The Latest in Employee Relations Challenges

Jackie McClain
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Key Issues

• Sexual Harassment
• Whistleblower
• Retaliation
• Maintenance of Electronic Records
SEXUAL HARASSMENT

- Added Focus
  - Many institutions have had financial pressures
    - Discontentment increases sensitivity
  - Required Supervisory Training
    - With increased awareness increased claims
    - Verbal banter
    - Hostile environment

Recommendations for Response

- Review established procedures.
- Be sure process has been communicated
- Provide addition training on the handling of Sexual Harassment complaints for supervisors
- Respond promptly to even minor issues.

WHISTLEBLOWER

- Effective process provides quicker response than other complaint procedures
- Broad based interpretation of statutes in some jurisdictions provides means of raising many issues
- Investigations can be initiated with minimal facts
- Laws afford substantial protection for claimants
Recommendations for Response

- Have a clearly outlined procedure and be sure that it is widely disseminated.
- Pick the method which will insure the best quality of investigation for each case.
  - Audit
  - HR
  - Third party
- Strictly adhere to each aspect of the timeline.
- Exercise the highest degree of integrity and error on the side of the complainant if there is ambiguity.

RETAILIATION

- On the Rise
- Used because more quickly handled than other processes
- Retaliation is more onerous than other complaints
- Many complaints focus on neither fraud or illegal activity but violation of policy or unethical practices
- Situations are extremely complex
- Often a defense when anticipating discipline

Four Questions Which We Ask Investigators of Retaliation Claims to Answer

- Was there a qualifying disclosure of wrongdoing?
- Did the “reporter” suffer harm from some adverse action which occurred after the disclosure?
  - Was the adverse action a direct result of the disclosure?
- If the answers to 1-3 are yes, what is the appropriate remedy?
Recommendations for Response

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MAINTENANCE OF ELECTRONIC RECORDS

• Electronic data, even that which is very time consuming and expensive to recover is discoverable
• In federal court the party owning the evidence must pay for its production absent extraordinary circumstances.
• In federal court if cost shifting may occur at all, it will generally be limited to shifting a portion of the cost of restoring and searching to the requesting party.

MAINTENANCE OF ELECTRONIC RECORDS CONT.

• In state court, the requesting party will normally bear the cost of retrieval of data from backup tapes
• Parties may be sanctioned if they fail to preserve evidence as soon as litigation is reasonably anticipated
Recommended Actions For Compliance

- Maintain close working relationship between Human Resources and General Counsel
- Error on the side of early identification of cases where litigation is possible.
- Set up separate file for all e-mail or other electronic documents related to the case.
  - Do not forget to file sent as well as received e-mails.
- Stop “normal” deletion schedule for electronic documents relative to these files.