

Preventing Employment Practices Liability

Risk Control from Liberty Mutual Insurance



This document is intended to give you a better understanding of employment practices liability risk and provide strategies and positive management practices to help protect your business.

This document also identifies some common mistakes that tend to increase risk of employment-related liabilities and discusses positive management practices to help avoid costly mistakes.

Why Be Concerned About Employment Practices Liability (EPL)?

The following are just a few reasons why you should be concerned about EPL.

- Many organizations have indicated that they have been named as defendants in at least one employment-related lawsuit. Some individuals within those organizations have also been sued personally.
- Employment-related litigation costs (e.g., attorney fees, damages, court fees, settlement costs) have increased steadily in recent years.
- Although individuals and organizations can help protect themselves against employment-related litigation by purchasing various forms of liability insurance (such as Employment Practices Liability Insurance (EPLI), few do. EPL is not an automatic coverage under most CGL policies and is often excluded unless endorsed under a separate policy provision.
- Since 1990, the Equal Opportunity Commission has reported more than a hundred-fold increase in complaints filed alleging workplace discrimination.
- Large numbers of employment claims are being filed in court and with various administrative agencies. This litigation can result in tremendous liability as well as substantial legal expense, even if the employer ultimately wins the EPL lawsuit.

Strategies to Help Prevent EPL

The following are some strategies to help you reduce your risk of EPL. Review each carefully with legal counsel well versed in employment law.

Maintain Good Employee Relations

The single best way to prevent employment liability lawsuits is to maintain good employee relations each and every day. To accomplish this, the employer should treat employees fairly throughout their entire employment — from hiring to final termination. Even if the employer fires an employee for disruptive or unproductive behavior, the employer must treat that employee in a fair and consistent manner. Other employees will judge your fairness by how you treat others.

Follow a Path of Consistency

Sometimes employees allege that they were treated unfairly because they received treatment different from their fellow employees. The court will be asked to judge fairness by examining whether employees in similar situations have received the same treatment. For example, if the employer allows some employees to arrive late while disciplining others for the same behavior, the court may find that the employee is being treated unfairly. Or worse, the court may presume that the employer is targeting the employee for punishment for a reason wholly unrelated to the punished behavior.

- Employers should strive to not only treat discipline consistently, but to avoid even the appearances of inconsistency. If the employer deviates from standard practices, he or she should thoroughly document the reasons for the deviation.

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- Treat all employees fairly and consistently. Do not punish employees for inappropriate behavior if you allow this same behavior in other employees. If you intend to prohibit a behavior that was previously allowed, document the change in policy. Notify all employees of the change and document that they have received the notification, preferably with their signature indicating they understand the change.
 - Justify exceptions to policy. If you intend to deviate from standard procedures, have an objective justification for doing so. Record the justification in the employee's personnel record. In situations where other employees know about the deviation, provide justification in writing to the employees.
 - Put all policies in writing and communicate to everyone. Distribute the policies so that all employees know what treatment they can expect. Follow your own guidelines in as many situations as possible. If you must deviate from your written policy, provide justification as described above.

Ensure Proper Performance Documentation

When a court or administrative body decides the merits of an employee's claim, they rely on written records to determine what occurred between the employer and employee. If an employer takes actions that show impartiality and application of consistent policies but does not record these actions, the court will not acknowledge their existence. Doing the right thing is not enough — always document your actions. Talk with your legal counsel about how the documentation should be kept and what it should contain.

Supervisors often do not document minor acts of misconduct. They do not document minor infractions unless a pattern develops. Therefore, they cannot evaluate the impact of the behavior except over time. However, after a manager discovers the pattern, recreating a full picture of the employee's activities is usually impossible.

Some managers do not document misconduct when an employee gives a plausible excuse. However, an employer's documentation may show that an employee repeatedly gives inappropriate or excessive excuses for his or her misconduct.

Your records must be able to demonstrate that you recognized the problem, addressed the problem at the time, and counseled the employee about his or her behavior.

Effective documentation should...

- Be consistent. Always identify advancement, discipline, and termination criteria and procedures in writing. Disseminate the criteria and procedures widely and apply the criteria uniformly to everyone.
- Be objective. Provide periodic performance evaluations focused on work-related consistent standards. Always document your observations objectively and record both positive and negatives. Avoid remarks that focus on your feelings about the behavior or assess the employee's character. Document only those things that you can see and prove.
- Give examples. Give concrete examples of the behavior that is objectionable. Also, give concrete examples of the types of behavior that is expected.
- Review documentation with employee in a timely manner. Give the employee a chance to respond in writing. Create a system where the employee must sign your documentation.

Avoid Inflating Performance Evaluations

Some managers inflate the ranking or scoring of employee work performance and award poor employees above-average scores on performance reviews. Courts will not look favorably upon employers who fire an employee for poor performance after they have given the employee a series of strong evaluations.

Truthfully and consistently evaluate all employees. Present an objective and accurate analysis of an employee's performance and resist the temptation to give false praise. Never insult, defame, or use inflammatory language. Evaluations should be factually based and not overly conclusive. For example, avoid statements like "lazy employee."

Instead state “the employee failed to arrive to work on time 28 times. Work standards demonstrate that he produces 35% less than other employees working in the same position on the same shift.”

The results of an employee evaluation should not be a surprise. If a supervisor has adequately documented employee performance and communicated this documentation to the employee, the supervisor will only be conveying information that the employee already knows.

Effective evaluations should...

- Be objective. Only state facts, not conclusions. Do not give unwarranted praise and do not use derogatory, defaming, or inflammatory language.
- Consider the full evaluation cycle. Keep timely records throughout the evaluation cycle based on your legal counsel’s retention and purge cycle advice.
- Review evaluations with the employee. Share results of the evaluation with the employee. Be certain the evaluation contains no surprises for the employee. Provide a means whereby the employee can respond in writing to the evaluation and attach the response to the evaluation for further reference.

Ensure Proper Training

Several state and federal statutes require that employers train employees in certain substantive areas (e. g., health and safety). In other jurisdictions, the employer must train employees or face the legal liability created from the absence of training. In some case law it has been found that employers can be held liable for sexual harassment by a supervisor even if the employer lacked actual notice of the supervisor’s conduct. Courts may find that to avoid this liability, employers must establish specific harassment policies and procedures and train employees in these measures. In short, companies need to establish proactive training measures to minimize their risk of employment practices liability.

Effective training should...

- Record all training efforts. As a minimum, records should indicate who was trained, when the training occurred and, what was the subject of the training
- Evaluate training. A good training program should include some ability to measure whether the training was successful and test to see if the students learned the materials presented. Counsel/retrain those students who failed the testing. Keep records to show that the employee has been properly trained.
- Provide opportunities to makeup a missed session. Employees may have other duties that necessitate that they miss training. Do not fabricate records of attendance after the training has concluded. Check with your legal counsel to verify what this should involve.
- Review key topics frequently. Typically an employee receives training on employment issues during orientation, if at all. The courts have determined that orientation training alone will not relieve the employer from liability for the actions of their employees.

Use Electronic Communications Correctly

In many of the employment cases in litigation today, plaintiff attorneys are submitting incredibly damaging electronic messages into evidence. While email seems private, any plaintiff attorney can insist that an employer produce these messages in court. For this reason, employers should avoid written email messages that he or she would not want made public.

Email has a life beyond the expectations of most users and can be monitored without the user’s knowledge. After the email is erased from the user’s screen, it frequently remains available through backup and server systems.

An organization should develop email and voice mail policies, consistent with your IT policy and your legal counsel. The policy should indicate that all electronic messaging is public. Train all users and follow up on the proper uses of an email system.

Effective electronic communications policy should...

- Assume the message is public. As with other written documents, avoid libelous, slanderous, and inflammatory language. Avoid discussions subject to discrimination claims such as age, race, creed, sex, national origin, religion, sexual preference. Avoid offensive humor. Assume that the employee will see the communication and act accordingly.
- Describe proper uses for email. Some of the most damaging evidence in employment cases comes from email sent for other than business reasons. A plaintiff attorney may discover personal messages sent in the work environment and may even use jokes told between personal friends as evidence of harmful employment practices in an organization. Humor in poor taste or with a discriminatory theme may be used as evidence of discrimination or harassment.
- Remind users frequently about email vulnerabilities. Stay current on legal audits and other changing employment law that can affect how you retain such documentation.

Termination and Employment References

Former employees are far more likely to file an EPL claim than current or prospective employees. For this reason, an employer should concentrate on making the discipline and termination procedure of his or her organization compliant with expectations of the current legal environment.

Originally, common law allowed an employer to terminate employment for any reason. It treated employees and employers as equal parties to an employment contract. As such, unless a specific provision of an employment contract specifically prohibited it, the employer could terminate employment at will, for any or no reason at all. Today's legal climate (both state and federal legislation) has significantly eroded an employer's ability to terminate employment. Because the rules for terminating employment are no longer as clear, employees frequently resort to litigation to determine whether an employer is acting within their legal rights and what recourse they may have against those employers.

In the unfortunate situation where a manager must release an employee, he or she must keep the matter *absolutely confidential*. Supervisors' statements to team members, managers, the employee's peers, contractors, and friends are all discoverable in litigation. Do not disclose personnel issues with any person who does not have an absolute need to know. Talk with your legal counsel to verify those who should be involved in these discussions and email transactions. Where comments are made outside of those contexts strictly required for business reasons, they might support a claim for discrimination. In extreme cases, the comments may support a claim for defamation. Even in cases where the supervisor does not specifically mention a name, he or she still exposes the company to liability where the description is sufficient to identify the person about whom he is speaking. Similarly, the supervisor should only allow those persons with an absolute need to know to inspect personnel records, email communications or memoranda, and other documentation concerning the employee.

- Create a termination policy. At a minimum, create a procedure for employee termination. Designate who has termination authority. This person(s) should review the file to ensure reasons for termination have been adequately documented. Stress the importance of the manner of termination. Identify severance and settlement packages. Conduct an exit interview by a neutral party, perhaps the Human Resources Director. Be certain your legal oversight has complete approval over the content and practices of such actions and that program adjustments are made that are consistent with that counsel.

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- Create a policy for giving references for former employees. Give only objective information during the process, such as dates of employment, responsibilities, number of times arrived tardy, etc. Avoid giving subjective information. However, when giving references to other employers for a terminated employee, the supervisor must give objective facts about the employee's performance. Some courts have even held an employer liable for negligent misrepresentation where the employer gives a favorable reference knowing the unfavorable.

When possible, always refer employment questions to the Human Resources department in tandem with your legal counsel. Always assume that your comments are public.

Provide an Alternate Outlet for Employee Frustration

Employees who have no recourse for airing complaints and frustrations will more frequently resort to litigation. For this reason, consider establishing a means whereby employees can report concerns and lodge complaints in a confidential and non-threatening manner, without fear of retaliation. Every new hire should be given a copy of written grievance procedures and each employee should be trained in those procedures annually or as changes occur.

Effective grievance procedures should...

- Provide options for employees to report complaints through channels other than his or her direct chain of command. Many employees will not bring a complaint directly to their supervisor for fear of retaliation. Assure employees there will be no retaliation for voicing a complaint.
- Specify a time by which the investigation must be complete. Every complaint must be thoroughly investigated, regardless of merit. If a claim has no merit, an investigation will produce evidence that will help the employer avoid needless liability. If the claim has merit, you need to take action as quickly as possible to mitigate the amount of damages. At all times, you must act respectful towards the employee and take immediate remedial action where warranted.

Additional Resources

About.Inc. (2016). *Employee Practices Liability Insurance*. <http://businessinsure.about.com/od/liabilityinsurance/a/epliinscov.htm>

Business Insurance Now. (2015). *What Is Employee Practices Liability Insurance or EPLI?* <http://www.businessinsurancenow.com/employment-practices-liability/>

FindLaw® for Legal Professionals. (2016). *Employment Practices Liability Insurance: A Viable Preventive Strategy*. <http://library.findlaw.com/2000/Dec/6/129662.html>

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