Examples:**
  1) “Thorough investigation of all complaints”
  2) “Zero Tolerance” Policy
  3) No policy prohibiting retaliation (or conditional prohibition)

Policy Problems – continued

- **Two Schools of Thought:** (1) No Handbook = HR personnel cannot violate own policies; (2) Handbook = HR personnel will know what to do based on publication

- Both have drawbacks:
  - If you have policy manual, you will be accused of violating your own policies
  - If you do not have a policy manual, you will be portrayed as an unconcerned, scofflaw employer
The attorney-client privilege protects confidential communications between a client and lawyer made for the purpose of securing legal advice.

The privilege only attaches to advice given in our capacity as a lawyer, not as a business advisor.

Failure to understand and properly use privilege can result in a waiver.
The Anatomy of a Privileged Communication:

- Each of these four elements **must be** satisfied:
  1. The person/entity asserting the privilege is a “client;”
  2. The communication is to or from a lawyer acting as a lawyer;
  3. The communication is made in confidence for the purpose of securing legal advice; and
  4. The privilege has not been waived.

Even if Properly Invoked, the Privilege May Be Subsequently Lost

- The privilege can be lost intentionally or unintentionally:
  - Discussing privileged matters with a third-party such as a friend or family member.
  - Forwarding privileged emails or materials to a third-party outside the circle of privilege.
  - Using privileged materials to explain the Company’s action or inaction unless waiver of the privilege was a strategic decision – once the window is open, it is wide open.
  - Even if accidentally disclosed, the privilege is lost unless the Company acts promptly to retrieve the information.
Waiver of Privilege

- Express or intentional
- Implied
  - Such as when proffer good faith defense or prompt remedial action affirmative defense
- Accidental
  - Balancing test will indicate no waiver as long as the company shows that it took reasonable precautions to prevent inadvertent disclosures and acted promptly to cure any inadvertent dissemination

Third-Party Consultants

- The presence of a third-party consultant may not waive privilege if the consultant is present to assist an attorney in understanding and interpreting complex principles needed to provide legal advice.
Emails with Attorney Copied

- Copy attorney on all emails that are attended to be privileged and confidential.
- Forwarding an email to your attorney (or copying your attorney in an email to others) with no request for legal advice is not a communication that is likely to be protected by attorney-client privilege.

The Pitfalls of Emails

- Emails that discuss or speculate on legal risk or perceived wrongdoing by the Company are especially troubling.
- Think carefully before sending emails
  - Adding a third-party outside the narrow “need to know” circle may waive the privilege.
  - Forwarding an email chain to a third-party can waive the privilege that otherwise applied to the earlier emails.
  - Simply copying an attorney will not shield communications that would otherwise be unprivileged – must seek legal advice.
Attorney in the Room

- A meeting with an attorney present does not always make the communication privileged
- Make clear during meeting that attorney is present to provide legal advice

Mark Written Communications

- All written communications (including email) from employees concerning legal matters should be marked “Privileged and Confidential” by the sender.
- Marking is not essential to bring the communication within the attorney-client privilege but it can help to protect the communication from compelled disclosure in litigation.
Attorney-Client v. Attorney Work-Product Privilege

- The attorney work-product privilege protects documents and records compiled or produced by an attorney in anticipation of possible legal proceedings.
- Broader than attorney-client privilege
- Attorney-client privilege only available when you meet the four elements, and it only applies to specific communications

Triggering the Work-Product Doctrine

- Generally, documents created in the normal course of business or pursuant to company policy, are not protected
- Must be created in “anticipation of litigation”
- Need to be able to point to a definite shift from the normal course of business to preparation for litigation
Failure to Train Managers

- Supervisors are agents. They speak, act, and hear for your company.
- Many of the mistakes we have discussed cannot be avoided without the engagement of your supervisors.
- Plaintiffs’ counsel **always** attack training or lack thereof.
Why Training is Important

- Because there is no legal mandate that an employee use a specific term, for example, “sexual harassment” or “racial harassment,” managers often fail to recognize or adequately respond to a complaint.
- Documented training allows employer an affirmative defense in employment litigation
- Training equips supervisors with knowledge to comply with the law

Training Topics

- Training Topics
  - Discrimination, Harassment, and Retaliation
  - Documentation
  - Medical Inquiries
  - Requests for Leaves of Absence
  - Requests for Work Accommodation
  - Wage and Hour Issues
- Train Frequently
  - Upon hire/promotion
  - Annually
Training Topics, continued

- Additionally, managers should also be trained on:
  - Effective communication techniques
  - Interviewing, discipline, and discharge
  - Investigations
  - When to get assistance
  - How to report complaints

Improper Handling of Complaints & Investigations
Effective workplace investigations are the number one tool in an employer’s fight against legal liability

Be Responsive/Investigate All Claims

- Preserve evidence (including emails)
- Interview the appropriate witnesses
- Understand when you can prohibit employees from discussing ongoing investigations
  - *Banner Health System*, 358 NLRB No. 93 (2012)
- Research a conclusion
- Share the results of investigation
Effective Investigations Require Planning

Stage 1 – Intake & Planning

- Define the scope
- Immediate remedial measures
- Identify investigators
- Witness list and documents
- Support business leaders
- Communication with parties
Investigation Stage 1 – Remedial Measures

- Remind of non-retaliation policy
- Change work assignments
- Suspension or transfer of the accused
- Removal of offensive material(s)
- DO NOT adversely affect the complainant

Stage 1 – Investigator Selection

- Inside or outside?
- Human resources, attorney, or private investigator?
- Objectivity and organizational dynamics
- Personal characteristics & cultural currency
Stage 1 – Empower Your Investigator

- Define investigator’s role
- Investigator training
- Investigator should never investigate within his/her own department or chain of command
- Train on duty to cooperate
- Ensure high level buy in to the investigation

Stage 2 – Investigation & Interviews

- Explain the investigation process
- Reiterate importance of honesty, completeness
- Confidentiality issues – yours and theirs
- Remind witness of retaliation prohibition (W protected and bound by)
- Provide necessary information about the scope of work
Stage 2 – Interviewing the Complainant

- Do NOT over-promise
- Address confidentiality
- Be empathetic but impartial and objective
- Ask about desired outcome
- Invite follow up – provide contact information

Stage 2 – Interviewing the Accused

- Convey seriousness of the situation
- Company requires full and honest cooperation
- Be impartial and objective – do not accuse
- Do not accept blanket denials
- Remind of non-retaliation policy
Stage 2 – Interviewing Other Witnesses

- Explain role and reason for interview
- Expectation of truthfulness
- Keep scope of interview narrow
- Explain no negative consequences for participation and confidentiality issues

Stage 3 – Report & Close Out

Must make determinations about credibility and motive
Rely on objective evidence only
Do not make legal determinations
Stage 3 – Is a Report Needed?

**Employee relation problem/disagreement**

Verbal report, executive summary, or some other less extensive written report will normally be sufficient

**Allegations of possible unlawful conduct, policy violations, serious unprofessional conduct**

Detailed, well-written report is necessary (particularly if remedial measures/discipline will be imposed)

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Stage 3 – Two Rules of Thumb

- The level of discipline should be commensurate with the level of severity of wrongdoing
- Discipline should be tailored to prevent the wrongful behavior from reoccurring

**REMEMBER**

THE REPORT (IF THERE IS ONE) WILL BE A CRITICAL PIECE OF EVIDENCE IN ANY LITIGATION
Failure to Properly Handle Accommodation Requests & the Interactive Process

- Missing or Minimizing the Disability:
  - Pregnancy
  - Recovery period following injury/illness
  - Limitations from workplace injury
  - Mental illness – bipolar; anxiety; depression
  - PTSD (domestic violence or military service)
  - Sleep or other conditions impacting attendance
  - Addictions, compulsive behavior, autism
Failure to Properly Handle Accommodation Requests & the Interactive Process

- Common accommodation requests
  - Telecommuting
  - Leave of absence
  - Exemption from policies/expectations
  - Flexible schedule
  - Equipment/technology upgrades
  - Chair or other option to allow resting while working
  - Others?

Leave as Accommodation

- You must consider unpaid leave as an accommodation under the ADA if no undue hardship, even if:
  - You don’t offer leave as an employee benefit
  - Employee not eligible for leave under your policies
  - Employee has exhausted all leave you provide as a benefit (FMLA, WC, state leave laws)
Leave Request – Accommodation?

- Leave = employment protected leave
  - If you aren’t protecting employment, you aren’t really giving anything as an accommodation
- Employee must exhaust all applicable job protected leaves before you consider it
  - Leave you give to anyone is not an accommodation . . . Accommodation means something more

Assess Request – Interactive Process

- You should ask employee:
  - Specific reason(s) he/she needs leave
  - Block of time or intermittent (details)
  - When the leave will end
Other Sources of Information

- From employee
- From employee’s health care provider (with employee’s permission)
  - Confirm or elaborate on information employee provided
  - Respond to specific questions you have
- May later assist in determining if undue hardship
- Ongoing communication if no specific return date or employee requests more leave*

Considering Leave as an Accommodation

Always consider three questions . . .

1 + 2 + 3
1. Would it be an Accommodation?
   - Accommodation means “effective”
     - If I grant you this leave, will it be effective in returning you to your job and permitting you to perform all essential functions?
   Consider:
   - Temporary v. permanent restrictions
   - Indefinite timeframe

2. Is it Reasonable?
   - “Reasonable accommodations are about enabling employees to work, not to not work”
     - *Hwang v. Kansas State Univ.*, 753 F.3d 1159 (10th Cir. 2014) (held University did not violate ADA by denying more than 6 months of leave)
Return to Work Extensions

- Ask doctor specific questions:
  - What has occurred with respect to treatment and/or medical issues that caused you to modify the employee’s RTW date?
  - How confident are you that employee will be able to return to work and perform all the essential functions of his or her job?
  - What is your prediction based upon, including whether employee is receiving additional treatments between old and new RTW date?

No Bright Line Rule – Individualized

  - Nursing home violated ADA when it denied a CNA 3 additional months of protected leave (after 12 weeks of FMLA)
  - Court noted steady flow of CNAs and frequent turnover in finding that nursing home could have “easily” accommodated CNA’s request
Maximum Leave Policies Beware!

- **EEOC Guidance**
  - Employer must provide additional leave unless employer can show:
    1. another effective accommodation would enable EE to perform essential functions; or
    2. granting additional leave causes undue hardship
  
- **Employer must engage in interactive process following exhaustion of paid and unpaid leave**

EEOC Considerations – Leave as Reasonable Accommodation

- **Assess**
  - Amount and/or length of leave required
  - Expected frequency
  - Impact of co-workers and job duties
  - Ability to recruit/train replacement
  - Impact on operations/ability to serve customers
Don’t Move Too Quickly

- Remember, you don’t have to move to the undue hardship step . . . if the accommodation is not “reasonable”

3. Undue Hardship

- Can the job wait?
- If not, how are you going to get it done?
  - Temporary labor
  - Non-exempt labor
  - Exempt labor
- Cost to getting it done (net)
- Undue burden on co-workers
- Failure of a deliverable to a customer
Burden on You to Prove Undue Hardship

- Burden on employer
  - Conduct individualized assessment of particular facts
  - Must prove significant difficulty or expense
  - Compare employer’s resources and circumstances v. cost and difficulty of providing accommodation

Types of Undue Hardship

- Financial difficulty
  - Appropriate in limited circumstances
- Non-financial
  - Unduly extensive, substantial, or disruptive
  - Would fundamentally alter nature and operation of business
Checklist for ADA Compliance for Leaves of Absence

- Actions to take for leave beyond mandatory job-protected leave
  - Undertake and document ADA interactive process
  - Ensure no accommodation that would enable employee to return to active employment
  - If additional leave is the only option, determine if unpaid leave is reasonable or an undue hardship

Checklist (cont.)

- Actions to take for leave beyond mandatory job protected leave (cont.)
  - If additional leave in employee’s present position is not a reasonable accommodation, the leave may be denied and if the employee does not return to work, the company may fill the position
  - But you should evaluate if there are any job vacancies for which the employee is qualified and keep that position open for duration of employee’s leave if it will not cause an undue hardship
Communication is Key

- Communicate to employee expectations for his/her communication with company during leave and monitor compliance
- Employee must communicate about any changes in their situation with HR, in addition to third party administrator or leave group
- HR works with employee’s supervisor/manager to understand and/or develop a plan to cover employee’s work during the leave

Actions to Take During Leave

- Instruct supervisor to report/document issues related to work coverage while on leave
- Check in with internal or third party leave administrator for any changes in leave status, in case employee neglects to or is unable to keep HR/Leave Dep’t apprised of any changes in the leave status
- Reach out to employee at least 2 weeks before leave expires
- Never make assumptions!
Failure to Properly Handle Accommodation Requests & the Interactive Process

- **Leave** = employment protected leave
  - If you aren’t protecting their employment, you aren’t really giving anything as an accommodation

- **Employee must exhaust all applicable job protected leaves before you consider it**
  - Leave you give to anyone is not an accommodation . . . Accommodation means something more

Failure to Properly Handle Accommodation Requests & the Interactive Process

- **Lack of Endurance and Patience**
  - Setting rigid deadlines
  - Resisting extensions or changes
  - Setting limited communication channels
  - Ignoring comparable situations
  - Setting up for failure
  - Forgetting tone in all communication
Choosing the Wrong Storyteller (or Not Having One)

- Choose confident, certain HR representatives
- Choose confident, certain managers/decisionmakers
- “I don’t know”; “I don’t remember” = kiss of death in depositions
The Wrong Storyteller, continued

BEWARE:

- The storyteller with a checkered history
- The terminated storyteller
- The storyteller with privilege

Failure to Adapt or Learn from Mistakes

2
Failure to Adapt

- Using “template” approaches to pay practices or other policies “that’s the way we’ve always done it” or “that’s the way my competitors do it”
- Not keeping track of changed laws and regulations
- Not using all the tools in your toolbox (class and collective action waivers, jury trial waivers, arbitration agreements)

Failure to Adapt, continued

- Not changing practices or processes when one has proven to be ineffective (e.g., complaint procedure in anti-discrimination policy)
- Not changing pay practices when there is an opportunity to do so (FLSA liability)
- Not taking effective (or serious) remedial action when necessary
Ignoring Your Lawyer’s Advice

1

Ignoring Your Lawyer’s Advice

- Lessons From the Trenches
  - Get Medical Verification, especially for ADAAA
    - Taking employee’s word for it is dangerous
    - No informed opinion about duration, changes, recommended accommodations, etc.
    - Mental illness self-disclosure can reveal more than you want/need to know
  - Don’t Disparage Terminated Employee
    - Can create independent claim
    - Creates sympathy
    - Motivates EE to pursue litigation
Ignoring Your Lawyer’s Advice

– Call Law Enforcement if Encouraged to do so
– Don’t Start a Fight You’ll Walk Away From

Lessons From the Trenches

– Don’t Fudge if Accusing Employee of Theft

  ▪ Theft is easy to assert and difficult to prove
    – Timecard theft
    – Petty cash
    – Shoplifting
    – Theft of intellectual property

  ▪ Don’t accuse without a credible investigation of facts and evidence

  ▪ Law enforcement sees this as civil issue

  ▪ Restitution unlikely, especially if unemployable
Ignoring Your Lawyer’s Advice

- Lessons From the Trenches
  - Red Flag Review of Every Termination
    - Employment is a relationship based on an agreement
    - Like any relationship, it takes work, and sometimes it’s easy to assume the worst
    - On average, each employee falls into 2 or more protected classifications and complainers are the most protected of all
    - Leaders’ decisions about employees have never been so precarious

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