KEEP THE TRAINS RUNNING ON TIME:

STRATEGIC RISK MANAGEMENT FOR EMPLOYERS

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Many well-run institutions dread the prospect of being sued and fear the impact that litigation could potentially have on their organizations. Yet, by applying the same principles of thoughtful planning firms routinely employ to effectively run their day-to-day operations to proactively prepare for litigation, they can mitigate potential future costs and limit the time litigation absorbs. Below we address two forms of risk management. In the first, we discuss how setting aside time to plan before litigation is visible in the distance will keep your organization on track with its proverbial trains running on time. Second, we discuss the human side of some common risky situations and how thoughtfully making decisions and implementing them affects significant employment risks.

Managing the Future Evidence

1. Document discovery

The centerpiece of most employment litigation is document discovery. The days of paper employee files in locked cabinet drawers have long passed and much communication between coworkers and between HR and employees is in a variety of electronic forms. When defending employment cases, it is essential to understand the narrative of an individual's employment. Attorneys want to grasp the whole story (warts and all) so that we can help resolve the situation as quickly, efficiently, and inexpensively as possible. That *story* is often told through the documents.

a. Policies related to employee communication

With the number of options of how employees may communicate—email, text, project management software, collaboration platforms like Teams and Google Chat, as well as any variety of other messaging services through platforms like Facebook, Instagram, SnapChat, What's App—clear written policies should specify the acceptable method of employee communication, both internally and externally. The goal of those policies should be to facilitate proper retention, and, when needed, provide review and monitoring of employee communication.

As a general rule, employee communication should be through platforms monitored and hosted by the organization with capacities for retention. Email from company-issued addresses is the easiest method for retention; platforms like Teams and Google Chat can be monitored and configured for retention as well. Employees should be

discouraged from communicating with coworkers from personal emails or from individual accounts on social media platforms. These communication policies should be contained within employee handbooks or employee contracts. At the commencement of employment, new hires should be trained and advised on approved modes of communication. As work transitions from the COVID-remote and back to more time in-person and on-site, employees (who may have gotten a bit lax during COVID) should be reminded of internal communication policies.

i. Cell phone use

Cell phones pose a thorny issue for many employers. While providing company-issued cell phones is costly, it presents the easiest way to monitor and preserve any communication employees may have on the company devices (with anyone). Company policies related to privacy of personal information shared on company-issued devices should be explained in employee handbooks.

When employees use their own cell phones as part of their day-to-day business practices, a *Bring Your Own Device Policy* can set the parameters and expectations of how employees will use their own phones, ensure preservation of information sent from and received on the device, and spell out the rights of employers to search personal devices that are used by employees during the workday. Moreover, as time passes, text messages can be difficult to save and retrieve, adding to the preference that employees use an organization's own email or internal messaging system rather than text messaging.

ii. Social media

Most companies have well-honed social media policies governing employee access to social media sites from company-owned devices and during working hours, but the policies should include an admonition against using the complementary messaging services offered with platforms like Facebook and Instagram.

b. Policies in place to ensure preservation of evidence

To mount a proper and robust defense of claims in employment litigation, employers must be able to access employees' communications, sometimes years later.

i. Document retention policies

IT departments should examine their retention policies for the preferred communication sources, i.e., company emails and approved internal communication platforms, and calibrate them to retain documents. The retention of most data on cloud-based systems can be controlled by the system's administrators and auto-delete functions can be overridden. That said, some platforms allow individual users to delete communications, so these capabilities should be disabled. The specifics of document retention and destruction policies should be in writing.

At key junctures, steps should be taken to ensure communications are not lost. When significant upgrades are made or new technology is purchased,

preserving communications should be considered. Similarly, when an employee's employment is terminated (voluntarily or involuntarily), their communications (particularly if it is an involuntary termination or reduction in force) should be retained.

ii. Litigation hold letters

As part of the process of contemplating document retention, a litigation hold letter should be drafted so it may be promptly customized once it appears that litigation may be imminent. The coordination and simultaneous consideration of retention policies with a litigation hold letter will ensure alignment in policies.

iii. Budget considerations

Finally, the retention of electronically stored information is an expense that needs to be budgeted. As a result, the preferences of the IT, finance, human resources, and legal departments at times may conflict. It is helpful and important for different stakeholders to communicate and work together so that polices can be drafted with an eye toward meeting all of these (at times, differing) priorities.

2. Risks of not planning ahead

Planning ahead has potential financial benefits with the advantage of an organized efficient response when litigation is commenced. Failure to prepare, however, carries some significant risks. As a practical matter, since employers typically are the custodians of relevant documents, failure to preserve documents related to claims may prevent employers from mounting a strong defense. Lost files, destroyed emails, deleted texts—all with the potential to exonerate a company of any accused wrongdoing—are ineffective if they cannot be located. In contrast, a well-organized system that preserves and quickly retrieves information saves internal resources and limits attorney time in gathering and reviewing documents.

As a legal matter, documents that are lost or destroyed create a potential for a claim of spoliation (that is, a failure to preserve relevant documents when there is an obligation to do so) and a court may consider sanctioning a company with a range of potential consequences from dismissing an action to creating a presumption against a company who lost or destroyed documents, i.e., a court may presume a document that was not properly retained was unfavorable. That said, if a court sees—through internal policies that are effectively implemented—that a good faith effort has been made to retain documents, it will likely look less skeptically on a company that, despite best efforts, misplaced or deleted some document.

The Human Element

One type of strategic risk management involves processes for records and data management as discussed above. Risk management is not limited to data and paper policies, but also involves how an employer manages the human element of risk-bearing employment situations. This section of the materials focuses on three common areas where risk arises: (1) discipline/performance management, (2) responding when employees make claims of mistreatment, and (3) dismissal/termination of employment.

1. Discipline/performance management

Discipline of an employee is often a standalone "adverse employment action" that can provide a basis to sue. And, discipline that does not result in corrected performance or conduct is a precursor to dismissal that prompts most employment lawsuits. Accordingly, employers must ensure that they engage in thoughtful discipline to minimize risk. While we like to be positive in our messaging, looking at some common mistakes in discipline is helpful to illustrate how employers can reduce risk.

» *Lack of clarity. Compare the following:*

> "Although I know you have had a lot of difficult challenges lately, it would be helpful if you were a bit more careful about paperwork."
>
> *with*
>
> "This job requires that paperwork be filled out accurately and completely. Four requisition forms you filled out last week had errors or missing information. For example, on Requisition Y, the price was inaccurate and there was no indication of the department making the request. Requisition Z was missing the vendor's identification number. These mistakes create a burden on others in the office and do not meet expectations. Going forward, it is imperative that paperwork is complete and accurate."

The first example is neither uncommon nor extreme. It is understandable that employers want to be supportive, and using passive language can feel like a way to be supportive and avoid conflict. In the long run, though, the first example also lacks candor, is less likely to result in improvement, and—from a risk management perspective—increases risk because an employee can claim that they did not understand the significance of the statement. Moreover, because of the inevitable gap in time between discipline and any later litigation, even if the manager providing the information in the first sentence told the employee the concern was serious, it will probably be the manager's word against the employee's at trial, even assuming the manager can remember what was verbally communicated to the employee at the time. The vagueness in the wording of the first example doesn't provide the support to a strong defense as well as the specificity of the second example.

» *Unrealistic statements of support.* A trap for the unwary is a statement of support in performance management or discipline. While there are often reasons that an employer might want to provide support mechanisms to help an employee improve, employers should be careful about how they document such support. Frequently, the support appears to be a promise–for example, a list of "supports" that the employer intends to provide. But if the employer doesn't end up providing the supports, the employee will garner sympathy because it appears that they were not supported.

Just as problematic are broad statements–"we will do everything we can to help you succeed." This is a big promise, slightly vague, and difficult to keep. An employer should only promise—and document—contemplated supports that it genuinely intends to deliver on and provide. If an employer is going to provide a coach or peer support, it can be recorded outside of the discipline document and be very specific.

» *Unflattering draft comments.* Reflected in Section A is the deep electronic discovery that occurs. This includes drafts and comment versions of the documents. Employers working on drafts sometimes write things like:

"I don't think this is really that bad. Other employees do this all the time."

"We don't have a policy about this, should we still include it?"

Imagine the statements those comments refer to are left in the drafts. There may be good reasons for the comments, but the digital comments suggest unfairness and make the discipline more difficult to explain.

Substantive discussions about whether to discipline and at what level are usually nuanced and thoughtful. Phone calls and meetings are preferred ways to have these sensitive discussions. Comments, texts, and emails are much less likely to suggest a thoughtful considered decision and may be viewed with a skeptical eye when seen by a jury months or years later.

2. Complaints of mistreatment, especially "retaliation"

Employees that have disagreements with coworkers and management that escalate create risk to the organization. Many employers hear the refrain by some employees that they are being "retaliated against." Retaliation is a term of art that can have significant legal consequences in some circumstances, but is often not used in that way. Employees in a disagreement often claim that conduct of another employee that they don't like is "retaliation" against them. While this feeling and sentiment can create morale and workplace productivity problems, most of the time the liability risk is low. But if an employee claims "retaliation," sometimes the employee is invoking retaliation concepts that are legally prohibited, like retaliation for reporting a safety concern, having a workplace injury, or reporting what the employee believes is evidence of a violation of law. These circumstances can lead to substantial risk and are not always clear. So, what can an employer do?

» *Take complaints seriously.* Treat all complaints of mistreatment by coworkers or supervisors seriously. If an employer has investigated and found no merit to the claims of mistreatment yet the employee persists, an employer can carefully assert that the issue is closed and that they won't be investigated further. In extreme cases, an employer can take disciplinary action if the employee is disruptive by complaining. Taking action is a very difficult undertaking and worth consulting counsel to avoid missteps and make sure risks are all identified.

» *Define retaliation.* If an employee claims retaliation, an employer needs to ask exactly what the employee believes the basis of the retaliation is, and how they believe they are being retaliated against. If the employee's retaliation complaints are not for protected activity, then an employer can be direct and indicate that the act is not something covered by policy. For example, compare:

"You explained to me that you feel retaliated against because your coworker always leaves the creamer containers on the sink for you to clean up and that they do so because you accidentally did not fill the copy machine. We would like to work with you to facilitate better communication with your coworker."

with

> "You explained to me that you feel retaliated against because you told your supervisor you thought that certain tax forms could not be submitted with an extension and your supervisor disagreed. You also indicated you think that your supervisor gave you a 'does not meet expectations' instead of 'exceeds expectations' because of the disagreement about the tax forms. I have looked into the matter. Your supervisor did not mind you raising the point about the tax forms even though it was mistaken. The 'does not meet expectations' score relates to the accuracy of forms you submit, as described in your evaluation."

Either of these responses is appropriate for the circumstance and reflects just how important the different use of "retaliation" can be. The second is a higher risk situation (potentially high risk if the employment action were dismissal instead of a low evaluation), and the first is simply a workplace management dispute.

» *Utilize nondiscrimination concepts/procedures.* The laws requiring investigations of employee mistreatment involve claims of discrimination or retaliation based on having raised claims of discrimination. When an employer does have a real claim of retaliation based on protected activity, it can respond along the lines of the second example under "Define retaliation" above and evaluate the concern relatively informally. However, in significant cases, it is in the employer's interest to assess if there actually is retaliation so it can manage the claim before it turns into a lawsuit. Employers can build their discrimination complaint procedures to include any prohibited form of retaliation, or, if the procedure doesn't include all forms of prohibited retaliation within the scope, nothing prohibits an employer from undertaking the same basic investigatory steps. This can create a more complete record and better assessment of how to manage the risk before it gets worse. If employers discover prohibited retaliation, they are wise to consider serious sanctions against any person engaged in it. Juries do not look kindly on employers that take action against employees for asserting their rights.

3. Dismissal

Dismissal—the termination of employment—is of course the most significant action an employer can take. There are no risk-free employees. And, some dismissals have obvious risk. These are some dos and don'ts that reflect areas where employers miss opportunities to reduce risk (the dos) and increase risk (the don'ts).

» *The Dos*

Tell the person the reason for the dismissal. This should be the real reason(s), carefully and accurately described. Providing one reason at the time of dismissal and another later when defending a lawsuit creates a high risk.

Dismiss for performance reasons after engaging in progressive performance management. While there can be exceptions for serious performance problems (like safety-related problems), jurors expect even at-will employees to get a chance to improve.

If at all feasible, ensure dismissal is dignified and recognize that this is likely difficult for the employee. Coach the employee communicating the dismissal about compassionately messaging the exit. This is the converse of the don'ts below.

» *The Don'ts*

Tell an employee that they are not a good "fit." This makes the employee wonder if protected status or protected activity is the reason they don't fit.

Be cold or callous. In many circumstances, an employee may have spent more time in their job than with family. Ensure that individuals telling the employee they are dismissed is a skilled and empathetic communicator.

Have a lawyer undertake the dismissal (unless the lawyer is the supervisor or some unusual circumstances exists). We have been asked to be the messenger and have terminated employees on rare occasions. This makes the employer look like it is concerned about legal issues and regardless of how the lawyer handles the dismissal; it is likely to be perceived as cold and callous.

Not review any pertinent contract, appointment letter, or policies that might affect whether dismissal can occur or how it must occur. Employers can be overconfident that an employee is at-will only to discover a policy written in a problematic way or an appointment/hiring letter with problematic reasons.

Unfortunately, litigation may be inevitable for many organizations, but it need not be feared, nor overtake the everyday operations of a company. If effective systems are put into place, companies can fold the management of litigation into the business of running the company and leave the details in the capable hands of its attorneys.

RISK MANAGEMENT CHECKLIST

Evidence preservation and management

- ☐ Draft litigation hold letter
- ☐ Include cell phone policy in employee handbooks or employee contracts
- ☐ Utilize a *Bring Your Own Device Policy* if not using company cell phones
- ☐ Establish document retention policies for and with IT/Systems department
- ☐ Train employees (on commencement of employment and continuously) on recommended ways to communicate with one another
- ☐ Retain devices (and communications) when employment is terminated (for any reason)
- ☐ Preserve information when systems are upgraded or devices replaced
- ☐ Protect metadata

Practices to manage the human factor

- ☐ Articulate clear expectations for employee performance and improvement
- ☐ Take all employee complaints seriously and follow up
- ☐ Ensure responsive procedures are in place and used as intended and as written
- ☐ Make dismissal decisions thoughtfully, with an eye toward potential risk