

Personnel Management



The Current Issues

Presented by:

NAME

TITLE

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Personnel Assistance Section

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PERSONNEL MANAGEMENT

- THE CURRENT ISSUES -

LIABILITY - THE “L” WORD

- Through their actions, county officials - whether elected or appointed - are in a position to create a tremendous liability for the county and, in some instances, for themselves.
- A significant area of potential liability is in the employer-employee relationship.
- While there is no way to completely eliminate liability and lawsuits, there are actions which can be taken to minimize their possibility and provide part of an effective defense if charges are filed. These include:
 - ◆ Treating all employees consistently and fairly;
 - ◆ Complying with all legislation pertaining to the employer-employee relationship;
 - ◆ Clearly defining the employer-employee relationship (personnel policies);
 - ◆ Having **SPECIFIC** and **VALID** work related reasons for all personnel actions and decisions, and thoroughly documenting those reasons;
 - ◆ Maintaining open two way communication with employees; and
 - ◆ Dealing with problems quickly.

EMPLOYMENT AT WILL

- Texas is generally considered to be an “employment at will” state.
- Under employment at will, an employer can discharge an employee at any time, with or without notice, for any reason (good reason, bad reason, or no reason), except for an illegal reason or if the employee has a property interest in his or her job. An employee may also quit employment at any time, with or without notice.
 - ◆ Illegal reasons for termination include decisions made based on a person’s protected status under law or retaliation for exercising a protected right or obligation. (Illegal reasons for termination and other personnel actions will be discussed in the section on Equal Employment Opportunity.)
 - ◆ Property interest in a job means the employee has reason to believe that there is some guarantee of duration of employment or that the job cannot be taken away without some form of due process.

EQUAL EMPLOYMENT OPPORTUNITY

- Under Title VII of the Civil Rights Act of 1964, and other related equal employment opportunity legislation, it is generally a violation of that legislation to make employment related decisions, or take other personnel actions, based on race, color, religion, sex, national origin, age, or disability.

- When jobs open, active steps should be taken to ensure that all qualified applicants have reasonable access to information about the openings.
- Applicants should be considered solely on the basis of job related criteria.
 - ◆ Questions which are not job related may give the appearance of discrimination even though there is no intent to discriminate.
 - ◆ Inflated job requirements can also be viewed as discriminatory.
 - ◆ When a selection is made, specific documentation should be prepared as to why the individual selected is the best qualified applicant.
 - ◆ Once hired, all employees should be treated consistently in regard to raises, promotions, training, discipline, use of facilities, and any other condition or privilege of employment.
 - ◆ It is also illegal to take adverse action against an employee for exercising certain protected rights such as filing a valid workers' compensation claim; voting; exercising the right of free speech; reporting believed wrongdoing of the county to the proper enforcement authority (whistleblowing); and other such rights guaranteed by law.

PROPERTY INTEREST

- As indicated earlier, a property interest in a job means that the employee has reason to believe there is some guarantee of duration of employment or that the job cannot be taken away without some form of due process.
 - ◆ A property interest in a job is often created by contract. While counties do not give written contracts to employees, an implied contract may be created through some communication between the county and a prospective or current employee.
 - ◆ Managers and supervisors need to avoid unintentionally eroding the employment at will status resulting from implied contracts.
- Implied contracts are often made during the interview and/or the orientation process by statements concerning salaries, probationary periods, raise schedules, basis for termination, or other statements indicating specific periods of time or giving the impression that a job cannot be taken away without some specific process.
- Wording in personnel policy manuals, employee handbooks, on application forms, and on other documents provided to employees and applicants may also create implied contracts.
- Terms used to designate employee status may indicate an implied employment contract.
 - ◆ Some courts have found that the term “permanent employee” can be interpreted as a lifetime, irrevocable employment contract.
 - ◆ At present, the term “regular employee” is considered safe in designating an employee who is not in a temporary position.
- Statements such as “ You do a good job and you can be with us until you retire” can be viewed as implied contracts.

- A list of reasons for discharge which seems all inclusive or an inflexible formal disciplinary procedure may also give an employee a property interest in his or her job.
- To protect at will rights, a county should develop a strong at will policy and communicate it to all employees.

PERSONNEL POLICIES

- Personnel policies should be dynamic working tools for supervisors and managers and, therefore, should be kept current.
 - ◆ A policy manual needs to be designed to allow for changes, additions, and deletions.
 - ◆ As policies are added, changed, or deleted, the policy manual needs to be updated and all affected employees need to be informed of these changes.
- In situations where you have a written policy but a practice, which is in conflict with that policy, is being accepted without attempt to change the practice, the practice becomes the implied policy which supersedes the actual written policy.
 - ◆ Policies need to be reviewed periodically to determine if they are still current and if they are being effectively followed.
 - ◆ Reestablishing a policy that has not been enforced needs to be done very carefully. Never do so by “making an example” of an employee.
- In the absence of a written policy, the accepted practice becomes the policy.
 - ◆ Even though not written, these implied policies have the same impact as written policies and need to be applied consistently.
 - ◆ Written policies give an employer a better understanding and, thus, better control over the actual personnel policies.
- Policies need to be carefully written to avoid implied contracts.
 - ◆ Words or statements which indicate a guarantee of employment for any duration, or which indicate that a specific process must be followed before an employee can be terminated, should be avoided.
 - ◆ Every policy manual should have a prominently displayed employment at will statement. This statement should say something to the effect that, “All employment with the county is at will and that no employment contract exists between the county and any individual for any period, either specified or non specified. The county or the employee may terminate the employment relationship at any time, for any legal reason, either with or without notice. The county also retains the right to change any condition, benefit or privilege of employment at any time.”

AMERICANS WITH DISABILITIES ACT (ADA)

- Under Title I of ADA, it is illegal to discriminate against an otherwise qualified individual on the basis of disability in any phase of employment.
- A person with a disability is defined as an individual who:

- ◆ Has a physical or mental impairment which substantially limits one or more major life activities;
- ◆ Has a record of such an impairment; or
- ◆ Is regarded as having such an impairment.
- Under the ADA, we can only evaluate an applicant’s qualifications based on the “essential job functions” – those duties that must be performed in the job – and not the “marginal functions” – those incidental duties that an employee may perform but which are not essential to the job.
- During the interview process, questions about an individual’s health, medical background, and workers’ compensation claims are prohibited by the ADA.
- Applicants cannot be required to take a pre-employment physical examination but may be required to take “post offer” physical.
 - ◆ The job offer may be made contingent on the physical showing that the individual can perform all the essential job functions.
 - ◆ An employer cannot selectively decide to whom to give a post offer physical. If such a physical is required of one person, all incoming employees in that job category must be required to take a post offer physical.
- Under ADA, an employer is required to explore reasonable accommodation for an otherwise qualified disabled applicant or employee to allow that person to perform the essential job functions.
- Because of the complexity and broadly stated requirements under ADA, all supervisors should become familiar with the employment requirements of this Act.

FAMILY AND MEDICAL LEAVE ACT (FMLA)

- Under FMLA, eligible employees (male or female) may take up to 12 weeks per 12 month period:
 - ◆ For the birth of a child;
 - ◆ For the adoption or placement of a child in the employee’s home for foster care;
 - ◆ To attend to the serious illness of the employee’s spouse, child, or parent; or
 - ◆ As the result of the serious illness of the employee.
- An employee returning from a qualifying absence under FMLA must be returned to the same job or an equivalent job.
 - ◆ During a qualifying absence, the employer must continue to pay the employee’s medical insurance at the same rate as if the employee were on the job.
 - ◆ The employee must also retain seniority status and privileges of employment enjoyed prior to going on leave.
- To protect its interests, a county should develop a specific policy on FMLA.
 - ◆ There is some flexibility as to how certain parts of FMLA can be administered by an employer.

- ◆ In the absence of a policy, FMLA must always be administered in the way that is most advantageous to the employee.

FAIR LABOR STANDARDS ACT (FLSA)

- Under FLSA, employers - including counties - must meet very specific requirements in regard to recognizing all hours worked by covered employees and in giving the correct compensation for straight time and overtime worked.
- Each employer must have a defined workweek for its covered employees and pay overtime for all hours actually worked over 40 in any workweek. (NOTE: There is a partial overtime exemption for qualifying law enforcement personnel under section 207(k) of the Act.)
- Overtime must be paid at a rate of one and one half (1 1/2) times the employee's regular rate of pay - OR - counties may give compensatory time off at a later date provided that an agreement exists between the county and the employee, prior to the overtime being worked, that overtime will be compensated in this manner.
 - ◆ Compensatory time is earned at a rate of one and one-half (1 1/2) the amount of overtime worked.
 - ◆ When an employee terminates, any unused FLSA compensatory time must be paid to the employee at his or her current regular rate or the average regular rate for the past three years, whichever is greater.
 - ◆ The maximum amount of unused compensatory time employees may have is 240 hours. For law enforcement, fire protection, and certain other emergency response and seasonal employees, the maximum unused compensatory time is 480 hours. When an employee has the maximum amount of compensatory time allowed, he or she must be paid for additional overtime at one and one-half (1 1/2) times his or her regular rate.

PERFORMANCE APPRAISAL

- A well designed and honestly applied system of performance appraisal can be an extremely useful tool in justifying personnel actions. However, a poorly designed system, or appraisals that do not accurately reflect an employee's performance, can be a supervisor's worst enemy if personnel actions based on performance are challenged through the legal system.
- For years, a form of the "trait scale" system was the appraisal system most frequently used.
 - ◆ In these systems, job related traits were rated against some type of scale, usually numerical.
 - ◆ This type of system is highly subjective, thus making it highly subject to distortion, which means it is not very legally defensible.
- A good performance appraisal system needs to be objective and thorough with a specific basis for the evaluation.
- Criteria based appraisal systems, which are well designed and accurately administered, have proven to be highly effective in both communicating performance expectations to an employee and

in providing a legal defense in the event that a personnel action based on performance is challenged.

- ◆ In a criteria based appraisal system, specific job duties and responsibilities are evaluated.
- ◆ Each duty has a defined acceptable standard of performance applied to it and a system for measuring that standard.
- While written formal evaluations are important, it is equally important that a supervisor provide regular verbal feedback to his or her employees regarding their performance.
 - ◆ If a supervisor is communicating effectively, employees will have no big surprises at the time of the formal appraisals.
 - ◆ A good rule to follow is to give praise as it is earned and correct problems as soon as they occur.

SEXUAL HARASSMENT

- The Equal Employment Opportunity Commission has defined sexual harassment as “Unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature when:
 - ◆ Submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment;
 - ◆ Submission or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
 - ◆ Such conduct has the purpose and effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive work environment.”
- Sexual harassment falls into two categories.
 - ◆ The “quid pro quo” or “this for that” form of harassment occurs when job related decisions are based on an individual’s acceptance or rejection of sexual advances, requests for sexual favors, or other conduct of a sexual nature. This type of harassment arises out of the supervisor-subordinate relationship and can include such decisions as hiring, firing, raises, promotions, and special treatment.
 - ◆ Hostile environment claims arise where there are unwelcome sexual advances, requests for sexual favors, or other physical or verbal conduct of a sexual nature which do not relate to tangible job benefits, but which unreasonably interfere with an individual’s work performance or which create an intimidating, hostile, or offensive work environment. Examples include sexual slurs, unwelcome touching, obscene pictures, suggestive comments, or off color jokes.
 - ◆ In addition to interaction among employees, the employer has an obligation to protect employees from sexual harassment from non-employees such as sales representatives, service and repair personnel, and clients of the employer.
- Determining a sexual harassment situation is not always an easy matter.

- ◆ What is offensive to one person may be fully acceptable to another.
- ◆ A key word in the definition of sexual harassment is “unwelcome,” but it should be noted that acceptance of a situation does not always mean it is welcome.
- To reduce the potential for sexual harassment claims, an employer should take the following steps:
 - ◆ Develop and communicate a policy that clearly prohibits sexual harassment.
 - ◆ Provide training for employees and managers on sexual harassment issues.
 - ◆ Establish a procedure that lets employees file complaints of alleged sexual harassment with someone in a position to take action.
 - ◆ Take each complaint of sexual harassment seriously and investigate immediately.
 - ◆ Where the investigation shows that sexual harassment has occurred, take prompt action to remedy the situation.

This outline only touches on several of the areas of personnel management that are significant in today’s work setting. Each of these is far more complex than can be represented on these few pages. Because of the liability exposures involved in the employer-employee relationship, each supervisor needs to have a thorough understanding of these and other issues affecting that relationship.

NOTE: This paper is provided for informational purposes only. Nothing in this paper is intended to be, nor should it be construed as, legal advice or guidance. Where legal assistance is needed, the services of a qualified attorney should be sought.