



# The Most Likely Lawsuits— And How to Protect Yourself

*Arm yourself with these tips before a lawsuit derails your organization.*

BY TANYA DOYLE & BRIAN KLEINER

**O**f all the legal problems your organization may face, the most likely is a lawsuit by an employee or former employee. Such lawsuits—which are becoming devastatingly frequent—are most likely to be filed for the following reasons:

- discrimination on the basis of national origin, age, gender, or religion
- wrongful termination
- sexual harassment
- wrongful retaliation

Let's look at how you can prevent each of these types of lawsuits.

## Prevent Discrimination Lawsuits

There are three things you can do to prevent a discrimination lawsuit or to defend yourself in court if someone claims you have discriminated:

**1. Base your actions on bona fide occupation qualifications.** For example, a hospital can discriminate against a nurse applying for a promotion to chief of staff if the nurse doesn't have a medical degree. A medical degree is a bona fide occupational qualification for the chief of staff position. Thus, the nurse couldn't sue the employer for discrimination.

**2. Base your actions on a bona fide seniority or merit sys-**

**tem.** Such a system must meet four requirements:

- It must apply to all people.
- It must follow industry standards.
- It must not be based on racial discrimination.
- It can't have any illegal racial purpose.

**3. Base your actions on professionally developed ability tests.** This is a tricky subject, since some tests may unintentionally discriminate. Be prepared to show that your organization's ability tests don't discriminate due to differences in culture and environment.

## Prevent Wrongful Termination Lawsuits

You can reduce your risks of wrongful-termination suits by carefully planning your personnel policies. Some suggestions:

**1. Make sure your printed materials are free of language that might be construed as discriminatory or inflammatory.** Such materials include your application form and policy handbook. Omit any reference to race, ancestry, gender, religion, national origin, age, or physical condition.

**2. Be sure none of your printed material implies that employees will have a job forever if they do good work.<sup>1</sup>**

**3. Do performance reviews routinely.** Keep detailed records of these reviews. Such documentation will support your case if a wrongful-termination suit arises. With every evaluation, tell the truth. If you sugarcoat it, you will have little defense in a wrongful-termination suit. Also document any disciplinary action that is required.

**4. If you must terminate an employee, first talk with your lawyer.** Review all documentation from an outside perspective to identify any inconsistencies or holes in your case for termination.

**5. Consider using a screening service to check potential employees.** Such services can investigate the litigation history of job applicants, thus limiting your vulnerability to those who might set you up for frivolous lawsuits.<sup>2</sup>

## Prevent Sexual Harassment Lawsuits

As an employer, you are liable for harassment in the workplace even if you didn't know it was taking place. It is crucial, therefore, to prevent it.<sup>3</sup> Follow these pointers:

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**1. Create a written anti-harassment policy,** and be sure all employees receive, read, and understand it.

**2. Have a third party investigate all allegations of harassment,** even if no formal complaint was filed. Find out all the facts, including the history, dates and times, objectionable conduct, and whether there is a pattern of misconduct. Emphasize that there will be no retaliation for anyone's testimony.

**3. If the investigation reveals that harassment occurred,** hand down discipline immediately to put a stop to it. This discipline may include written warnings, suspension, or termination.

**4. If the investigation isn't conclusive,** warn the accused against any future harassment, and ask the accuser to report any further activities that can be construed as hostile or sexual.

## Prevent Wrongful Retaliation Lawsuits

As an employer, you can't terminate, suspend without pay, demote, or otherwise create a hostile work environment for an employee in "revenge" for making a claim. You must show that you had justifiable cause for any action you took which your employee interpreted as "retaliatory."<sup>4</sup> To prevent a retaliation lawsuit, keep these guidelines in mind:

**1. Establish an open door policy** to encourage employees to report problems internally before reporting to an outside agency such as the EPA or EEOC.

**2. Counsel managers** on the importance of proper conduct, organizational policy, and adherence to regulations.

**3. If an agency such as the EEOC asks you to respond to a complaint,** follow its instructions to the smallest detail.

## Use Alternatives to Court

If an employee or ex-employee does sue you, despite all your preventative measures, do all you can to avoid going to court. Since the average punitive damage award in employment litigation is \$2,875,000, you want to avoid a lawsuit at all costs. So, explore these alternative dispute resolutions<sup>5</sup> (ADRs):

**1. Negotiate.** Discuss your dispute with the employee, and agree to a solution. In a negotiation, both sides win by devising a compromise together.

**2. Bring in a conciliator.** Not an active participant, a conciliator merely helps diffuse heightened emotions and keeps the discussion from getting out of hand.

**3. Use a mediator.** Unlike conciliators, mediators play an active part in the discussion. They don't try to sway opinions but, rather, to persuade each side to participate fully and fairly and come to an agreement.

**4. Bring in an arbitrator.** In an arbitration, both parties agree on a third party who is an expert on the subject in dispute. The arbitrator makes a decision, and both of you are bound to it. Arbitration is much like a lawsuit, but the benefits to arbitration far outweigh those of a lawsuit. It is much less expensive, both in time and money, to arbitrate. Arbitration is also more private and less formal than a lawsuit. Finally, the disputing parties have a say in choos-

ing the arbitrator, while they can't choose the judge in a lawsuit. ■

### Footnotes

<sup>1</sup>See Vaughn Burkholder, "Avoiding Wrongful Discipline Suits: Every Employee is a Potential Claimant," *Kansas Employment Law Letter*, Vol. 4, No. 3, 1997.

<sup>2</sup>One example is Employment Screening Services, Inc., <http://www.scm-ae.com/ess/employee.htm>.

<sup>3</sup>Andrew Shaw Kilpatrick and Brian Kleiner, "New Developments Concerning Sexual Harassment," unpublished paper.

<sup>4</sup>Victor Guerrero and Brian Kleiner, "New Developments Concerning Retaliatory Discrimination," unpublished paper.

<sup>5</sup>Bennett A. Neale and Brian Kleiner, "How to Conduct Arbitration Effectively," unpublished paper.

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