

Legal Literacy for Supervisors

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Employees are usually promoted to supervisory positions because they are good at their jobs, but many never receive training on how to be good managers. This lapse can lead to lawsuits, particularly if the missed training involves compliance with a wide variety of employment laws. Supervisors do not have to become employment lawyers, but they should have enough legal literacy so that they can understand and handle basic legal situations and recognize more serious situations that require assistance from human resources (HR) or legal counsel.

The following overview of the employment laws that most frequently generate claims covered by UE can help clarify areas of confusion and also serve as a handy reference guide whenever troublesome situations arise.

Discrimination

Unlawful discrimination involves treating one person differently from another because of a legally protected characteristic. Federal laws prohibit discrimination based on race, sex, age, disability, religion, color, and national origin. Some state and local laws go further by prohibiting discrimination based on sexual orientation or gender identity. Examples of unlawful discrimination include:

- Imposing tougher performance standards on an African-American employee because of his race
- Paying an employee less because of her gender
- Promoting stereotypes about an employee because of his national origin
- Refusing to hire a person because she has a disability

Most of the legally protected groups are self-explanatory, but age and disability discrimination merit special mention (disability laws are discussed on page 2). Federal age discrimination laws protect individuals age 40 or older, even though many people would not consider someone who is 41 to be “old.” Many state laws go further. New York laws, for example, provide age discrimination protection to anyone age 18 or older. Thus, supervisors should be sure to check with HR about the laws in their state.

Nondiscrimination laws do not mean that supervisors need to treat every employee equally at all times. For example, a supervisor can give one employee a higher raise than her coworkers because of her exceptional job performance. However, differential treatment because an employee belongs to a protected group is unlawful and can result in expensive litigation.

Harassment

Harassment based on any legally protected characteristic is unlawful and is a type of discrimination. Harassment is a complex topic that should be covered in a workshop or training for all supervisors. The most common form of harassment is sexual harassment. *Quid pro quo* sexual harassment occurs when a supervisor ties a job benefit to sexual favors. For example, a supervisor could promise an employee a raise if she goes out on a date with him or threaten to demote her if she does not. Hostile environment sexual harassment, which is far more common, occurs when the victim is subjected to sexual behavior or comments; the behavior or comments are unwelcome; and the harassment is severe or pervasive enough that a reasonable person would find that it created a hostile working environment.

The following are examples of actions or comments that could generate a hostile work environment:

- Racial or ethnic jokes
- Unwanted sexual touching of another person
- Obscene language or gestures
- Derogatory remarks about a person's age
- Making fun of a person's disability
- Demeaning comments about someone's religious beliefs

Supervisors have special responsibilities to prevent and remedy unlawful harassment. If a supervisor witnesses harassment, he or she must take immediate action to ensure that it does not recur and take disciplinary action if necessary. If a supervisor receives a complaint of harassment or hears of potential harassment, he or she must ensure that the situation is investigated and handled properly, even if the victim does not want to move forward with a formal complaint. The supervisor is not necessarily obligated to resolve the problem but must make sure that the problem is brought to the attention of someone qualified to resolve it.

Example: Lisa tells her supervisor, Evan, that a coworker made numerous offensive racial remarks to her, but she wants Evan to keep the matter confidential. Because Evan is a supervisor who is now aware of potential unlawful harassment, the institution is legally on notice and must take action. Evan should explain to Lisa that he cannot keep her allegations confidential, but an inquiry will be as discreet as possible and conducted on a need-to-know basis. Evan may conduct the investigation if he is qualified to do so. If not, he must ensure that the allegations move forward to someone who is qualified to conduct investigations. If Evan asks Lisa to go to HR, he must follow up with HR to ensure it receives Lisa's allegations.

Americans with Disabilities Act (ADA)

Most nondiscrimination laws simply prohibit different treatment of employees because of protected characteristics. The ADA, however, goes further by requiring that employers provide "reasonable accommodations" to disabled employees who are "otherwise qualified." Compliance with the ADA can be confusing because Congress did not clearly define what it means to be "disabled," who is "otherwise qualified," and what constitutes a "reasonable accommodation."

As a general rule, supervisors should not offer accommodations unless an employee requests them.

Except in rare cases involving mental disabilities, it is the employee's responsibility to state that he or she is disabled and to request accommodation. Any supervisor who receives a request for accommodation would be wise to obtain HR's assistance because accommodations are determined on a case-by-case basis. The institution must engage in a dialogue with the employee about what accommodations are necessary and what the institution can provide. In most situations, employers and employees are able to find mutually agreeable solutions. If a case goes to litigation, it is important for the employer to show a track record of good faith efforts to accommodate the employee.

Supervisors should never state or write that an employee is disabled unless the institution has already made a formal determination that the person is disabled. Under the law, employees who are later determined not to be disabled are entitled to all the protections of the ADA if they can prove that a supervisor regarded them as disabled.

Example: Steve breaks his leg and will take four months to recover. Impairments that last less than six months are not disabilities under the ADA. However, if Steve's supervisor treats him as if he is disabled, the law gives Steve all the rights the ADA provides to disabled employees.

Family and Medical Leave Act (FMLA)

The FMLA allows up to 12 weeks of unpaid leave in a 12-month period for one or more of the following reasons:

- The birth and care of the employee's newborn child
- The placement of an adopted son or daughter or a foster child with the employee
- The care of an immediate family member (spouse, child, or parent) with a serious health condition
- An employee's own serious health condition that makes him or her unable to work

An employee becomes eligible for FMLA leave after working for the employer for 12 months and at least 1,250 hours during the 12 months preceding a leave request. Unlike the ADA, which defines the term *disability* quite narrowly, the FMLA defines the term *serious health condition* very broadly to include any health condition for which an employee is a hospital inpatient or is obtaining continuing treatment from a health provider. The term *health provider* includes doctors, dentists, optometrists, psychologists, nurse practitioners, chiropractors, and even licensed social workers. As a result, many routine health problems qualify as *serious health conditions* under the FMLA.

Employees do not need to use all their FMLA leave at one time. Instead, the FMLA allows employees to use leave in increments of as little as one hour. Intermittent leave can sometimes be abused, and supervisors should immediately seek HR's help if they suspect misuse.

Example: Maria suffers from severe migraine headaches that render her unable to work. When Maria experiences a migraine, she uses intermittent leave under the FMLA, usually for a day or two until the migraine subsides. However, her supervisor notices that most of Maria's migraines occur on Fridays and Mondays. Her supervisor should immediately notify HR, which can check with Maria's health-care provider as to whether her pattern of absences is consistent with her condition.

Although FMLA leave is technically unpaid, employers can require employees to use accumulated vacation time and sick leave during their FMLA leave. It is the employer's obligation to notify employees of their FMLA rights and start the 12-week FMLA clock when an employee becomes eligible for FMLA leave. Consequently, supervisors should notify HR whenever they think one of their employees may be eligible for FMLA leave.

Religious Accommodation

Federal law requires employers to accommodate employees whose sincerely held religious beliefs conflict with their work responsibilities unless the accommodation would impose an undue hardship on the employer. Courts seldom question whether a person's religious beliefs are sincerely held, even if the employee belongs to an unconventional religious group or has beliefs that are not part of any organized religion.

The most common religious accommodation issue involves workers whose religion prohibits them from working on their Sabbath or other holy days. In such situations, the employer must help the employee find a coworker who will swap shifts, find a lateral transfer to a position with a different schedule, or examine the possibility of a flexible work schedule. If those efforts are unsuccessful, the employer usually is not obligated to pay premium wages for someone to fill in, since that would constitute an undue hardship. The second most common issue is employees whose religious dress or personal appearance conflicts with the employer's dress code. These are difficult situations that are usually examined on a case-by-case basis, and supervisors should seek help from HR or legal counsel in resolving the situation.

Retaliation

Many federal and state laws prohibit retaliation against employees who engage in legally protected activities such as:

- Complaining of discrimination or harassment
- Serving as a witness on behalf of someone alleging harassment
- Taking leave under the FMLA
- Reporting financial fraud, research misconduct, or other legal violations

Retaliation is any action that could convince a reasonable person not to make a harassment complaint or support a coworker who made a harassment complaint. Some common retaliatory actions are demotion, limiting pay increases, or giving less favorable work assignments. Some types of retaliation are not so clear and depend on the context.

Example: Two months after Jane filed a harassment complaint against her supervisor, the supervisor changed her work hours from 7 am to 3 pm to 8 am to 4 pm. For many employees, this might not be a significant change. However, Jane's supervisor knows that she is a single mother who needs to get home by 3:30 to meet her kids when they get home from school. In this situation, the change in hours could be retaliatory.

A complainant may prevail on a retaliation claim even if the facts subsequently reveal that the employer engaged in no wrongdoing prior to the retaliation.

Example: Carl filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging race discrimination by his supervisor. Three weeks later, Carl was demoted. The EEOC investigated Carl's charge and found no race discrimination. Nevertheless, Carl's employer may still be held liable if Carl's demotion occurred in retaliation for his filing a race discrimination charge.

Retaliation claims are usually preventable but are troublesome because retaliation is often a natural human reaction. For instance, the supervisor in the example above would probably be offended by being called a racist and may not act rationally in future dealings with Carl.

Hiring

Hiring begins the employment relationship and is fraught with legal landmines. In making hiring decisions, supervisors must focus on the applicant's qualifications and usually may not consider legally protected characteristics such as race, age, sex, or national origin. For example, a supervisor may be looking for "new blood" to re-invigorate a program. Yet, the supervisor cannot rule out a 60-year-old applicant because of her age and must instead look at whether the applicant possesses the vigor and initiative needed for the position. Affirmative action in hiring presents special challenges. Many institutions want to diversify their faculty and staff. As a general rule, it is legal to broaden the pool of applicants by encouraging applications from members of underrepresented groups. However, the actual hiring decision should be made solely on the qualifications of the applicants unless the hiring is closely supervised by legal counsel.

Federal laws strictly limit what prospective employers may ask in interviews. The appendix contains a chart that summarizes which areas of inquiry are permissible and which ones interviewers should avoid.

Termination of Employees

Most employment lawsuits arise out of terminations. Many supervisors harbor the misconception that they are protected by the doctrine of employment at will, which provides that either the employer or employee can terminate the employment relationship at any time for any reason. Although all states except Montana follow the employment-at-will doctrine, it has eroded significantly because of numerous exceptions.

- **Employment discrimination laws:** Federal and state laws prohibit terminations motivated by an employee's membership in a legally protected group. For example, it is unlawful to terminate an employee because of his or her religion.
- **State public policy:** Courts in more than 40 states have created exceptions to the employment-at-will doctrine on public policy grounds. For example, many state courts have ruled that terminating an employee for refusing to break the law, serving on a jury, or filing a workers' compensation claim would run counter to the public policy interests of the state.
- **Implied contract doctrine:** Courts in more than 35 states have held that an implied contract is formed when an employee handbook says that employees will only be disciplined or terminated for "just cause" or when an employer makes oral representations that employment will continue as long as work performance is adequate. If a court finds that an implied contract exists, the employer faces a higher burden in demonstrating misconduct or poor performance before an employee can be terminated.

- **Covenant of good faith and fair dealing:** Eleven states have recognized this contractual doctrine that usually requires that employees can only be terminated for just cause.
- **Unionized employees:** Unionized employees usually are not subject to the employment-at-will doctrine since their collective bargaining agreement defines when employees can be disciplined or terminated.
- **Government employees:** At public institutions, employees are protected by state civil service laws that override the employment-at-will doctrine.

Given all the exceptions to the employment-at-will doctrine, it is wise for supervisors to know the laws that apply in their state and involve HR before terminating an employee. Many supervisors may also find the pre-termination checklist contained in the resources section of this publication helpful in making termination decisions.

Essential Supervisory Practices

The following supervisory practices are key components of good management. They can also help prevent litigation and improve an employer's defenses if litigation is unavoidable.

1. Use HR as a resource.

Supervisors should follow a simple rule of thumb: When in doubt, contact HR. Many supervisors go it alone despite the fact that they must comply with many federal and state employment laws. These supervisors fail to recognize that HR can serve as a valuable resource. It can provide advice, serve as a sounding board, and seek the assistance of legal counsel if necessary.

2. Document employee performance problems.

Proper documentation of employee performance problems is the best defense in employment lawsuits. Many employment lawyers say that, for legal purposes, an event never happened if it was not documented. Legal proceedings often occur years after the event. By that time, memories are hazy, witnesses are hard to find, and the case becomes a credibility contest between the supervisor's testimony and that of the complainant. Juries tend to believe documentation that was written at the time a problem occurred or shortly afterward. The documentation does not need to be fancy or formal—it can even be handwritten—but it should be dated, factual, and specific.

Example:

Memo to David Worrell 09/08/10

David, this memo summarizes our conversation today. You have been more than 15 minutes late to work five times in the past month. I verbally warned you after the third and fourth times that your tardiness is not acceptable. Today, I warned you that if this problem continues, I will need to consider serious disciplinary action. I am placing a copy of this memo in your personnel file.

Martha

This simple memo accomplishes many purposes. It gives a date of the conversation, states how many times David has been late in a specific time period, states that he has been more than 15 minutes late each of those times, documents that Martha has warned him twice verbally and once in writing, and establishes that David is on notice that he may face disciplinary action if his punctuality does not improve.

3. Conduct accurate performance evaluations.

A key component of good documentation is accurate performance evaluations. Above all else, supervisors should conduct regular performance evaluations of their employees. Some managers gloss over employee deficiencies or engage in grade inflation. For example, imagine a supervisor who considers an employee a weak performer and gives him a 3 out of 5 on his annual performance evaluation, the lowest of anyone in the department. However, the definition for a "3" is "meets expectations." If the supervisor later tries to terminate the employee for poor performance, the employee will argue that he could not possibly be incompetent if he met the supervisor's performance expectations.

In performance evaluations, supervisors need to be candid about deficiencies, provide specific examples of problems, and offer constructive criticism and suggestions for improvement. By giving employees formal notice of performance problems and helping them remedy the problems, supervisors show that they are being fair and also give employees the opportunity to improve performance so that termination may become unnecessary.

4. Use progressive discipline.

It is wise for most employers to adopt a written progressive discipline policy. Progressive discipline allows a supervisor to put an employee on notice that a problem exists and give the employee a chance to improve. For example, before terminating an underperforming employee, a supervisor could first try a written warning and then try a performance improvement plan with specific benchmarks. Juries tend to regard well-documented progressive discipline as a fair and humane way to treat employees. It is important to clearly describe the performance problem, the disciplinary action taken, and potential future consequences. In addition, supervisors should consult with HR so that progressive discipline is applied consistently across the organization.

5. Watch what you say.

In litigation, careless and insensitive comments by managers and supervisors are some of the most damaging evidence of bias or discrimination. Consider the following comments made by supervisors in actual cases:

- A supervisor wrote in an evaluation that an employee's skills were suited to the "pre-electronic era."
- A white supervisor who saw a Samoan employee talking to a Filipino employee said, "What do you think this is, a Polynesian convention?"
- A supervisor complained to a colleague, "I'm still struggling with Hanukkah, and now we have Kwanzaa."
- A supervisor told a colleague that he kept a woman on his staff "strictly because of her looks."

Emails often create powerful evidence because they preserve the supervisor's actual words with a date and time stamp. Many supervisors fail to recognize that deleting emails does not destroy them since they are stored in multiple places on the computer system and can almost always be retrieved. Thus, a wise rule of thumb for supervisors is to never write an email that they would not want to be printed on the front page of their local newspaper.

Conclusion

A basic understanding of the key employment laws can help supervisors handle many situations on their own and recognize when to get help as situations become more complex. This is an area where a little bit of knowledge can go a long way. By becoming legally literate, supervisors can prevent costly and time-consuming litigation that adds stress to their jobs and distracts them from their everyday work.

Resources

To access the UE resources cited in this document, you will need a password for the Learn@UE section of the UE website. To obtain a password, simply go to www.ue.org and take a minute to register. Passwords are usually activated by the next business day.

Discrimination

Horowitz, Sharri. "Race Discrimination and Harassment Claims Remain Challenging in the Education Workplace." *Employment Action* 3(3). www.ue.org/Libraries/Shared_RML/Employment_Action_Race_Discrimination_and_Harassment_Claims_--_Summer_2000_Vol_3_No_3.sflb.ashx

"Preventing Age Discrimination in the Workplace." *UE Quick Tips*, August 2004.
www.ue.org/Libraries/Shared_RML/Quick_Tips_Preventing_Age_Discrimination_in_the_Workplace_--_08-04.sflb.ashx

"Respecting Differences—Discrimination and the Melting Pot." *Employment Action* 4(1).
www.ue.org/Libraries/Shared_RML/Employment_Action_Respecting_Differences_Avoiding_Defamation_Claims_--_Winter_2001_Vol_4_No_1.sflb.ashx

Wilczek, Daniel, and Kraemer, Ann. "Why Did You Fire that Older Employee?" *Employment Action* 3(3).
www.ue.org/Libraries/Shared_RML/Employment_Action_Race_Discrimination_and_Harassment_Claims_--_Summer_2000_Vol_3_No_3.sflb.ashx

Harassment

Vinik, D. Frank. "How to Implement Employee Harassment Prevention Training: A Practical Guide for Educators." August 2010.
www.ue.org/Libraries/Shared_RML/How_to_Implement_Employee_Harassment_Prevention_Training_A_Practical_Guide_for_Educators.sflb.ashx

Wilczek, Daniel. "Training Supervisors to Prevent Workplace Harassment." *Perspectives*, March 2010.
www.ue.org/Libraries/Shared_RML/Perspectives_Training_Supervisors_to_Prevent_Workplace_Harassment_3-10.sflb.ashx

Religious Accommodation

Brown, Lisa A. "Accommodating Employees' Religious Beliefs." *Employment Action* 6(2).
www.ue.org/Libraries/Shared_RML/Employment_Action_Accommodating_Employees_Religious_Beliefs_--_06-03.sflb.ashx

Retaliation

Vinik, D. Frank "Preventing Retaliation: A Guide for Managers," *How to Implement Employee Harassment Prevention Training*, August 2010. www.ue.org/Libraries/Shared_RML/How_to_Implement_Employee_Harassment_Prevention_Training_A_Practical_Guide_for_Educators.sflb.ashx

ADA and FMLA

Vinik, D. Frank. "The Family and Medical Leave Act Liability Hotspots." *Risk Research Bulletin*, July 2008. www.ue.org/Libraries/Shared_RML/Risk_Research_Bulletin_Family_and_Medical_Leave_Act_FMLA_-_July_2008.sflb.ashx

"10 Lessons Learned From Expensive Claims Involving Employees With Disabilities and Serious Medical Conditions." *Risk Research Bulletin*, September 2005. www.ue.org/Libraries/Shared_RML/Risk_Research_Bulletin_Employees_with_Disabilities_-_09-05.sflb.ashx

Hiring

"Conducting Interviews Legally." *UE Quick Tips*, Issue 1, 2003. www.ue.org/Libraries/Shared_RML/Quick_Tips_Conducting_Interviews_Legally_-_08-03.sflb.ashx

"When Do Efforts to Diversify Faculty Become Reverse Discrimination?" *Employment Action* 5(3). www.ue.org/Libraries/Shared_RML/Employment_Action_Reverse_Discrimination_-_Summer_2002_Vol_5_No_3.sflb.ashx

Termination

Checklist for Termination of Employees. www.harrp.com/forms/terminationchecklist.pdf

Muhl, Charles J. "The Employment-at-Will Doctrine: Three Major Exceptions." *Monthly Labor Review*, January 2001. www.bls.gov/opub/mlr/2001/01/art1full.pdf

Documentation

Tips on Documentation of Employee Performance and Conduct. www.allbusiness.com/human-resources/workforce-management-employee-records/12471-2.html

Wilczek, Daniel. "Properly Documenting Employee Disciplinary Actions." *Reason & Risk* 8(2). www.ue.org/Libraries/Shared_RML/Reason_Risk_Properly_Documenting_Employee_Disciplinary_Actions_-_Winter_00_Vol_8_No_2.sflb.ashx

Progressive Discipline

McDaniel, Myra A. "Progressive Discipline Policies and Employment at Will." Bickerstaff, Heath, Pollan & Caroom, April 18, 2007. www.bickerstaff.com/files/MAM_Progressive_Discipline_4_17_07.pdf

Email Use

"Dangers of Email in the Workplace." *Employment Action* 5(1). www.ue.org/Libraries/Shared_RML/Employment_Action_Information_Technology_-_Winter_2002_Vol_5_No_1.sflb.ashx

Appendix: Basic Interview Guidelines Under Federal Law

ITEM	UNACCEPTABLE QUESTIONS	PERMISSIBLE QUESTIONS
Age	For or about birth certificate, date of high school or college graduation, age.	Whether candidate meets minimum or maximum age requirement that is a bona fide occupational qualification.
Alcohol or Drug Use	Whether candidate is an alcoholic or has been addicted to drugs in the past.	Whether candidate currently uses, or has used, illegal drugs.
Arrest Record	About arrests.	None (may have a disparate impact on certain minority groups).
Citizenship	Whether candidate is a U.S. citizen.	Whether candidate is legally eligible to work in the United States.
Conviction Record	About convictions that are not relevant to the job being applied for.	Whether candidate had convictions that reasonably relate to performing the job in question. Consider the nature and number of convictions, facts surrounding each offense, and length of time since the last conviction.
Disabilities	If designed to elicit information about a disability.	How candidate would perform the job and whether the candidate could perform the job with or without accommodation.
Height or Weight Requirements	Concerning height or weight when not related to the job.	Whether candidate meets height or weight requirements necessary for the job.
Marital and Family Status	About marital status, child care, number of children, or pregnancy.	Whether candidate can meet work schedule. Ask all questions to candidates of both sexes.
Name	About national origin, ancestry, or prior marital status.	Whether candidate has ever worked under a different name.
National Origin	Regarding lineage, ancestry, descent, native language, birthplace, and national origin of spouse or parents.	Whether candidate is legally eligible to work in the United States and can communicate well enough to perform the job's essential functions.
Race or Color	About complexion or color of skin.	None.
Religion	Concerning religious preference or affiliation, except at religiously affiliated institutions when hiring faculty or ministerial positions that further the institution's religious mission.	Whether candidate can meet the work schedule with reasonable accommodation, if necessary.
Sex	About the candidate's sex, where sex is not a bona fide occupational qualification.	Where candidate's sex is a bona fide occupational qualification, such as actor or locker room attendant.

We welcome your suggestions regarding issues you would like UE to address. Please contact us at risk@ue.org. For more information about UE, its services, and its policies, please visit our website at www.ue.org.

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