Bureau of Labor
and Industries

Documentation, Discipline & Discharge

A Handbook for Oregon Employers

2013 Edition

Oregon Bureau of Labor and Industries
Technical Assistance for Employers Program

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Technical Assistance for Employers Program

Documentation, Discipline and Discharge

A Handbook for Oregon Employers

2013 Edition
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Oregon Bureau of Labor and Industries
Technical Assistance for Employers Program

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Bureau of Labor and Industries

Dear Friend of Technical Assistance (TA):

Welcome to the Bureau of Labor and Industries (BOLI)'s newest handbook, *Documentation, Discipline and Discharge*. Thank you for investing in this handy manual for human resources professionals, attorneys and managers and employers at all levels.

Documentation, Discipline and Discharge is a concise guide to enforcing workplace policies and getting the most out of your employees in terms of attendance, performance and conduct. When workers are not meeting expectations in these areas, this handbook will provide a framework for creating a written record of the shortcomings, demonstrating that the employer gave the worker a fair and reasonable opportunity to succeed. If the worker is not successful, the employer will have a path through the coaching and progressive discipline process that will ultimately lead to correction or termination. Ideally, this will be done in such a way that the employer will prevent or minimize exposure to costly legal claims.

BOLI is committed to helping Oregon's businesses and employers stay strong and successful. Our primary goal through TA is to help employers and businesses stay in compliance with the law and prevent costly litigation. When the law is known and followed in the first place, it's a win for all Oregonians.

Throughout the year, TA provides a variety of services to support Oregon employers. These services are funded almost entirely through the sales of publications like this one and attendance at public seminars on various employment law topics. Customized, on-site seminars for employers are also an important part of TA's work. Through your support, TA continues to answer 15,000 to 20,000 employer questions via phone and e-mail, conduct more than 130 public and private seminars, and produce a high-quality, two-day law conference each year.

I hope you find this book to be a helpful tool for understanding and complying with state and federal employment laws. Any feedback you may have should be directed to TA, and be sure to visit www.oregon.gov/boli/ta to learn more about the resources and services that TA has to offer. Please do not hesitate to contact our offices if you have questions or thoughts to share.

Sincerely,

Brad Avakian, Commissioner
Oregon Bureau of Labor and Industries

A WORD FROM BOLI TECHNICAL ASSISTANCE …

Thank you for purchasing this book! Proceeds from the sale of this handbook support the Technical Assistance for Employers Program (TA), a self-supporting program that receives little taxpayer funding.

As an independent unit within the Bureau of Labor and Industries, TA is dedicated to providing the resources, information and training employers need to comply with state and federal labor and employment laws.

TA offers a number of free and low-cost resources for Oregon employers, including fact sheets, employer advice columns, required workplace posters, and personal assistance by telephone and email. Our informative and practical handbook series is currently available for purchase through our website and includes topics like:

- Civil Rights Laws;
- Family and Medical Leave Laws in Oregon;
- Wage and Hour Laws;
- Child Labor Laws;
- Employee Classification & Wage and Hour Exemptions;
- Legal Hiring Practices; and
- Policy Writing Guidelines.

You can access the seminar descriptions, schedules and registration information for all of our public training sessions online, as well as information about arranging an on-site, customized seminar for your staff.

To contact us, feel free to visit our website at www.oregon.gov/boli/ta or call our Employer Assistance line at 971-673-0824.

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CONTACTING BOLI

The mission of the Bureau of Labor and Industries is to protect employment rights, advance employment opportunities, and protect access to housing and public accommodations free from discrimination.

The four principal duties of the Bureau of Labor and Industries are to:

(1) Protect the rights of workers and citizens to equal, non-discriminatory treatment through the enforcement of anti-discrimination laws that apply to workplaces, housing and public accommodations;
(2) Encourage and enforce compliance with state laws relating to wages, hours, terms and conditions of employment;
(3) Educate and train employers to understand and comply with both wage and hour and civil rights law; and
(4) Promote the development of a highly skilled, competitive workforce in Oregon through the apprenticeship program and through partnerships with government, labor, business, and educational institutions.

If you have questions or concerns regarding any of these areas, please feel free to contact us!

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INTRODUCTION

This handbook is based on the premise that good, clear documentation lets employees know what their employers' fair and reasonable expectations are. If they fail to meet those expectations, timely and measured discipline is appropriate. This discipline should be promptly documented as well. If poor performance, attendance problems or misconduct are allowed to go unchecked, things will not improve. Productivity and morale will suffer. Ineffective or even dangerous employees will remain. Good workers will feel like they are the only ones pulling their weight and they may very well flee to better organizations. Well-documented discipline is a warning to correct problems before they get out of hand. If the problems continue, suspension or termination may be appropriate. While the goal should be to retain workers in whom the organization has spent time and resources recruiting and training, that is sometimes not possible.

Terminated employees technically need not be told why they are being terminated, but if they are left to wonder they may think the worst and seek revenge against the company through legal channels such as lawsuits or administrative claims, or illegal ones such as violence or sabotage. The best defense against a disgruntled former employee's lawsuit is to present documentation showing that the organization had a legitimate, non-discriminatory reason for the termination. Former employees who have been given a fair opportunity to succeed and keep their jobs are far less likely to sue for wrongful termination. If they do sue, they are far less likely to be successful. In this climate of increasing litigation, it is important to build your case from the beginning in the event that a summons and complaint are served on you. Lawsuits are expensive and uncertain, even if you ultimately prevail. Good documentation will equip your attorney with the ammunition needed to get that case dismissed early in the process. Then you can get back to focusing your energies on running a safe, efficient and productive operation.

ABOUT THIS HANDBOOK

TA has produced *Documentation Discipline and Discharge, A Handbook for Oregon Employers* as a general summary and teaching guide.

The purpose of this handbook is to help employers understand the basics of the hiring process and how to move through that process without creating unnecessary exposure to legal complaints, including claims of unlawful discrimination or invasion of privacy.

Several sections of this handbook contain answers to commonly asked questions, best practice tips, updates, sample forms and checklists in order to illustrate the application of disciplinary practices. Please keep in mind, however, that this handbook is not intended as legal advice regarding any particular situation. Those seeking legal advice should

contact an attorney. It is always prudent to have an attorney review a draft of new policies or procedures to ensure compliance within a particular workplace and industry.

Other resources:

- The BOLI website: http://www.oregon.gov/BOLI
- Technical Assistance seminars: http://www.oregon.gov/boli/TA/Pages/T_SEM_Taseminar.aspx
- Technical Assistance phone line: 971/673-0824
- Technical Assistance email line: bolita.ta@state.or.us
- Other BOLI publications: *Policy Writing Guidelines, Wage and Hour Laws, Family Leave Laws, Civil Rights Laws, Employee Classification, Child Labor Laws* and Workplace Posters!

Employment at Will

The common law rule regarding the employer-employee relationship allows the termination of the relationship by either party, without notice and without cause.

Oregon courts have long followed this general rule of "at-will" employment. This means that generally, in the absence of a contract or statute to the contrary, Oregon employers may discharge an employee at any time and for any reason, or for no reason at all. *Simpson v. Western Graphics*, 293 Or 96, 99, 643 P2d 1276 (1982); *Nees v. Hocks*, 272 Or 210, 216, 536 P2d 512 (1975).

Most employers choose to reserve the right to employ at will with specific language in personnel policies.

Example: "We reserve the right to employ at will. This means that employment can be terminated, with or without cause, and with or without notice, at any time, at the option of the company or at the option of the employee."

To maintain at-will status, it's wise for employers to indicate that policies are merely guidelines and are not to be construed as a contract.

Example: "These policies are not to be construed as a contract of employment. We expressly reserve the right to change, add to, or delete policies at any time. Changes will be effective on dates determined by the company, and you may not rely on policies that have been superseded. No supervisor or manager other than our Chief Executive Officer, Beau Lee, has authority to alter the policies, and all such changes must be in writing."

Declaring and retaining at-will status provides an employer greater flexibility in the workplace, but being an at-will employer is not a cure-all or a substitute for establishing clear policies, keeping thorough documentation, and applying consistent disciplinary practices.

Since organizations that employ individuals at will may still be called upon to defend various types of employment claims in court or before state or federal agencies, prudent at-will employers will maintain records showing a legitimate business reason for any important personnel action.

It is also important for employers who wish to remain at-will to take steps to retain that status.

Retaining at-will status

EMPLOYER QUERY: EMPLOYMENT AT WILL

Policy manual should clearly address at-will employment

QUESTION: We understand that Oregon is an employment-at-will state and that we don't necessarily have to show cause to terminate an employee. What should we say about this in the employee handbook we distribute to our staff?

ANSWER: It's true that employment in Oregon is "at will," so an employer generally may terminate an employee at any time for any reason, and an employee is similarly free to leave employment at any time for any reason. There are, however, exceptions to the rule. State and federal civil rights laws prohibit employers from discriminating against employees, and employers may also be liable in court under tort theories, for breach of contract, or for employment actions that violate public policy.

This means that even though you probably want to retain at-will status, you shouldn't rely on it when making employment or discharge decisions. Even if you're an at-will employer, it's still advisable to establish clear policies, to counsel and discipline employees who fail to meet your expectations, and to keep written documentation that shows your actions were taken for legitimate, non-discriminatory reasons.

Because employment-at-will is the default rule in Oregon, you don't have to take special steps to become an at-will employer. You'll retain that status as long as you don't do anything to defeat it – for example, entering into contracts with employees. Most employers do want to retain at-will status, because it allows greater flexibility in changing policies, job descriptions and salaries, and in disciplining and terminating employees.

It's still advisable to include at-will language in a clear and prominent place in your employee handbook, perhaps in large, bold print at the top of the first page. You should state that the manual is not to be construed as a contract, that management reserves the right to employ at will, and that either the employer or employee can terminate the employment relationship at any time and for any reason. You should also state that the policies in your handbook are meant to be general guidelines only, and that management reserves the right to deviate from them at its discretion and the right to make changes to policies from time to time.

Even when you do include an at-will statement, be sure that you write the rest of your employee handbook in a consistent manner. A court could still view

EMPLOYER QUERY: EMPLOYMENT AT WILL

Policy manual should clearly address at-will employment

your policy manual as a contract, particularly if it's 400 pages long and makes too many promises of specific outcomes in specific situations.

One critical place where you'll want to retain flexibility is in your disciplinary policies. Some employers create a progressive discipline policy that promises a verbal warning for the first violation, written warning for the second, suspension for the third, and finally, termination. Progressive discipline is an excellent tool for demonstrating fairness and providing employees notice of performance or attendance problems or of misconduct, but it's dangerous to promise such a rigid disciplinary sequence, because some policy violations warrant immediate termination, particularly those involving violence, theft or dishonesty.

Therefore, it's a good idea to reiterate within your disciplinary policy that you are an at-will employer. You can also state that the disciplinary measures you list are only guidelines and that management has discretion to initiate discipline at any step, to skip steps in the disciplinary process, or to immediately discharge an employee. Policies that provide for discipline up to and including termination in the event of a violation help employers retain flexibility in correcting employee problems.

You may also wish to include "at-will" language in other key places. You can require job applicants to sign a statement on the employment application form acknowledging that if hired, they'll be at-will employees. You can also have new-hires sign an acknowledgment form during orientation indicating that they have read the employee handbook, and that they understand it is not a contract and that their employment is at will.

Although the at-will language in your policies is important, it's not by itself enough to insulate you from liability. For example, if a manager with apparent authority makes verbal promises of job security, promotions, or pay raises, an employee who can prove such an oral contract may hold your organization to those promises, particularly if they rely on those promises to their detriment (i.e., passing on a better job or relocating). Therefore, if you want to retain at-will status, instruct managers not to make guarantees of employment for any specific term and not to make promises to employees that could constitute a contract. Please refer to our *Policywriting Guidelines Handbook* for further information on this subject.

Exceptions to the "at-will" doctrine

There are many exceptions to the "at-will" doctrine. An employer's at-will status will not serve as a defense if an employer has created a contract, violated public policy, engaged in actions that create tort liability, or violated civil rights laws.

Contracts

In some cases, employers may unwittingly defeat their at-will status by way of the language included in personnel handbooks and other documents, or even in seemingly casual conversation. Even if the employee manual states that it should not be construed as a contract, individual managers may inadvertently create verbal contracts through promises made to individual employees.

In some cases, employers deliberately enter into contracts of employment for a particular term with certain employees. Those employees may no longer be employed at will, as they can hold the employer to the terms of the written agreement and may file breach of contract claims if the employer violates those terms. One example of such a contractual obligation would be an employment agreement containing a severance provision that requires an employer to pay an employee three months salary in the event of a termination unless it is due to the misconduct of the employee. That employment relationship is not at will.

Employers who are subject to a collective bargaining agreement must follow the provisions set out in the union contract, which typically provide that an employer may only discipline or discharge an employee for "just cause."

Employees represented under a union contract generally have far greater rights than at-will employees, as the contract typically allows them to file grievances and appeal personnel actions, guarantees them the right to notice and a hearing, and allows for arbitration of disciplinary matters.

EMPLOYER QUERY: VERBAL CONTRACTS

Ability to discharge could be hampered by promises to employees

QUESTION: My husband and I believe in fostering a friendly, team atmosphere for the employees at our small business. The same four employees have been with us for several years now, and we treat them just like members of the family. But now it seems that our kindness has come back to bite us.

EMPLOYER QUERY: VERBAL CONTRACTS

Ability to discharge could be hampered by promises to employees

We are close to terminating Karen, our office assistant, because of her absenteeism and performance problems. Karen is threatening to see her lawyer and sue us for breach of contract if we discharge her. We have never signed an employment contract with any of our employees. In fact, our employee handbook says we're an "at-will employer" and that we can terminate employees at any time. However, Karen claims we have a "verbal contract" with her, because our manager tells employees they'll always have jobs with us as long as they work hard. Are we in trouble here?

ANSWER: Possibly. Although Oregon is an "employment-at-will" state, meaning that either an employer or employee can end the work relationship at any time, there are many exceptions to the rule. You probably know, for instance, that even at-will employers can be liable for discrimination if they terminate an employee because of age, race, sex, or other classifications protected under Oregon and federal laws.

Similarly, employment may no longer be at will when employers create contracts with workers. Supervisors often don't realize that verbal contracts can be as legally binding as written ones. If an employee can prove that a company owner or manager promised her employment for a specific period of time, a judge or jury may conclude that a contract exists, giving the worker greater rights than an at-will employee.

Does the "at-will" language in your handbook protect you? If you want to retain at-will status, it's an excellent idea to include an at-will statement at the beginning of your employee handbook and in other key places – in your disciplinary policies, for example. But even if you include this language, your manager can bind the company by promising an employee too much.

In your case, a jury could decide that it was reasonable for Karen to conclude she had a guarantee of lifetime employment, as long as she "worked hard." That's a very subjective standard, and it might not have anything to do with the actual results of her work. Karen's attorney might argue that even if her performance was below par, she was still working hard for you.

Other employers have found themselves defending breach of contract claims in court because they promised the employee job security as long as she was a "team player" or "showed up for work" or "didn't screw up too badly."

Employers who want to retain good employees are often tempted to make

EMPLOYER QUERY: VERBAL CONTRACTS

Ability to discharge could be hampered by promises to employees

promises they may not be able to keep. To avoid creating a contract, don't guarantee employment for life or for any fixed period of time. (The opposite of temporary status is "regular" status -- not "permanent" status!) Even if the employee you're dealing with is an excellent worker, you can't predict the future. Your company's financial condition may change, requiring restructuring or layoffs at some point. And the employee's work performance may not always be as stellar as it is now.

Are we suggesting you shouldn't be friendly or give your employees positive feedback? Of course not. But managers do need to know that their promises can be legally binding. Even if the terminated employee does not ultimately prevail in a lawsuit, perhaps being unable to prove the assurances of the manager or that the manager had the authority to bind the company to such an obligation, it is unwise to create those kinds of expectations in an employee. If they choose to test their expectations in court, it will be an expensive, time-consuming and uncertain process for the employer to defend the claim. Managing employee expectations is an important aspect of running a business in general and avoiding litigation in particular.

Public Policy

Employers who violate public policy fall into another exception to the at-will doctrine.

Employers may not discharge or retaliate against employees for a "socially undesirable motive" – for instance, because an employee fulfills an important societal obligation such as serving on jury duty. *Nees v. Hocks,* 272 Or 210, 536 P2d 512 (1975).

Terminating an employee because he or she refuses to perform an illegal act or refuses to sign a false and defamatory statement about a former employee would also constitute public policy violations. *Delaney v. Taco Time Int'l.,* 297 Or 10, 681 P2d 114 (1984).

Tort Actions

Even at-will employers can be sued under various tort theories, including civil suits for defamation, invasion of privacy, assault or battery, false imprisonment, wrongful discharge, and intentional infliction of emotional distress.

Employees may claim intentional infliction of emotional distress in cases where the employer's conduct constitutes an "extraordinary transgression of the bounds of socially tolerable conduct." *Lewis v. Oregon Beauty Supply Co.,*302 Or 616, 626, 733 P2d 430 (1987); *Patton v. J. C. Penney Co.,* 301 Or 117, 122; *Hall v. The May Dept. Stores,* 292 Or 131, 137, 637 P2d 126 (1981).

Plaintiffs in such cases must also show that the employer intended to cause emotional distress and that its conduct did in fact cause emotional distress.

For example, in *Madani v. Kendall Ford, Inc.,* 102 Or App 478, 794 P2d 1250 (1989), the plaintiff claimed wrongful discharge and intentional infliction of emotional distress when the car dealership he worked for discharged him because he refused to comply with the instruction to pull down his pants and expose himself to public view.

The employee argued that if he had complied with the employer's request, he would have violated county ordinances that prohibit indecent exposure and would have been subject to criminal penalties.

Individuals who are employed at will can nonetheless prevail on claims of intentional infliction of emotional distress where they can show that the employer's conduct was outrageous, shocking to the conscience and beyond the bounds of tolerable behavior.

Another classic example of intentional infliction of emotional distress is the case of *Agis v. Howard Johnson Co.,* 371 Mass. 140 (1976). The plaintiff, Debra Agis, was employed as a waitress for a restaurant run by the Howard Johnson Company. Her manager called all of the waitresses to a meeting and informed them that "there was some stealing going on," and that until the person or persons responsible were discovered, he would begin firing the waitresses in alphabetical order, beginning with the letter "A." He then proceeded to terminate Agis.

Even though the general at-will rule is that employers may terminate for "any reason," it is important for supervisors to understand there can still be liability where their actions would lead jury members to say, "Oh my Gosh … I can't believe they did that to the poor employee!"

A more recent case, *Hudgens v. Prosper, Inc*., 243 P.3d 1275 (Utah 2010), sets a new standard for outrageous conduct by an employer. An overzealous sales manager who had drawn mustaches on the faces of underperforming associates with a permanent marker and taken their chairs away to discipline them, and who used a fraternity paddle to strike the desks of inattentive workers, sought a volunteer to demonstrate a new motivational technique. Mr. Hudgens volunteered. He was taken outside and instructed to lie down on a hill with his head below his feet. While his co-workers held him down, the manager poured water from a gallon jug over his face. The managers urged the associates to work as hard at making sales as Mr. Hudgens was working to breathe. The trial court, incredibly, dismissed the case for failure to state a claim, but the Utah Supreme Court

reversed and remanded it for trial. Presumably, the remand resulted in a costly settlement for Mr. Hudgens.

Oregon and Federal Civil Rights Laws

State and federal anti-discrimination laws prohibit employment decisions that are based on a variety of protected classifications. These laws also require employers to make reasonable accommodations for employees with disabilities or sincerely held religious beliefs, and require covered employers to grant family leave in qualifying situations.

The chart on the following pages provides a brief overview of the more significant Oregon and federal civil rights legislation. Supervisors and managers must be familiar with the various protected classes to ensure that they do not inadvertently take disciplinary actions that are discriminatory. For more detail on these laws, see the Bureau of Labor and Industries' employer handbook on *Civil Rights Laws* or the BOLI website at http://www.oregon.gov/BOLI.

AN OVERVIEW OF FEDERAL AND STATE CIVIL RIGHTS LAWS

FEDERAL LAW	OREGON LAW
TITLE VII OF CIVIL RIGHTS ACT OF 1964 Federal laws apply when an employer has 15 or more employees (except where noted)	OREGON REVISED STATUTES CHAPTER 659A State laws apply when an employer has 1 or more employees (except where noted)
Race **Color** **National Origin** **Sex** (includes pregnancy-related conditions) **Religion** **Retaliation** **Association with Protected Class** **Genetic Information** (under Genetic Information Nondiscrimination Act)	**Race** **Color** **National Origin** **Sex** (includes pregnancy-related conditions) **Religion** **Retaliation** **Association with Protected Class** **Prohibition on Genetic Screening and Brain-wave Testing**
AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967	OREGON REVISED STATUTES CHAPTER 659A
Age (40 and older in companies with 20+ employees)	**Age** (18 and older)
Uniformed Services Employment and Reemployment Rights Act of 1994 and the Vietnam Era Veterans Readjustment Assistance Act of 1974 (all employers)	Members of the Uniformed Services (ORS 659A.082) Taking leave to Serve in State-organized Militia (ORS 399.065)
Veteran Status **Leave to Serve in the Military** **Veterans Preference in Hiring and Promotion** (Public Employers)	**Veteran Status** **Leave to Serve in State-organized Militia** **Veterans' Preference in Hiring and Promotion** (Public Employers)
AMERICANS WITH DISABILITIES ACT OF 1990	OREGON REVISED STATUTES CHAPTER 659A
Physical or Mental Disability	**Physical or Mental Disability** (in companies with 6+ employees)
Family and Medical Leave Act of 1993 (in companies with 50+ employees)	Oregon Family Leave Act (in companies with 25+ employees)
Protected leave for: • **Serious health condition of employee (including pregnancy-related conditions)** • **Serious health condition of employee's family Member (includes spouse, parent, biological or adopted or foster child)** • **Parental leave for birth or placement of newborn, adopted or newly-placed foster child**	**Protected leave for:** • **Serious health condition of employee (including pregnancy-related conditions)** • **Serious health condition of employee's family Member (includes spouse, parent, biological or adopted or foster child, parent-in-law, grandparent, grandchild, same-sex domestic partner and parent or child of same-sex domestic partner)** • **Parental leave for birth or placement of newborn, adopted or newly-placed foster child** • **Non-serious health condition of a child requiring home care**
Leave by Spouse, Son, Daughter or Parent of a Covered Military Service Member on active duty or call to active duty status for a qualifying exigency	**Leave by Spouse or Same-sex Domestic Partner of Member of the Armed Forces** prior to or during leave from deployment (under the Oregon Military Family Leave Act, ORS 659A.090 to 659A.099 in companies with 25+ employees)
Leave by Parent, Spouse or Child of Next of Kin to care for a seriously ill or injured service member or veteran (26 weeks)	

ADDITIONAL CLASSES PROTECTED BY OREGON LAW
OREGON REVISED STATUTES CHAPTER 659A (Except where noted, laws apply when an employer has 1 or more employees)
Access to Employer-owned Housing **Credit Records or Credit History** **Expunged Juvenile Record** **Injured Workers** (in companies with 6+ employees) **Lawful Use of Tobacco Products on off-duty hours** **Leave to Donate Bone Marrow** **Leave to Serve in the State Legislature** (ORS 171.120-125) **Limits on Breathalyzer and Blood Alcohol Testing** **Marital Status** **Medical Release as a Condition of Continued Employment** **Opposition to Health or Safety Conditions** (ORS 654.062(5)(a)) **Prohibition on Employer Requiring Medical Release unless Employer pays out-of-pocket costs** (ORS 659A.306) **Prohibition on Polygraph Exams** **Family Relationship** **Right to File a Lawsuit, Testify in Criminal or Civil Proceedings or Report Criminal Activities** **Right to Report Health Care Violations** **Right to Testify at Employment Division Hearings** **Right to Testify Before the State Legislature** **Sexual Orientation and Gender Identity** **Victims of Domestic Violence, Harassment, Sexual Assault or Stalking, including Leave Provisions**

ORIENTATION AND TRIAL SERVICE PERIODS

One of the most important steps management can take to ensure workplace fairness is to make work expectations clear from the outset.

Frequently, when disciplining or terminating a worker, employers are faced with the "you-never-told-me-that-was-the-rule!" syndrome. Employees who feel that they were not given fair notice of policies often file employment claims asserting that the employer's disciplinary action was pretextual and discriminatory.

To avoid such claims, provide new employees with an updated, accurate position description that reflects the essential job functions, working environment, minimum qualifications, and performance and production goals. Also, good, clearly written policies, whether or not in an employee handbook format, provide employers with the ability to say "I told you so!" Seriously, written notice of expectations and consistent documentation showing that employers gave employees a fair and reasonable opportunity to correct poor behavior or performance or attendance problems, and to succeed as an employee of the organization. Like it or not, if our termination or disciplinary decisions are challenged in court a bit of a popularity contest ensues. Prudent employers cast themselves in a favorable light by being fair and reasonable, giving employees written warning of problems that could cost them their jobs.

Starting Employees on the Right Foot

Although not required by any law, formal orientation periods for new employees can be an invaluable tool for establishing policies and setting new employees on the right course. Rather than just handing the new employees a 300-page policy book and instructing them to review it on their own time, consider spending several hours actually reviewing key policies with new employees, providing them an opportunity to ask questions, and having them sign a form acknowledging receipt and understanding of company rules.

What is the company dress code? What are the rules on smoking? When is payday? How does the insurance plan work, and when does the employee become eligible for group health coverage and other fringe benefits such as vacation, sick leave, holidays, personal time off, severance pay or bereavement leave? Can accrued benefits be cashed out upon separation from employment or is it a "use-it-or-lose-it" system? Does it depend upon whether the employee left on good terms or was terminated for cause? Spell it out! Absent clear, written directives, a messy post-mortem on past practices and gray areas will likely result and that is uncertain and potentially expensive.

What special rules should the employee know in order to comply with your particular corporate culture?

Who can the employee contact when questions or problems arise?

You may wish to consider assigning a mentor to the new employee, a person to whom the new person can go with questions or concerns, and plan on a period of several weeks for the employee to become familiar with work rules and expectations, since in real life, orientation to a new workplace is rarely a one-day affair. You probably hired the new employee because it was a busy time at work, but time spent at the front end will pay big dividends over the course of the employee's career with the organization.

Sample Acknowledgment Form

Acknowledgment of Receipt of Company Handbook

I have received a copy of the Boley Company Employee Handbook dated February 13, 2004. I understand it contains important information on the Company's policies, rules and benefits and my responsibilities as an employee.

I understand that my employment is at will, meaning that either the company or I can end the employment relationship at any time, with or without notice and with or without reason.

I understand that this Handbook supersedes all prior handbooks, policies, verbal statements and understandings on these subjects, and that it is not a contract of employment or a guarantee of specific treatment in specific situations.

I agree to follow all existing and future Company policies and rules.

I understand that the Company has the right to change (modify, substitute or eliminate), interpret and apply, in its sole judgment, the policies, rules and benefits described in this Handbook. I understand that Beau Lee, CEO, is the only person authorized to make such changes in the policies, rules and benefits described in these 84 pages, and that all such changes must be in writing to be valid.

Prior to signing this acknowledgment, I was given an adequate opportunity to review the Handbook and ask questions about its contents.

Dated: _____ Employee signature: _____

Setting Clear Goals

How will the employee be rated when it comes time for a formal performance appraisal? The employer's benchmarks for performance shouldn't be a mystery to the new employee. On the contrary, a prudent employer will advise employees from the start as to what criteria will be used in measuring performance.

Ideally, an employer's performance goals will be objective, measurable, and tied to numerical measures, so that it can be possible to justify why one employee scored better than another, and to show that methods for evaluating performance are legitimate and non-discriminatory.

Are your performance standards communicated clearly? Are they reasonable and attainable? If goals are set too high, employees may give up, concluding there's no point in trying. If they are set too low, employees may conclude that they can "take it easy" and relax once they reach the designated performance level.

Rewards and Recognition

A "rewards and recognition" program can be one of the most effective tools in motivating employees to achieve and even surpass workplace goals. Employers may be able to head off attendance and discipline issues before they occur by providing employees strong incentives for positive achievement.

Consider implementing some of the following rewards and recognition programs to keep employees motivated:

- ✓ Certificate of appreciation
- ✓ Commendation at staff meeting
- ✓ Write-up in company newsletter
- ✓ Employee of the month
- ✓ Opportunity for cross-training
- ✓ Lunch for employee or team
- ✓ Special project assignment
- ✓ Paid time off
- ✓ Attendance bonus for crew
- ✓ Gift certificate
- ✓ Pay increase
- ✓ Education hours / credits
- ✓ Reserved parking space
- ✓ Employee recognition day
- ✓ Discounts on company services or products

Introductory Service and "Probation" Periods

Employers often choose to establish introductory periods for new-hires, but many employment attorneys caution that "probation" policies may in some cases defeat an employer's at-will status. Sometimes, employers imply that workers have greater rights or job security once they successfully complete the trial service period, and employees may conclude that they have contract rights once they have "passed probation."

Employers who do use a probationary period and wish to retain at-will status should make it very clear that even employees who complete trial service remain at-will and can be terminated at any time.

Many supervisors erroneously believe that employees in their trial service period have no rights and can be terminated more easily than other employees. In fact, even newer employees can file employment-related claims, including discrimination actions, workers' compensation claims, breach of contract claims and tort actions.

So what good is a trial service period? Why have one at all?

Some employers feel it is useful as a tool for evaluating new employees and giving them notice that they are being watched more closely during their introductory service. The employer may use this time to determine whether the new employee truly meets the minimum job qualifications, whether she or he represented herself or himself accurately in the application and interview process, and whether he or she will be a "good fit" with the company.

Also, the employer may use the probation period to determine an employee's eligibility for fringe benefits such as group health coverage or vacation leave earned at the successful completion of trial service.

In a union environment, the employee's coverage under the collective bargaining agreement may be determined by the successful completion of trial service. The employee who "passes probation" may then have greater rights, such as the right to file grievances under the union contract.

EMPLOYER QUERY: TRIAL SERVICE PERIOD

Establishing probation period isn't a cure-all when terminating employees

QUESTION: Should our company have a 90-day trial service period for new employees? What laws cover probationary employees? I've heard it's legal to fire an employee during her probation, and that we don't have to give her a reason. I've heard we can simply say, "It's just not working out." Is that true?

EMPLOYER QUERY: TRIAL SERVICE PERIOD

Establishing probation period isn't a cure-all when terminating employees

ANSWER: Although many employers choose to have a "probationary" period for new employees, there are no specific laws that define or require such a period. Oregon is an employment-at-will state, meaning that either you or your employee can end the employment relationship at any time and for any reason. There are, however, many exceptions.

For instance, it's illegal to terminate an employee because of race, sex, religion, disability, or numerous other protected classes under Oregon and federal civil rights laws. It's also illegal to make employment decisions that violate public policy, such as firing an employee because she is on jury duty. Furthermore, a written or oral employment contract can limit your rights to discharge an employee.

Since at-will employers can generally terminate an employee at any time, you should understand that instituting a "probationary" period for new employees doesn't give you greater rights than you already have. But you might still choose to establish an introductory time as a waiting period for benefits eligibility, or simply as your own timeline to determine whether the new employee is a "good fit" with your company.

If you do decide to implement an introductory period, consider calling it a "trial service" period rather than "probation." "Probation" has a criminal connotation, and you don't really want to label your new employees as criminals from day one, do you?

Be careful when developing a trial service policy. Employment attorneys caution that you can inadvertently create a contract with employees by giving them the impression that after 90 days (or perhaps six months), they will become "permanent" employees. If you wish to retain your "at-will" status as an employer -- and most employers do! -- never use terminology such as "permanent."

Many employers share your desire not to give an employee the reason for a termination. It's true that as an at-will employer, you're under no obligation to explain the reason for your decision. But if you were the one being terminated, you probably wouldn't be satisfied with a vague explanation such as, "Things just aren't working out." Indeed, you might suspect that the employer was hiding the "real" reason, perhaps discrimination or some other unlawful motive.

Often, employers get too comfortable with the idea of "probationary"

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employees. The common thinking goes something like this: "Mary is a probationary employee. There's no need to address or document her performance problems. It's uncomfortable to confront or counsel Mary, and I'd rather not alienate her. She'll probably figure it out and fix the problem on her own. And if she doesn't, we can just fire her. After all, she's on probation!"

This sort of thinking is dangerous. Employers who treat new employees in this manner are more susceptible to lawsuits, because they don't realize that "probationary" employees have the same rights as other employees. Even though the employee is new to your company, she can still file discrimination claims, wage claims, tort actions, and breach of contract claims. And if you're hit with a lawsuit, your lack of documentation will come back to haunt you. You may ultimately convince a jury that your actions were not unlawful, but going through the litigation process will cost you in time, money and aggravation.

So it's just as important to give new employees notice of your rules and expectations from the very start, and to promptly address any performance problems. This will provide the new employee a fair opportunity to correct any deficiencies.

The bottom line is that probationary or not, it shouldn't be a surprise to the employee that she is being terminated and he or she shouldn't have to speculate as to the reason for the termination. Leaving the employee in the dark makes it far more likely that we'll be hearing from her at the Oregon Bureau of Labor and Industries -- or that you'll be hearing from the employee's attorney.

DOCUMENTATION OF PERFORMANCE

Documentation of personnel matters is often one of management's least favorite activities, but it is critical for a number of reasons and should be a part of every supervisor's daily "to do" list. Problems often arise when supervisors choose to wait and allow an employee's performance issues to accumulate. The employee may be unaware that his or her performance is not meeting expectations and, without guidance from management or other sources, may be heading further and further off target.

Although at-will employers aren't obligated to give ongoing feedback to employees, supervisors should still strive to do so as a matter effective management and of fairness. It's never good management practice to deliver a poor performance appraisal after six months or one year, when the employee didn't understand the expectations or didn't know his or her performance was unsatisfactory.

Also, supervisors who aren't contemporaneously providing feedback, counseling employees, and documenting performance issues will have a much more difficult time reconstructing events later, and the documentation will not be as accurate or helpful as if it would have been were it completed when events were still fresh in the employer's (and employee's) mind. The purposes of effective documentation are twofold: to develop employee potential, fixing problems as they arise, and building a provable case to defend a termination if things don't improve.

When to document

- ✓ Every time you meet with an employee for significant work-related reasons;
- ✓ Every time you discipline an employee (even if you merely give a verbal warning);
- ✓ Every time a personnel action is taken;
- ✓ Every time you discuss policies and procedures;
- ✓ Every time an employee has a grievance;
- ✓ Every time an investigation is conducted, even if the complaint is ultimately unfounded;
- ✓ Every time significant events or discussions occur.

How to document

- ✓ Document in a neutral, objective fashion;
- ✓ Use specific language;

- ✓ Document employees consistently in terms of detail, tone, and frequency;
- ✓ Document primarily facts (who, what, where, why, when and how) more than just opinions. Documentation should be similar to a newspaper article as opposed to an editorial. For example, if an employee has used objectionable language in the workplace, quote that actual language rather than writing that the employee was "rude and vulgar" or "used profanity."
- ✓ Document the event as soon as possible, so that details are fresh in your mind;
- ✓ Identify any behavior or conduct that must change and reiterate the standard to be met;
- ✓ If change is needed, identify the timeline ("immediately" is an option);
- ✓ If termination is imminent unless dramatic improvement happens, state that is the case;
- ✓ To comply with Oregon and federal disability laws, keep any medical information obtained in a separate, confidential medical file and make sure the reason for any discipline is unrelated to the employee's protected class status, such as a disability, workers' compensation claim or use of family leave.

Traditional approach to progressive discipline

Progressive discipline is a process in which the penalty becomes greater for each succeeding infraction. In addressing performance issues, many employers choose to use some sequence of verbal warnings, written warnings, suspension(s), demotion, and, as a last resort, termination.

Many employment attorneys caution at-will employers that discipline policies must be written carefully so as not to create a contract. Employers who promise that specific disciplinary steps will be taken in some specific order may be legally bound to follow those steps. It is wise to provide in your disciplinary policies that a violation may result in discipline *up to and including termination*, to give you the flexibility to terminate an employee for a particularly egregious violation such as theft or violence. Sample language is provided in our Policywriting Guidelines Handbook.

In fact, even using the term "progressive discipline" may imply that the employer will follow specific disciplinary steps.

Employers who wish to retain their at-will status should reiterate in any discipline policy that the employment relationship is at will. It would be prudent to state that the policy only lists potential disciplinary measures that the employer may choose, and that the employer reserves the right to initiate discipline at any level or to skip steps, at management's discretion and depending on the circumstances.

It's also wise to explicitly state in the discipline policy that immediate termination is an option.

Employers might wish to list examples of violations that could lead to immediate discharge, but should take care to retain flexibility. For example, stating that an employee "may be immediately discharged for violence, harassment, theft or gross insubordination" could suggest the employer doesn't have the right to immediately discharge for other bad acts not on this list.

Therefore, it would be wise to indicate that the listed infractions are merely examples, that this is not intended to be an exclusive list, and that management reserves the right to immediately discharge an employee, at its discretion, for other reasons or without having a reason. You don't want to give your employees the mistaken impression that they can only be terminated for cause.

EMPLOYER QUERY: WRITTEN WARNINGS

Employer's policies determine discipline measures

QUESTION: I was terminated after receiving just one written warning. How many warnings does an employer have to issue before terminating an employee?

ANSWER: That's entirely up to the employer to decide, as the law doesn't require warnings at all. Of course, it's wise for employers to document policy violations and use progressive discipline, but employers who aren't subject to a contract or collective bargaining agreement are free to determine their disciplinary rules and how many warnings are "grounds for termination," as long as they apply their standards in a non-discriminatory manner.

EMPLOYER QUERY: EMPLOYEE SIGNATURE ON WARNINGS

Employee signature on records not mandatory, but good idea

QUESTION: Are employees required to see and sign written warnings before they go in their personnel files?

ANSWER: No. In fact, there's no law that requires an at-will employer to follow specific disciplinary steps or to issue formal written warnings at all. But if your goal is to show fairness in the workplace, then using progressive discipline and having an employee sign a written warning are excellent ideas.

Though not legally required, it's a way of showing you gave the employee

EMPLOYER QUERY: EMPLOYEE SIGNATURE ON WARNINGS

Employee signature on records not mandatory, but good idea

notice of performance problems and an opportunity to improve. A record of signed written warnings can also be instrumental in your defense if the employee later claims discrimination or claims that the documentation was fabricated by the employer on the eve of trial.

The records in your personnel file should show that you acted for legitimate, non-discriminatory reasons, and that you apprised the employee of any problems at each step.

Note that there is a law (ORS 652.750) that allows employees to inspect or obtain a copy of their personnel records, so upon an employee's request, you're obligated to provide access to personnel records within 45 days, or such longer time as the employer and employee may agree. Any extension of this deadline should be memorialized in writing.

Also, a collective bargaining agreement or other employment contract might grant employees the right to see any disciplinary notices before they are placed in the personnel file, so you'll have to honor any such contract provisions that apply to your organization

EMPLOYER QUERY: EMPLOYEE'S REFUSAL TO SIGN

Document uncooperative employee's receipt of warning

QUESTION: What do we do if an employee refuses to sign a disciplinary warning?

ANSWER: It's a good idea, in such cases, to have another member of management present as a witness to the counseling session or future counseling sessions. That individual can sign or initial the document to indicate that the employee in fact received the warning but refused to sign it. What you're really trying to accomplish is to show that the employee received notice of a workplace issue or performance problem on a particular date. There are ways of documenting that other than obtaining a signature from the individual.

Of course, if your policy requires the employee to acknowledge receipt of a

EMPLOYER QUERY: EMPLOYEE'S REFUSAL TO SIGN

Document uncooperative employee's receipt of warning

warning letter, you could choose to treat the refusal to sign the warning as a disciplinary issue in and of itself.

However, before going that route, try explaining to the employee that his or her signature doesn't necessarily indicate agreement with the contents of the warning letter, but merely is an acknowledgment of receipt. You might even include a statement by the employee signature line to that effect. Many employers also provide an opportunity for the employee to write a few lines of text to give his or her response to the warning. This serves several purposes: giving the employee the opportunity to vent, learning valuable information from the employee's perspective that could prove useful, or making your case for the discipline in the employee's own handwriting. For example, if you are disciplining the employee for insubordination, and the employee has written in bold script with exclamation points that this was a stupid, ill-conceived action, he or she has made your case for you!

EMPLOYER QUERY: REBUTTAL STATEMENTS

Employer may allow employee to submit rebuttal to disciplinary action

QUESTION: Does Oregon law give employees the right to put a rebuttal statement in their personnel file when we discipline them?

ANSWER: No, but allowing employees to tell their side of the story is one way to demonstrate fairness.

If you allow an employee to place a rebuttal statement in the personnel file, it doesn't mean that you have to rescind any disciplinary measures you've decided on. It does, however, help to show that you're considering all of the evidence and fairly investigating the facts when taking disciplinary action.

If your workplace is subject to a collective bargaining agreement, it's possible that your union contract guarantees employees the right to submit rebuttal statements for their personnel files.

Examples of documentation

The following written warning is problematic because it is vague in many ways and uses language that is very subjective:

Date: October 10

To: Lee Vingus

From: U.B. Trubble

Re: Tardiness and Customer Relations

This will call to your attention the need to improve observance of work rules in the following specific areas: (1) tardiness and (2) customer relations. This means that you are to be at work on time and be courteous to customers.

Our records show that during the time period, May 20 to May 26 you were frequently late to work. During this same time period you received several warnings about your pattern of tardiness. It is imperative that you consistently report to work in a timely fashion.

At numerous times on June 1, I observed you being rude to customers. I remind you that XYZ Supply Company requires all employees who give service to customers do so in a manner that promotes good customer relations. Your behavior and bad attitude shows a flagrant disregard for this standard.

This is not an acceptable record of compliance with work rules as set forth above. It is also an indication that improvement in attitude and cooperation is needed. Please be advised that your failure to correct these deficiencies may result in further discipline.

I have read and understand the above memo:

Employee Signature: _____

Date: _____

One problem is that the documentation does not reflect the year in which the violation occurred. Often, a sequence of documents spans two or more years. Thereafter, if a termination occurs, the employee has one year from any alleged unlawful employment action to file a complaint. Then the investigation could take a year before going to the hearings process or litigation. A supervisor could have to testify about facts that occurred several years prior, so giving the month, day AND year the offense happened will establish the chronology without having to reconstruct the sequence of events. In addition, it appears that the documentation was not timely. Events in May are being documented in October. Contemporaneous documentation is likely to be more accurate, more detailed, and better received by the employee being disciplined. Finally, the language used is vague in imprecise in several respects. Terms like "frequently", "several" and "numerous" are devoid of real, concrete meaning.

The following written warning letter is far superior to the prior one, because it provides specifics, uses objective language, identifies the behavior that must change, explains the rationale for the policy at issue, identifies the timeline for correcting the problem, and makes clear what stage the employee is in – specifically indicating that termination will be imminent if the problem behavior does not improve.

To: Al Beebak

From: Will Sleepwell, Manager

Re: Final Warning

Date: August 4, 2012

On numerous occasions over the last five months, your supervisor has discussed with you concerns about your pattern of calling in sick, indicating that you would be late for work. On most of these occasions, you have been at least two hours late. These absences result in problems providing adequate customer service and place an unnecessary burden on your co-workers who must assume additional work.

On March 24, 2012, you received a verbal warning regarding attendance, tardiness, and the behavior you have exhibited toward some of your customers.

On May 15, 2012, you received a written warning for unsatisfactory attendance and tardiness.

On July 11, 2012, you received a second written warning for tardiness and repeated absences.

Despite a verbal warning and two written warnings over the last five months, you have failed to improve your pattern of tardiness. Your working hours are 8 a.m. to 5 p.m. You are expected to be at work on time each day. Since your last written warning, you have been late on the following occasions:

Date	Called In	Arrived
July 15	8:30 a.m.	9:50 a.m.
July 18	9:50 a.m.	11:40 a.m.
July 23	10:00 a.m.	12:00 p.m.
July 25	11:00 a.m.	12:08 p.m.
August 1	8:50 a.m.	1:10 p.m.

You have been advised of management's expectations about being to work on time, you have been given many opportunities to meet those expectations, and you have repeatedly failed to so. The company needs to employ individuals who are reliable and dependable to be at work on time. Your behavior shows a disregard for your employer and co-workers who must pick up your work and cover for your absences.

There must be immediate and sustained improvement in your reporting to work on time. Failure to do so will result in your termination from this company.

Supervisor Signature: _____

Date: _____

Employee Signature: _____

Date: _____

The employee's signature confirms only that the supervisor has discussed and given a copy of the material to the employee. The employee's signature does not indicate agreement or disagreement with the contents of this material.

Issues with attendance

Legally Protected Absences

EMPLOYER QUERY: DISCIPLINE FOR ATTENDANCE

Many employee absences are legally protected

QUESTION: I have a problem employee, Craig, who is chronically absent from work – typically on Mondays, Fridays, and good weather days. Under my attendance policy, I assign employees a point for each unexcused absence, and I terminate employees who accumulate four points or "incidents" during the year.

The problem is that every time I try to discipline Craig for an absence, he claims that one law or another protects him. One day, he calls in with a migraine headache, and the next day he's on jury duty. Last week, he missed three days of work because his uncle is seriously ill And this week, he was out Tuesday due to "girlfriend problems". I understand that some absences are legitimate, but I have a business to run. How can I deal with this problem legally?

ANSWER: Some of the absences you describe are indeed protected by Oregon law, but others can be treated as unexcused absences under your attendance policy. You may be relieved to learn that Craig's most recent absence is not legally protected and the prior one is probably not protected.

Although aunts and uncles are family, they are not considered those family members covered by state or federal leave laws unless they are in loco parentis, meaning they are in the place of the employee's parents, having provided financial support or day-to-day responsibility as a parent would, often when biological parents are not present. So you're not obligated to allow Craig time off for the "girlfriend problems" and probably not for the uncle's serious health condition, and you could choose to treat those absences as "incidents" or disciplinary "points" under your policy.

You indicate that Craig had a migraine. That is a serious health condition under state and federal leave laws. If Craig has become eligible for protected time off, and if you are an employer covered by those leave laws, disciplining him for that absence is an unlawful employment practice. If your company has 25 or more employees, you're covered by the Oregon Family Leave Act, and if Craig has worked for you for 180 days and 25 hours per week or more, he is eligible for protected OFLA leave. That means he can take up to 12 weeks off

EMPLOYER QUERY: DISCIPLINE FOR ATTENDANCE

Many employee absences are legally protected

in qualifying situations, including when he has a sick child with a non-serious health condition which requires home care, or when he or a covered family member has a serious health condition. Those leave laws are explained in detail in our Family Leave Laws Handbook.

You should note, also, that Craig's absence for jury duty is protected under Oregon law. ORS 10.090 states that employers "shall not discharge or threaten to discharge, intimidate, or coerce any employee by reason of the employee's service or scheduled service as a juror on a grand jury, trial jury or jury of inquest." So when tracking Craig's attendance, put the jury duty in the column for excused absences and don't count it as a "point" or "incident."

Numerous other laws permit employees to take protected absences, including the federal Family and Medical Leave Act, state and federal disability laws, and statutes pertaining to military service, service in the state legislature, and leave to donate bone marrow. Employers should have attendance tracking systems that carefully distinguish between unexcused and legally protected absences. To avoid disciplining a worker for a protected absence, be sure you have a thorough understanding of the civil rights laws.

"No-Fault" Policies

EMPLOYER QUERY: NO-FAULT ATTENDANCE RULES

Certain absences still protected despite "no-fault" policy

QUESTION: Is it legal to have a "no-fault" attendance policy under which we terminate employees who reach a certain number of absences during the year

ANSWER: Generally, yes. You could choose, for instance, to discipline or terminate employees once they reach eight "incidents" or "occurrences" of unexcused absence during the year. However, you must be careful as to how and when you apply your no-fault policy.

For example, if an individual is absent because of a disability covered under the Americans with Disabilities Act or state disability laws, you should consider whether granting the time off would be a reasonable accommodation. If so, you must make an exception to your no-fault policy.

EMPLOYER QUERY: NO-FAULT ATTENDANCE RULES

Certain absences still protected despite "no-fault" policy

Similarly, when your employee misses time because he or she is a victim of sexual assault, domestic violence, stalking or harassment, protected under Oregon law unless it would be an undue hardship, you may not count these protected absences as a "point" or an "occurrence" that could lead to discipline.

Abuse of Sick Leave

EMPLOYER QUERY: ATTENDANCE ISSUES AND SICK LEAVE

Employee's abuse of sick leave may be grounds for discipline

QUESTION: We offer a generous benefits package that allows employees to accrue up to 15 days of paid sick leave per year. What are our legal options when an employee takes advantage of our generosity? We have one employee, Jay, who seems to call in sick every time the sun is shining on a Friday. Jay's attitude when we question him about his illness is that it's none of our business. He feels he's entitled to take sick leave since he's earned it. Do we have the right to ask for the specifics on what his illness is or to demand that he bring us a doctor's excuse? Can we discipline or even terminate an employee for using excessive sick leave?

ANSWER: It's up to your company policy to determine just when and how employees may use paid sick leave. You can authorize or deny the use of sick leave according to your policy, so long as it's applied in a non-discriminatory way. Generally, you can request relevant information and discipline employees for unauthorized use of sick leave. You should, however, be aware of disability and leave laws that regulate medical inquiries, give certain employees the right to take time off and, in some cases, guarantee the right to use accrued paid leave.

Jay may be telling you to "mind your own business," but you do have a business reason and the right to ask questions to determine how to track his absence and whether paid leave is authorized under your policy, if your policy is well written. Oregon and federal disability laws permit employers to make medical inquiries of employees as long as they are job-related and consistent

EMPLOYER QUERY: ATTENDANCE ISSUES AND SICK LEAVE

Employee's abuse of sick leave may be grounds for discipline

with business necessity. You can, therefore, inquire about Jay's pattern of absenteeism – especially when the circumstances are suspicious.

Although you can make job-related inquiries, be careful not to overstep your bounds. In most cases, it's inappropriate to demand information about the employee's specific symptoms, prescription medication or medical prognosis, unless you can demonstrate there's a business need to know. You are entitled to general information about the reason for Jay's absence so that you can determine whether to track the absence as family leave and whether the absence qualifies under your paid sick leave plan. If it's your company policy to do so, you can require that Jay bring a doctor's excuse or fitness for duty release when he returns to work. Many employers require such documentation when an employee has missed three days of work. Keep in mind that if you do require a doctor's note or an evaluation under such a policy or under the family and medical leave laws, you've made it a condition of employment, and an Oregon civil rights statute (ORS 659A.306) requires you to pay any out-of-pocket costs incurred by the employee.

There are other limitations on requiring medical certification. Under the Oregon Family Leave Act (OFLA), covered employers may only require a doctor's note for "sick child" incidents for non-serious illnesses beginning with the fourth incident or day of sick child leave during the year. With all absences that qualify for family leave, the employer must make any medical certification request in writing and must allow the employee 15 days to return the completed certification, absent extenuating circumstances.

You can specify in your sick leave policy under what circumstances paid sick leave is authorized. Some employers limit the use of sick leave to situations when the employee is ill. Others allow paid sick leave for illness of the employee's spouse or family member. During family leave absences, however, employees are entitled to use paid sick leave, even if that policy is stated to be limited to situations where the employee himself or herself is sick..

You can terminate an employee for excessive use of sick leave, but you should be certain that you're not counting any absences legally protected under workers' compensation, disability or family leave laws. In addition, you can track absences to see if patterns emerge, such that the employee's health care provider may be asked (through the employee rather than directly) to verify that the pattern is consistent with the employee's health condition.

Posting of Attendance Records

EMPLOYER QUERY: EMPLOYEE ATTENDANCE RECORDS

Posting of employee records not the best option

QUESTION: We want to recognize the employees with good attendance records and give a "heads up" to those with problem absenteeism. Is it legal to post staff attendance reports so that everyone may view them?

ANSWER: Posting of attendance records would likely be impermissible or at least unwise, even if the material you display excludes information on protected leaves and absences.

It would be illegal, for example, to post that your "problem" employee Angie missed two work days for jury duty, took two weeks off for training in the Oregon National Guard, filed three workers' compensation claims this year, missed eleven days of work due to her disability, and used seven weeks of family medical leave.

If you simply intend to show each employee's number of unexcused, unprotected absences for the year, it wouldn't violate civil rights laws, but it could raise privacy concerns.

When management disciplines or discharges an employee for poor attendance or for other reasons, it's not a good idea to disclose details to other staff that don't have a need to know. The posting of information that will potentially lead to employee discipline is somewhat questionable for that reason.

Recognizing and rewarding good performance is a great way to motivate employees, but perhaps you could limit your posting to the "Top Ten" employees with the fewest unexcused absences. You might also put the names of top performers in your company newsletter or provide bonuses to those with stellar attendance. Some organizations reward good performance by allowing the accrual of extra paid time off, providing a special parking space to the employee of the month, awarding gift certificates for local establishments, or offering discounts on the employer's own products and services. Note that under the Oregon Family Leave Act, covered employers are required to consider those who only took time off under the protections of that law to have perfect attendance despite those absences.

As for your employees with problem attendance, have supervisors tried one-on-one coaching and counseling techniques? Have they developed work plans with

EMPLOYER QUERY: EMPLOYEE ATTENDANCE RECORDS

Posting of employee records not the best option

these employees? Have the employees signed written warnings and been provided an opportunity to correct performance deficiencies? You may find that this type of direct feedback is more effective in providing a "heads up" than the public humiliation technique you had in mind.

Job Abandonment

EMPLOYER QUERY: NO-SHOW EMPLOYEE

Employer policy determines "job abandonment" when employee disappears

QUESTION: If one of our employees simply disappears and stops showing up for work, how long do we have to wait before we can legally consider this to be job abandonment? What do we do with the employee's final paycheck in this situation? Is the employee going to be eligible for unemployment benefits?

ANSWER: It's your company policy – not the law – that defines what constitutes "job abandonment." A common practice is to state in your work rules or employee handbook that the company will consider the employee to have voluntarily resigned after three consecutive "no call, no shows."

But before you decide on a termination under this type of policy, you should attempt to contact the employee, by telephone, e-mail and by letter (best practices), to determine if there are extenuating circumstances. Is the absence related to a medical condition that prevented the employee from contacting you? Is the absence possibly protected under family leave laws, disability laws, or workers' compensation rules? Gather as much information as possible about the circumstances. It's also a good idea to document that you made reasonable efforts to reach the employee. If you later learn that the absences of an employee terminated for excessive no-shows were protected, as for example if the employee was unconscious in a hospital and could not contact the employer, that employee should be reinstated immediately.

If you do decide after a certain number of absences that the employment relationship is over, you have really terminated the employee at that point -- at least for purposes of wage and hour laws.

EMPLOYER QUERY: NO-SHOW EMPLOYEE

Employer policy determines "job abandonment" when employee disappears

Even if you characterize the unexcused absence as a "voluntary quit," the employee in this scenario hasn't stated that he or she is resigning. Rather, you're applying your policy to determine that the employee has separated from employment and is no longer welcome to return.

The significance, under Oregon wage rules, is that you must have the employee's final paycheck available by the end of the next business day following the termination (certain exceptions apply, for example, to seasonal farmworkers). A different rule applies when an employee resigns without giving 48 hours advance notice. In that situation, you must have the paycheck available within five working days, or at the next regular payday, whichever is sooner.

If possible, you should promptly notify the employee of the termination decision and advise that the final paycheck is available. If the employee requests that you mail the check, it's required that you do so, but it should be mailed certified mail, return receipt requested. If it is not requested to be mailed, the best practice is to hold the check until the former employee comes to get it, since problems can result from the mailing and the check may not be timely. In such cases, severe penalties can result. These issues are discussed in greater detail in our Wage and Hour Laws Handbook.

Although you should follow the wage and hour rules for a discharge, this doesn't necessarily mean, for purposes of unemployment rules, that you have terminated the employee or that the employee will be eligible for benefits. The Oregon Employment Department will examine the facts and determine on a case-by-case basis whether an employee has voluntarily resigned. If so, unemployment benefits will not be granted.

To address the problem of the employee "missing in action," consider implementing a reporting policy which requires all employees to check in at regular intervals when absent from work. For instance, your policy might require any employee who is absent for a specified time period to phone in daily at a designated hour and speak personally to the supervisor.

Literacy requirements

EMPLOYER QUERY: EMPLOYEE ILLITERACY

Employers may properly inquire as to some workers' reading, writing abilities

QUESTION: We are in the construction business, and it has come to our attention that our lead carpenter may have a literacy problem that is affecting his job performance. His duties include reading bids and then completing paperwork at the conclusion of each job.

We have discovered that he asks his assistant to read every bid for him, and then he takes work materials home (without authorization) and has his wife complete all the paperwork. Not only does this delay the completion of work, but we also fear it could lead to miscommunication and errors at our jobsites. We don't want to lose this employee, because he does great work, but we strongly suspect that he is unable to read or write, and we don't know how we can legally broach the subject.

ANSWER: Just ask him. It's always legal to talk to an employee about work issues, as long as you don't discriminate in the way you apply your standards. And if reading and writing are essential job functions, you're well within your rights to address the performance of those duties. If these functions are not essential, however, requiring them could be shown to create a pattern and practice of discrimination against those with impairments or those whose inability to read and write in English is based on their national origin, a protected class under state and federal civil rights laws.

Your best bet is to address the problem in a straightforward manner and ask the employee why he doesn't read the bids and complete the paperwork himself, as the job description apparently requires him to do.

You may be right that your employee is illiterate, and he may tell you that is the case. But you shouldn't jump to conclusions, because there are other possibilities.

Say, for example, the employee tells you he is dyslexic and delegates the paperwork because he doesn't want to mix up numbers and measurements. His condition might be a disability, and if so you would need to consider making any reasonable accommodations that would help him to perform his job.

EMPLOYER QUERY: EMPLOYEE ILLITERACY

Employers may properly inquire as to some workers' reading, writing abilities

However, if it turns out the issue really is a problem with reading and writing skills or simply a lack of education, you have several options. If you determine that the employee just doesn't have the qualifications needed to perform all of his job duties, you could discipline and even terminate him for failing to meet performance benchmarks you have set.

But since you've indicated you want to work with and retain this employee, you might choose to pay to send him to a literacy course so that he can learn the skills needed to meet your work requirements.

You might even decide that the employee's carpentry skills are valuable enough to you that you are willing to redesign his job description and assign the normally required, essential reading and writing functions to other workers. This is not something the law requires you to do – even with employees who have disabilities – but you could voluntarily choose to go above and beyond for this individual.

In the future, you should consider screening job candidates more carefully before making your hiring decision. If a particular job requires a certain level of fluency in reading, writing or speaking English or other languages, you should write those requirements into the position description as minimum qualifications.

You can even conduct reading and writing tests within the job interview to determine an applicant's skill levels. Also, when conducting reference checks, you may ask about the applicant's job-related qualifications, including language skills.

Another issue you'll want to address promptly is your employee's "delegation" of work to his wife. Now that you've learned about this practice, you need to put a stop to it as soon as possible. Oregon and federal wage laws state that you "employ" an individual when you "suffer or permit" the individual to work, so you should take steps to prevent the wife from performing work for you if you don't wish to add her to your payroll.

Presumably, you don't have I-9 or W-4 forms for the wife, you're not providing her workers' compensation coverage, and you're not reporting any state and federal tax withholdings for her. All of these matters, among others, could be sources of liability, if a court later determines that the wife was your employee.

PERFORMANCE APPRAISALS

Preparing and delivering performance appraisals is often a supervisor's most daunting and dreaded assignment, but it doesn't have to be that way.

When supervisors are giving contemporaneous feedback to employees throughout the year, counseling and coaching employees on performance, and documenting issues that arise, the task of preparing an annual performance review becomes much easier. If done correctly, reviews or performance appraisals are a valuable management tool, both in recognizing positive contributions and further documenting problems.

First, the supervisor won't have to go back in time and try to reconstruct events from memory. The documentation of discussions and personnel issues that has been created throughout the year will be up-to-date, accurate, and easy to compile.

Second, and more important, the employee will already know how he or she is doing before meeting with the supervisor for the all-important review. The formal review should never be a time to spring surprises on an unsuspecting employee. This is the time to summarize and review the evaluation period. It shouldn't be the first time the employee is hearing about a serious attendance problem or performance issue.

In preparing to conduct a performance review, review the employee's position description and the personnel file. Review the standards and any goals you and the employee had previously set for this review period.

This isn't the time for nitpicking, so try to concentrate on the most important points with respect to the employee's job performance. Try to follow objective standards for rating the employee, and be prepared to give specific examples to support your conclusions.

Be sure to make notes of areas deserving positive reinforcement, as well as identifying areas for improvement. This helps to show that you were fair and objective.

It's also important to keep to any promised schedule for the performance review, especially when merit increases or other bonuses are tied to the evaluation. Employees who are denied a previously promised review may claim a breach of contract, or may later claim that the failure to provide them with notice of a problem was discriminatory, especially if other employees received their reviews on time.

Ask the employee to be prepared in advance of your meeting, and request that he or she provide a summary of accomplishments, needed improvements, suggestions to improve workplace functions, and personal goals for the next evaluation period.

Finally, avoid taking the "easy way out" and simply rating the employee "satisfactory" or "above average" in each category just to avoid a confrontation or discussion of

performance issues. In truth, not every employee is above average. If supervisors artificially inflate employees' "grades," the overly generous evaluations may later be used as evidence against the company when the employee is terminated for continuing performance problems. Be consistent in your documentation. Shortcuts here can be very costly.

EMPLOYER QUERY: PERFORMANCE APPRAISALS

Terminating employee without honest evaluations is problematic

QUESTION: I own an auto repair shop, and Linda has been my employee for 10 years. She and I long time family friends, and we work closely together and also socialize off the job. Although I give annual performance appraisals to all of my employees, I've never spent much time on Linda's appraisals. I just write down that she's doing a great job.

I've continued this practice, even though her performance has been deteriorating in the last couple of years. She rarely comes in on time, and she's starting to move slower and without her usual enthusiasm. She's also been testy with a few customers and a couple of her co-workers. She's confided in me that she's having emotional problems and is distracted at work.

I like Darcy, but 10 years is a long time to work someplace, and I think she's getting burned out. There are also some people who have applied that I think might do better and have more energy and enthusiasm for the job. My handbook states that I am an "at-will employer," so I'm thinking of just telling Linda she's no longer a good fit and I'm letting her go pursuant to my at-will policy. Is there a problem with this?

ANSWER: Potentially, yes. Although the law does not require employers to provide performance appraisals, there are many advantages to doing so. Performance appraisals give you the chance to provide feedback to your employee as to how she's doing. You and the employee can discuss what has worked and what could be improved, and you can also put together a plan with goals for the upcoming appraisal period.

Regular performance appraisals should occur in addition to ongoing conversations with employees about their performance. That way, when it's time for the performance appraisal, there should be no surprises. The employee should be aware of and anticipating what will be in the appraisal.

Where does this leave you with Linda? Even though her performance has been declining, you haven't noted that on the performance appraisals. It will probably come as a great surprise to her when she's terminated, and she

EMPLOYER QUERY: PERFORMANCE APPRAISALS

Terminating employee without honest evaluations is problematic

probably won't buy your "employment at will" explanation. It's more likely that she will believe that you're hiding some illegal reason -- for example, discrimination based upon a perceived disability regarding her mental health. Or, if she's older than several of your other employees, she may believe she's being discriminated against because of her age. If she's the only woman working in the shop, she may feel that her not being a "good fit" really means that she's being let go because she's not a man.

Although you may be able to show that none of those things was the reason for her termination, you could still be subject to the very unpleasant (and potentially expensive) task of proving it to a jury or an investigating agency. If you tried to introduce evidence of performance problems in that type of forum, Linda or her attorney would likely present copies of your performance evaluations which continue to reflect only that "she's doing a great job." This situation also provides a cautionary tale concerning hiring and managing friends or family members. Linda might be decidedly more frosty in her attitude toward you at family reunions if you terminate her.

So instead of being so eager to ditch Linda, it would be more prudent to treat her like all of your other employees—starting with giving her an honest performance appraisal and an opportunity to improve.

DISCIPLINE

Addressing employee "attitude"

EMPLOYER QUERY: ADDRESSING POOR BEHAVIOR

Discipline and document objectively rather than firing for "attitude"

QUESTION: My husband and I own a local print shop and have 16 employees. Our biggest problem is Maggie, an employee who has been with us for almost 20 years. Maggie has always been a thorn in our sides. Her job performance is acceptable most of the time, but she's very negative with co-workers and customers, and sometimes she's even disrespectful to me. We've never really taken the time to document these problems, because we're so busy running the shop, but now things are getting worse.

ANSWER: Although you certainly can discipline -- and even terminate -- an employee for the types of behavior you describe, you should proceed very carefully under the circumstances. Consult an employment law attorney before making a decision to terminate Maggie.

As a business owner, you know that getting the work done is only half the battle. Having the workplace run smoothly also depends on having employees who are professional and courteous to customers, supervisors and co-workers. Those are standards that you can and should enforce in the workplace.

Of course, you know that you can set rules for work performance and attendance. But you can also establish a workplace conduct policy requiring your employees to treat others with dignity and respect. With such a policy in place, you'll have a mechanism to address the kind of problems you've encountered with Maggie. The problem here is that you've apparently allowed Maggie to behave this way for the last two decades, and this is the first time you're formally addressing it. It's never a good idea to terminate an employee without giving fair notice and an opportunity to correct the problem.

When disciplining Maggie for her workplace behavior, avoid the common mistake of referring to her "rudeness," "disrespectfulness" or "bad attitude." While these terms may accurately describe Maggie, they are loaded words likely to anger her, and they're also terms which are very subjective.

EMPLOYER QUERY: ADDRESSING POOR BEHAVIOR

Discipline and document objectively rather than firing for "attitude"

It's much more effective (and probably more compelling to others who may eventually see your documentation) to specifically identify the problem behavior that violated your policy. For example, "On Tuesday morning at 8:27 a.m., I observed Maggie arriving to work nearly 30 minutes late, in violation of our attendance rule. At 10:00 a.m., Maggie's co-worker reported to me that Maggie used the "F" word, told him to 'shut up,' and refused to help with the blueprint copying to meet our afternoon deadline. I attempted to raise the issue with Maggie, but she interrupted me and in a loud voice told me she had her work 'under control' and that I should 'mind my own business.'"

You mention that Maggie has not only threatened legal action, but also recently disclosed a serious medical condition. It's not illegal to discipline or terminate an employee when you can show that you're applying your normal workplace policies in a non-discriminatory fashion, without regard to age, health, or any other protected classification. But since you haven't previously documented Maggie's bad behavior, to suddenly do so now could look suspicious to an outsider – perhaps Maggie's attorney, an investigating agency, or even a jury.

Terminating Maggie at this juncture would be very risky. Instead, why not make a commitment to promptly document (and hopefully correct) inappropriate employee behavior.

Wages and discipline

EMPLOYER QUERY: DEDUCTIONS, "FINES" AND DISCIPLINE

Coaching the problem employee a better option than lowering pay

QUESTION: Robert, who's been our Information Systems Specialist for the past eight months, is our biggest challenge. When we hired him, we agreed he'd earn $14 per hour, though that's significantly more than we paid the last person in the job. We agreed to this because of Robert's hi-tech experience, salary history and the good job references we received.

EMPLOYER QUERY: DEDUCTIONS, "FINES" AND DISCIPLINE

Coaching the problem employee a better option than lowering pay

Despite his pledge to give us 110 percent, Robert's job performance has been lackluster. He's often late to work, his attitude suggests job burnout, and he doesn't work up to his potential. We've expressed our displeasure several times, but he doesn't seem to take it to heart, and the problems with tardiness and low productivity continue. We don't want to terminate Robert, as we know how difficult it would be to find a qualified replacement. Robert already knows our computer systems, and when he applies himself he does good work.

We figure if we hit him in the pocketbook, he'll finally get the message that we're serious about our attendance rules and project deadlines. Can we impose penalties if an employee violates our rules? For instance, could we tell Robert we'll dock his pay by a dollar for every minute he's late in the morning? Or when his performance is mediocre, can we simply pay him at a lower rate than what we initially agreed upon, say $9.00 per hour?

ANSWER: Attempting to discipline an employee through the paycheck is almost always illegal. While in some circumstances you can lower a worker's pay rate for hours not yet worked, it's probably not the best option if your goals are employee retention, higher motivation and better job performance.

Oregon wage laws don't allow employers to deduct a "fine" from an employee's check for poor performance or tardiness. Payroll deductions are generally limited to those that are required by law and those that an employee authorizes in writing for his own benefit. Your proposed dollar-per-minute penalty might scare Robert into better attendance, but it's also likely to scare up a wage claim.

As for lowering Robert's hourly wage to $9 per hour, you can do this if you're an at-will employer, provided you're not violating an existing written or verbal contract, and provided that you make the change prospective rather than retroactive. For example, it would be a violation of your wage agreement to simply hand Robert his paycheck and announce that you've paid him at a lower rate than the agreed-upon $14 per hour for hours already worked.

On the other hand, you could tell Robert that effective next week you'll be reducing his hourly wage to $9. You'd first want to be certain that you've retained at-will status with proper language in your employee handbook, that your policies clearly indicate the company can change benefits and pay, and that you haven't promised Robert he'd remain at $14 per hour for any fixed period of time.

EMPLOYER QUERY: DEDUCTIONS, "FINES" AND DISCIPLINE

Coaching the problem employee a better option than lowering pay

But having said that, consider the message you'd be sending: "We're going to start paying you less, and we expect you to work harder." Is that really likely to get you improved performance? Most employment experts instead recommend coaching the problem employee. To improve employee motivation, consider implementing recognition programs to reward good performance. Give ongoing feedback to employees, document performance problems, create work plans, and apply your disciplinary policies to show you're serious about company rules.

EMPLOYER QUERY: REDUCTION IN PAY

Retroactive pay cut violates wage and hour laws

QUESTION: I was hired last month at $12 per hour, but my employer issued my most recent paycheck at $10 per hour, claiming that I overstated my qualifications and that my performance hasn't been up to par. Isn't it illegal to change my pay rate after the fact?

ANSWER: In most cases, it's not against the law for an employer to adjust your pay rate, but it is illegal for the employer to make such adjustments retroactively.

If you work for an employment-at-will company and don't have a contract that guarantees you'll remain at $12 per hour for any specific time period, then your employer may prospectively adjust your pay based on your job performance. But handing you a paycheck and informing you only at that time that you've earned less than what you expected for the last pay period is a violation of the wage laws.

The position of the Bureau of Labor and Industries is that it's not legal for your employer to unilaterally change your pay rate without your knowledge. Instead, your employer may make a lower pay rate effective only after informing you of the change. That way, you have the opportunity to accept or reject the change in pay rate.

The Oregon law defining "employee," ORS 652.310, refers to an individual

EMPLOYER QUERY: REDUCTION IN PAY

Retroactive pay cut violates wage and hour laws

who renders personal services "to an employer who pays or agrees to pay such individual at a fixed rate …" And ORS 652.320 defines "rate of payment" as " . . . the rate at which payment is made or is to be made in the manner described in this section."

The administrative interpretation of these statutes is that when an employee receives a certain fixed rate of pay and believes this to be the rate as agreed, the employer may not change the rate without the employee's knowledge or agreement.

In other words, you're entitled to receive $12 per hour for the most recent pay period, and your employer may only make the new $10 rate effective at the time it notifies you of the change and only if it does not violate an agreement to pay a fixed sum for the term of the agreement.

Disciplining workers in protected classifications

Injured Worker

EMPLOYER QUERY: TERMINATION AND PROTECTED STATUS

Terminating worker after on-the-job injury can be risky business

QUESTION: Is it legal to fire an employee who had an on-the-job injury if our reason for the termination is unrelated to his workers' compensation claim? We have an injured worker who is back to work on light duty, but his attitude is bad, and he isn't completing his work on time.

ANSWER: The answer is a qualified "yes." You can terminate an injured worker – or, for that matter, an employee who is African-American or a person with a disability or a member of the armed forces or Muslim or Norwegian – if you have a legitimate, non-discriminatory reason that has nothing to do with the worker's membership in a protected classification. Workers who enjoy legal protections based on those classifications can be held to the same performance,

EMPLOYER QUERY: TERMINATION AND PROTECTED STATUS

Terminating worker after on-the-job injury can be risky business

attendance and conduct standards as everyone else. But the reason for discipline or termination cannot be their membership in a protected class. In fact, if the timing of the discipline is close in time to a protected class status event, such as requesting a disability accommodation or taking family leave, the employment action will be subjected to additional scrutiny.

Since Oregon civil rights law provides a protected class for injured workers, ask yourself whether you'd discharge a non-injured employee for the "attitude" and performance problems you're encountering with this employee. If so, you can apply your disciplinary policies in the same way to this employee, even though he happens to be in a protected category.

You should recognize, however, that terminating an employee in a protected class is risky, and you'd be wise to discuss the matter with your employment attorney before making your decision.

If you find yourself facing an injured worker discrimination claim, having clear policies and good documentation in your personnel files will be critical to your defense, hopefully allowing you to show that you've applied your company rules uniformly. Have you disciplined other, non-injured workers for similar violations of this policy? These comparators are extremely useful in evaluating whether you had a discriminatory motive.

You should proceed with caution, because some employers haven't fared well in similar situations. In one noteworthy BOLI case involving a large retail chain, an employee who had suffered an on-the-job injury was later terminated for violating the employer's policy prohibiting offensive language in the workplace. However, the agency determined after a contested case hearing that the employer had not terminated other non-injured workers who violated the same policy.

The Commissioner found that the employer's stated reason for the discharge was a pretext for discrimination and that the employer discharged the employee because of his workers' compensation claim.

In another BOLI case, a restaurant terminated a dishwasher/prep cook after he cut his thumb while cleaning a knife, because he violated the employer's safety policy requiring employees to wear protective cutting gloves.

EMPLOYER QUERY: TERMINATION AND PROTECTED STATUS

Terminating worker after on-the-job injury can be risky business

However, it was determined in that case that this employee was the only kitchen employee discharged for violating the policy. Several other workers violated the policy, but none of them filed workers' compensation claims, and they received only verbal reminders and, in one case, a written warning. Because the employer did not terminate these other employees who violated the policy, the Commissioner found that the termination of the injured worker was discriminatory.

Employee Complaining of Harassment

EMPLOYER QUERY: DISCIPLINE AND PROTECTED ACTIVITY

Discipline after harassment complaint may appear retaliatory

QUESTION: We have a female manager who has a habit of putting her arm around male employees when explaining things. She is lively and flirtatious. A new employee who referred to this as "sexual harassment" has received a written warning about his work. Would it be safe to terminate him if he receives a second warning?

ANSWER: It depends on what you mean by "safe." You should consult with your employment attorney to weigh the risks, but if you're applying your performance standards in a non-discriminatory manner, then you can legally discharge the employee for violating company policy.

Your concern is warranted, however, because a termination that closely follows protected activity may be viewed by the employee as retaliatory. In your example, the employee could allege an unlawful employment practice, as both Oregon and federal civil rights laws prohibit employers from retaliating because an employee complains about discrimination or harassment based on gender or any other protected category.

EMPLOYER QUERY: DISCIPLINE AND PROTECTED ACTIVITY

Discipline after harassment complaint may appear retaliatory

If the employee were to file such a claim, you could defend against the charge by showing that your termination decision was based solely on performance issues and was completely unrelated to the employee's harassment complaint.

In such cases, courts look to comparator evidence related to similarly situated employees. It would be helpful to you, for instance, if you could show that you have terminated other employees who violated the same work rules as this employee, and that other employees who have raised similar workplace concerns were not discharged.

Your first concern should be your manager's habit of putting her arm around male employees. Did you follow up on the employee's harassment complaint and conduct a thorough investigation? Even if he didn't file a formal written complaint with your human resources department, it's enough that he brought the manager's behavior to your attention.

You can be liable for not investigating and taking appropriate corrective action if you knew or should have known about harassment in your workplace. And if a supervisor takes a tangible employment action – such as discipline, demotion or discharge – in conjunction with harassment, your organization can be liable even if you weren't aware of the harassment.

But is it really sexual harassment when a manager puts her arm around employees? It could be. It's possible that this manager had no sexual intentions and simply sees his gesture as a friendly way of encouraging employees as she describes work rules or assignments. Regardless, this kind of touching in the workplace is risky, especially when done by an individual in a position of authority.

Keep in mind that courts determine harassment based on the perception of the recipient rather than the actor. Both the manager and your organization could be liable if a jury determines that the behavior was directed at this employee because of his sex, that the employee reasonably found the behavior unwelcome and offensive, that it was severe or pervasive, and that it created a hostile environment.

Even if the manager's behavior didn't rise to the level of illegal harassment, you could still face liability for illegal retaliation if the employee can prove his discharge was connected with the complaint he made in good faith.

Obesity as Protected Class?

EMPLOYER QUERY: PERFORMANCE ISSUES AND OBESITY

Overweight employee isn't necessarily "disabled"

QUESTION: We have an employee who is not meeting performance standards with respect to some of her job duties. When we gave her a negative performance appraisal, she suggested we were discriminating based on her weight. Is being overweight considered a disability? Is an employer required to make special accommodations for an employee who is obese?

ANSWER: Obesity is generally not, by itself, a disability that is protected under the federal Americans with Disabilities Act. This is a tricky area, however, because obesity is often associated with other conditions that are disabilities, and in some cases courts have held that "morbid obesity" is a protected medical condition.

Also, under the ADA and related Oregon statutes, it is illegal for an employer to discriminate because of a record of disability or "perceived disability." Some lawsuits for discrimination based on weight are filed on the basis that the employer regarded the overweight employee as having a disability – even if the employee was not in fact "disabled" as defined by law. Under the ADA Amendments Act of 2008 and corresponding changes in Oregon disability law, it is now much easier to qualify as a person with a disability. These changes were in response to court decisions that were viewed as eroding the rights of persons with disabilities. Now, we move past the disability issue more easily and shift the focus to whether or not the employer can reasonably accommodate a disability.

Some states and local jurisdictions have enacted laws that prohibit discrimination based on an employee's size or "personal appearance." Oregon employment laws don't contain this type of specific protection. The Oregon and federal laws define "disability" as a mental or physical impairment that is permanent or long-term and that substantially limits an individual in one or more major life activities.

To be considered a person with a disability under the law, an individual must be substantially affected in some major life activity as compared to the average person. But numerous studies report that a majority of American adults are overweight and that the percentage is rising each year. So obesity alone will

EMPLOYER QUERY: PERFORMANCE ISSUES AND OBESITY

Overweight employee isn't necessarily "disabled"

generally not qualify as a disability or require an employer to take any special action.

On the other hand, some state and federal courts have ruled that severe or morbid obesity can be a disability entitling an employee to ADA protection. Morbid obesity is often defined as being 100 percent over ideal body weight, being 100 pounds overweight, or having a Body Mass Index greater than 40.

The EEOC guidance states that this type of severe obesity "is clearly an impairment" and that an employee in this category may have "an underlying or resultant physiological disorder, such as hypertension or a thyroid disorder," that is a protected disability.

Even if your employee has a "disability" within the meaning of the employment statutes, it doesn't mean you're prohibited from addressing her performance problems. You may, however, be obligated to make reasonable accommodations for her. An employee with a disability will be protected under the law only if she is " qualified" to perform the essential functions of her job, either with or without accommodation.

You should enter into a meaningful "interactive process" with the employee to explore possible accommodations, and you're entitled to request medical certification to assist you in that process if it is job-related and consistent with business necessity (and you must pay the out-of-pocket costs). Whether or not you determine that she is capable of performing the essential job functions with or without assistance, you can address her performance issues and apply your disciplinary rules as you would with any other employee, but proceed with caution. The timing of discipline that corresponds to a protected class status event may be viewed with suspicion. Good prior documentation of problems that are independent of the disability issue are your best protections in a discrimination action.

If her condition affects her ability to perform essential job functions, then you must make an accommodation that would enable her to do the job, as long as it is "reasonable" and does not pose an "undue hardship" on the company. If you and the doctor determine that she can't perform her job even with reasonable accommodation, then you should check to see if you have any vacant positions that could be accommodated for her. If not, the employee would have no further job protection under the disability laws.

EMPLOYER QUERY: PERFORMANCE ISSUES AND OBESITY

Overweight employee isn't necessarily "disabled"

It would be prudent to consult your employment attorney before making any decision based on an employee's weight. This remains an unsettled area of the law, and a termination connected with an employee's weight could lead to a legal challenge.

Whistleblower

EMPLOYER QUERY: PROBLEM EMPLOYEE

Don't make employee's protected activity "the last straw"

QUESTION: I own a commercial painting company and have a difficult employee I've disciplined a number of times for performance issues. Among other things, he crashed my company van a few months ago, but I allowed him to continue working for me. This week, he called me from the worksite and told me he couldn't complete a paint job because of birds nesting in the building. When I told him to remove the nest and complete the job, he called the police. I've since learned the birds are protected, and removing the nest would be illegal. This employee is driving me crazy. What are my rights as an employer?

ANSWER: Although you can generally discipline an employee for insubordination, you should never take adverse action against a worker for refusing to perform an illegal act. If you were to discipline or discharge the employee for the incident you describe, he could bring a whistleblower retaliation claim or a wrongful discharge claim against you.

Civil rights laws prohibit you from taking adverse action when an employee engages in any type of protected activity – for instance, reporting an OSHA violation due to an unsafe or unhealthy working condition, complaining of sexual or racial harassment, or filing a workers' compensation claim. Therefore, you certainly don't want to count the protected activity as "the last straw" or even a contributing factor in making a discharge decision. There must be a legitimate, non-discriminatory reason for the adverse employment action, and the protected activity cannot be a substantial factor in the action. Temporal proximity of the activity to the action will heighten scrutiny.

Disability

EMPLOYER QUERY: DISABILITY AND PERFORMANCE ISSUES

Employer doesn't have to tolerate sleeping on the job

QUESTION: Over the past few months, we've taken multiple corrective actions with an employee who repeatedly falls asleep at her desk. We literally have to wake her up throughout the day. This week, for the first time, she told us that she has heart problems and that her blood pressure medication is making her drowsy. How do we address this without discriminating?

ANSWER: The employee's heart condition may qualify as a disability under Oregon and federal civil rights laws, but that doesn't mean you have to put up with sub-par job performance.

An employee has an obligation to advise her employer if she needs accommodation because a disability is affecting her ability to work.

Now that you do know about her high blood pressure, you should enter into the interactive process and explore options for accommodation. Document this process thoroughly. The employee may suggest a plan that would enable her to meet your work expectations. You and the employee should each explore and discuss options, needs and limitations. http://askjan.org is a useful website that helps guide the process and matches potential accommodations with jobs or job functions and disabilities. Printing out a search on that website would be a good way to supplement other documentation of this mandatory process.

You're also entitled to medical certification to determine if the condition is indeed a qualifying disability when it is job-related and consistent with business necessity and when the employer pays for the out-of-pocket costs. The doctor may recommend a specific option -- perhaps different medicine, a dosage adjustment, some time off work, or even extra rest breaks – so that the employee can meet your performance expectations.
If there's a reasonable accommodation that allows the employee to perform her job, you should offer it. If, however, the employee continues to sleep on the job despite all reasonable efforts to accommodate her, and if staying awake is an essential job function (it may not be for some jobs!) the disability laws won't protect her, and you can discipline her as you would any employee who violates your policies.

Off-duty conduct

EMPLOYER QUERY: AFTER-HOURS BEHAVIOR

Employee's off-duty conduct might be grounds for discipline

QUESTION: Can my employer legally fire me for what it calls "misconduct" that took place away from the workplace?

ANSWER: It depends. Your employer is probably on solid ground if the misconduct adversely impacted your job performance or the employer's business. On the other hand, you may have an invasion of privacy claim if the conduct had no effect on the business, or if the employer went too far in investigating or restricting your personal off-duty activities.

Your employment in Oregon is "at will" unless you have an agreement or contract with your employer that gives you greater rights. Under the "at will" doctrine, either you or your employer can end the employment relationship at any time, with or without reason. Because there are numerous exceptions to at-will employment, however, employers should proceed very cautiously before disciplining or terminating employees for off-duty conduct. Having said that, it's also true that the courts have upheld such discharges in a number of cases.

For instance, your employer could legally discharge you if you were convicted of a crime that occurred outside of work hours, if that conviction would impact workplace safety, the business reputation, or your qualifications to do the job. The exclusion must be job-related and consistent with business necessity, and that can be established through a targeted screen and an individualized assessment. The targeted screen looks at the nature of the crime, the recency of the conviction and the nature of the job. The assessment is used to allow the employee to explain or to establish that the employee was not the person convicted. In April of 2012, the EEOC issued new guidance on criminal background checks based on claims that racially neutral policies have a disproportionate adverse impact on those of certain races and national origins. The guidance can be viewed at:
http://eeoc.gov/laws/guidance/arrest_conviction.cfm

Certainly, an employer may discharge a truck driver who loses his driver's license (a bona fide occupational qualification) after a DUII conviction. Likewise, your employer could potentially dismiss you from a cashier position if you were convicted of shoplifting, consistent with the EEOC guidance.

An employer may also legally terminate employees who test positive for drugs

EMPLOYER QUERY: AFTER-HOURS BEHAVIOR

Employee's off-duty conduct might be grounds for discipline

or alcohol under a legitimate, non-discriminatory workplace testing policy – even if the positive screening results from drug or alcohol use that took place outside of work hours. Because these policies implicate employee privacy rights, making sure that the policies are well written is critical. Consider using employment counsel to draft or review policies or consult our Policy Writing Guidelines Handbook.

Some employers discipline or terminate employees under "fraternization" or dating policies. Even if the dating happens away from the office, an employer can legally restrict intimate relationships between co-workers when there's a valid work-related reason. For example, an employer might prohibit supervisors from dating regular staff, to prevent against sexual harassment or perceptions of favoritism or discrimination.
Even if your employer determines you acted inappropriately, it doesn't necessarily mean that the Oregon Employment Department will deny your claim. If the "misconduct" didn't occur in the course and scope of your employment, you may still be eligible for unemployment benefits.

A word about social media

Tech savvy businesses, leveraging social media to promote brand recognition, create event publicity, and increase product sales. Along with these potential benefits, however, it has also become clear that social media presents businesses with a whole new set of challenges in their role as employers. Unfortunately for employers, this emerging social phenomenon has workplace implications and there is little formal legal guidance available for how to regulate this activity without violating important employee rights.

CASE ON POINT: In the aftermath of a recent riot, a Vancouver business received more than a hundred emails regarding offensive comments made by one of its employees on his Facebook page. Because the employee had identified the name of his employer in his user profile, his ill-considered riot related comments also had a negative impact on his employer's reputation. Reports like this make it clear that social media has a way of amplifying the impact of employees' use (and misuse) of information technology and blurring the line between personal and professional conduct.

So what do you need to know about social media? "Social media" can refer to any of several web-based applications that are accessed from a computer or a mobile device,

like a smart phone or tablet. What tends to set social media apart from other internet content, however, is its interactive nature. Where "traditional" web pages may display content and provide links to other websites, the flow of information is pretty much one way. Social media websites, on the other hand, enable any user (not just a webmaster) to create content, leave comments, or even edit others' content, as well as interact with other internet users in real time. Publishing content to the internet on social media sites does not require hosting a website or editing html code, and as a result, social media sites have dramatically lowered previous barriers to participation on the internet.

The potential problem is that social media applications also have lowered the barriers to inappropriate participation on the internet. This is why it is so critical for employers to develop and implement a social media policy as part of a comprehensive employee handbook. An effective policy on social media will help you to clarify expectations on the use of social media, give guidance to those employees who do participate in social networking sites, and provide a framework for responding to violations of that policy.

- Be clear on whether the use of social media is allowed at work and if so, under what circumstances.
- Be clear that employees who engage in social media should not identify themselves as representatives of the company, unless authorized to do so.
- Clearly communicate that even when employees use social media on their own time they may still be associated with their employer. This means that any respectful workplace, anti-harassment or anti-discrimination policy will still apply.
- Require that employees' blogs, pages, etc. should bear a disclaimer stating the employee's views are not the views of his or her employer. This may be especially important for the use of social networking sites like LinkedIn where users routinely request and provide professional references or endorsements.
- Emphasize the public nature of social networking and social media and the need for employees to exercise discretion and common sense. Once posted, social media content and comments may be impossible to completely retract.
- Be careful not to restrict protected "concerted activity" through which employees communicate about wages or working conditions. Even in non-union work environments, restrictions on such discussions are prohibited by the National Labor Relations Act and have resulted in complaints against employers who seek to limit employee use of social media.

TERMINATIONS

When you feel you're ready to terminate that problem employee, take a deep breath and think again. Termination is obviously the most serious employment action you can take, and it's the one that's most likely to lead to litigation.

Because of the potential for claims and the amount of time and training you have invested in each employee, discharging an employee should be the very last resort, and it's helpful to think through a pre-termination checklist to determine if separation is really the best and only answer.

Consider the following questions:

- ◻ Has the company's disciplinary policy been followed? If you are deviating from the stated company policy, can you articulate a good reason for doing so?
- ◻ Is the misconduct serious enough to justify termination? In other words, does the punishment really fit the crime? Does it involve safety or efficiency? Dishonesty or violence?
- ◻ Were the actions properly documented?
- ◻ Was the matter investigated? If so, was the investigation prompt, thorough, objective and well-documented?
- ◻ Were the rules applied evenhandedly? In other words, have other people who have engaged in similar conduct (comparators) also been terminated, or is there a risk the employee can show different treatment and discrimination?
- ◻ Is termination the only reasonable option?

At some workplaces, before any discharge decision is finalized, the company president or personnel director will conduct a final review, considering the contents of the employee's personnel file.

If I were a judge or jury member considering this documentation, would I think the company was fair with this employee? Are the personnel records and documentation sufficient to explain and justify our decision?

If the answer to these questions is "yes," the company representative gives final approval for the termination. If the answer is "maybe" or "no," the representative may decide to reject the discharge decision and allow the employee one final chance to correct the problem behavior or performance.

In an at-will environment, the employer isn't obligated to provide an employee with notice and opportunity to correct the problem prior to termination. But ideally, the personnel file will reflect that this is exactly what the employer has done.

Supervisors should have counseled the employee on performance issues throughout his or her employment, memorialized their efforts in writing, and provided the employee time to correct deficiencies. The documentation will then provide a complete chronology from hiring through firing, reflecting plenty of notice and plenty of opportunity. This is the way an employer can demonstrate workplace fairness to a third party – such as an administrative agency investigator or a court of law.

Keep in mind that in the worst-case scenario, if you find yourself defending your discharge decision in state or federal court, the case will be in the hands of a jury comprised mostly of employees or individuals who once were employees. They'll naturally tend to sympathize more with the "poor fired worker" than with your large, faceless corporation.

The employers who win the jury over are the ones who can demonstrate that they had clear policies, that they applied their work rules logically and consistently, and that they gave the discharged employee every opportunity to correct performance problems before settling on termination.

Conducting the termination interview

If you are certain that termination is your best option, be sure to prepare for the final meeting with the employee.

Choose your words ahead of time.

Choose a good time and place. Try to schedule the meeting for the end of a workday so that the employee can collect his or her belongings without having to interact with many other employees or take that "walk of shame". Keep the meeting private and confidential. The goal is to reduce or eliminate the humiliation factor and allow the employee to depart with his or her dignity intact. Otherwise, if animosity against the organization is allowed to escalate unnecessarily, bad things can result: vandalism, violence, retaliatory litigation, etc.

Arrange for another member of management to be present as a witness during the interview, to avoid the potential "he said, she said" dispute about why the employee was in fact terminated.

Stay on task, be straightforward, and keep the meeting short and to the point. Avoid becoming apologetic or angry. Remain calm and professional.

State that the employee is being terminated and why. Have the appropriate documentation available. You may even wish to draft a termination letter, so that it's clear your decision is final, and the employee isn't left with the impression that he or she can argue their way out of the discharge.

While it's true that an at-will employer isn't required to provide any reason at all for terminating employee, an employer that is operating fairly will have made the reason very clear to the individual. The termination should never come as a complete shock to an employee.

If the employee becomes too emotional during the meeting, you may decide to take a break or to end the interview politely.

This is not the time to argue the legal merits of the employee's case. If the employee threatens legal action, do not escalate matters. The proper response is to agree that the employee has the right to consult an attorney. You may also choose at this point to gently indicate that you are confident any legal claim is defensible because the employee's difficulties were well documented and he or she was given fair and ample opportunity to correct the problems.

Although the deadline for providing a final paycheck is almost always the end of the next business day following the discharge, you may nonetheless wish to have the final check ready at the termination interview, to avoid the need for the employee to return to the workplace the following day.

Provide the employee with any necessary separation documents, such as COBRA paperwork notifying him or her of rights to continue health insurance coverage.

You may wish to have the employee sign an authorization describing what information you may provide to prospective employers who contact you for references.

Although things have not gone well with this employee, recognize that the way you conduct the termination will likely be known by your other staff and can have a major impact on employee morale. Keep in mind that the terminated employee will still likely be a member of the local community and isn't likely to disappear completely from your "radar screen."

Therefore, if possible, try to end the interview on a positive note and maintain some type of relationship with the employee. Especially where the individual has been a long-term employee with your organization, it is appropriate to thank him or her for the positive contributions made over the years.

Exit interviews

Consider conducting an "exit interview," in which the departing employee is asked for his or her perspective on what went right and what went wrong with the employment relationship.

You may choose to have a "neutral" supervisor conduct the exit interview, or you may conduct the exist interview by way of a questionnaire that the employee completes.

The information you gather in this process may actually help you to avoid turnover and similar problems with other employees.

Additionally, providing the employee an opportunity to "vent" internally may reduce the possibility that the employee will seek legal recourse through court or administrative agencies like BOLI or the EEOC. This interview must be handled deftly, however, as an employee mustn't be left with the impression that the employer doesn't know what went wrong or was somehow at fault in the termination of the employment relationship.

Layoff versus discharge

EMPLOYER QUERY: SEPARATION TERMINOLOGY

Layoff versus discharge distinction can be murky

QUESTION: Is there a legal difference between the terms "laid off" and "fired"?

ANSWER: When you're laid off, you're out of a job, and when you're fired, you're really out of a job. How's that for a legal answer?

In one sense, there's not much difference between the two terms, and whether an employer uses "laid off" or "fired" to describe the employment action is a matter of semantics. But there are some subtle differences, and it depends to some extent on which laws you look at.

Of course, a "firing" or "termination" usually has a worse connotation, and it typically means the action is permanent. On the other hand, some companies who terminate workers may still categorize them as "eligible for rehire" under some circumstances.

A "layoff" is often associated with a restructuring, a reduction in force, or simply a lack of work, and it may or may not have anything to do with the employee's job performance or productivity. Then again, many layoffs are in fact based on such criteria, and many layoffs are permanent.

Employers sometimes take the "easy way out" and label a separation a "layoff" when they're really terminating an employee for poor performance. They may do this to avoid confrontation, documentation, discipline and hurt feelings. Oregon is an employment-at-will state, so at-will employers who use this

EMPLOYER QUERY: SEPARATION TERMINOLOGY

Layoff versus discharge distinction can be murky

strategy aren't necessarily breaking the law.

Still, it's a risky approach that may be a recipe for a lawsuit, because the so-called layoff gives the impression that the employee will be returning when the economy recovers or when revenues rise. In fact, the employer may have no intention of ever reinstating the person. When this "laid off" worker -- who was never counseled about performance issues -- learns that a replacement worker has taken his place, he quickly figures out that he was fired, and he may conclude that the employer had a discriminatory motive.

There are a few legal distinctions between layoffs and terminations. An employee who is laid off for lack of work will often be eligible for unemployment benefits, but the Oregon Employment Department will deny benefits when it determines that an employee was discharged for "willful misconduct."

Oregon's wage and hour regulations make another distinction. When an employer terminates an employee, the employer must pay all final wages by the end of the next business day. But when an employee is laid off and the employee is reasonably expected to return to work within 35 days, the layoff is not considered to be a termination under the wage rules, and the employee's wages are simply due at the next regularly scheduled payday following the layoff.

When an employee is laid off with no reasonable expectation that he will return to work, the employer must treat the layoff as a termination, and all wages are due by the end of the next business day following the layoff.

Reason for termination: To tell or not to tell

EMPLOYER QUERY: TERMINATION

Honesty the best policy when terminating an employee

QUESTION: Are we required to give a reason for discharging an employee? I know that employers often get sued because of the reasons they provide for firing employees. Since employment is "at will" in Oregon, can I simply tell a

EMPLOYER QUERY: TERMINATION

Honesty the best policy when terminating an employee

problem employee that his services are no longer needed? Or instead, can I just call it a layoff or a reduction in force?

ANSWER: You're correct that Oregon is an at-will employment state, which means that if you haven't created a contract with your employee, either you or the employee may terminate the relationship at any time, without advance notice and without giving a reason.

Having said that, however, wise employers don't rely on their at-will status when making important personnel decisions. The many exceptions to at-will employment nearly swallow the rule. Even if you're an at-will employer, you can still be sued for violating public policy or civil rights laws or for breaching a contract.

It may be tempting to take the easy way out when terminating an employee, but simply telling him that his services are no longer needed or that you're conducting a reduction in force suggests that his job position is being eliminated. Labeling your action a "layoff" suggests that you may be bringing the employee back to work at a later date, when in fact it sounds as though you have no such intention.

If you're actually discharging the "problem employee" for poor performance and replacing him with another worker, it's likely the employee will learn of your actions. And if you never counseled the employee and documented his performance issues, he's likely to conclude you had a hidden, illegal motive for discharging him.

You may then find yourself defending a claim of discrimination based on age, race, sex, religion, disability, or some other protected class.

Therefore, the better course of action is to address performance issues head-on. Implement clear policies. Train employees on your rules and have them sign a form acknowledging their understanding of your company's guidelines. Promptly counsel the employee who is not performing to your standards, documenting your actions and providing him an opportunity to correct the problem.

There's no law requiring at-will employers to use progressive discipline, but it's a way for you to demonstrate fairness in the workplace and to get your problem employee back on track.
If you decide to terminate the employee as a last resort, he should by that time

EMPLOYER QUERY: TERMINATION

Honesty the best policy when terminating an employee

be well aware of the reason for the discharge. When you've applied your business policies consistently with all of your staff, the discharged employee should realize that you've been fair, giving him plenty of notice of the problem and opportunities to improve his performance.

If you provide the employee a legitimate, non-discriminatory reason for the discharge that's supported by documentation, you're actually less likely to be sued. In the worst-case scenario, if the employee claims that the termination was illegal, at least you'll have a built-in defense. Your written work rules and the documentation in your personnel file should demonstrate that you've applied your policies in a fair and legal manner.

Layoffs and age discrimination

EMPLOYER QUERY: REDUCTION IN FORCE

Employee layoffs implicate civil rights and wage issues

QUESTION: Financially speaking, last year wasn't a great one for our company. Revenues were sharply lower, and we're now faced with the need to lay off several employees. What are the legal requirements for conducting layoffs? We're concerned because a gentleman who has been with the company nearly 20 years holds one of the jobs we've slated for elimination. Are we required to keep him instead of others with less seniority, even though his performance in recent years has been lackluster?

ANSWER: How you conduct layoffs is largely a matter of your company policy. Employment laws don't provide a prescribed method or "legal way" to conduct layoffs. Instead, Oregon and federal civil rights laws tell you what you can't do as an employer.

You can't make employment determinations -- including layoff decisions -- that are based on an employee's age, race or other protected classification. That's why it's important to clearly document the reasons for your layoff decisions to show you haven't violated discrimination laws.

If you're an at-will employer and don't have a collective bargaining agreement

EMPLOYER QUERY: REDUCTION IN FORCE

Employee layoffs implicate civil rights and wage issues

or other employment contracts with workers, you're not required to retain a long-term employee simply because he has greater seniority.

Still, you do risk an age discrimination claim if you lay off your 20-year employee while retaining younger, less experienced workers. If the job performed by the more senior employee is now obsolete or unnecessary, that could be a legitimate, non-discriminatory reason for eliminating the position. But if you are selecting this individual for layoff based on job performance, have you clearly documented the performance problems and given the employee a fair opportunity to correct them?

It would help to have a policy that sets forth criteria on how your company selects individuals for layoff. In screening employees for layoff, some companies simply look at actual job duties performed and eliminate those positions that are no longer necessary (or jobs that are the least critical). Other companies make layoff decisions based on seniority, attendance records, job performance, or some combination of these factors. It is important for employers to demonstrate that they objectively considered reasonable factors other than age (RFOA) in conducting reductions in force (RIFs). The EEOC has issued new regulations to help employers determine if their RFOA are an effective defense to a claim under the Age Discrimination in Employment Act. Please review those regulations through the EEOC website at http://eeoc.gov

Employers should also consider getting waivers of claims under the civil rights laws from laid off employees in exchange for severance payments or temporary continuation of benefits. Counsel should be consulted to guide employers through this process.

If you're an at-will employer, you're not obligated to provide advance notice to employees that they'll be laid off. Of course, most employers strive to break the news gently and provide as much notice as possible when layoffs are imminent. If you have 100 or more employees and are closing an entire plant or conducting a mass layoff, the federal Worker Adjustment and Retraining Notification Act in some cases requires you to provide notice to employees 60 days in advance. Contact the U.S. Department of Labor for more information on the WARN Act.

Also note that Oregon wage laws provide special rules for paying employees who are laid off. If you're conducting a temporary layoff and you're certain the employee will return to work for you within 35 days, the wage laws allow you to consider the worker a continuing employee. Therefore, there isn't a special

EMPLOYER QUERY: REDUCTION IN FORCE

Employee layoffs implicate civil rights and wage issues

"final paycheck" deadline, and you can simply issue a paycheck on the next regular payday. On the other hand, if you're not sure or have no expectation the employee will return within 35 days, the final paycheck is due by the end of the next business day after the layoff.

"Willful misconduct" standard

EMPLOYER QUERY: WILLFUL MISCONDUCT

Employer sets rules for discipline and discharge

QUESTION: We're thinking of firing an employee for a fairly serious performance issue but don't know if it really qualifies as willful misconduct that justifies termination. What are the legal standards for making that determination?

ANSWER: You're not required to show "willful misconduct" or "just cause" in order to terminate an employee, unless you have an employment contract or collective bargaining agreement that requires it.

If you're an at-will employer – and most Oregon employers are – you can discipline or discharge an employee for violating your policies or failing to meet the work expectations you've set. You're entitled to set your own workplace standards for performance and conduct, as long as you apply those standards in a non-discriminatory manner.

You're probably thinking of the standard used by the Oregon Employment Department. That agency investigates on a case-by-case basis whether a terminated employee engaged in willful misconduct. If not, the employee is generally eligible for unemployment benefits. However, the fact that your employee may receive benefits doesn't mean that your decision to terminate is unlawful or unjustified.

Workers determining peer's termination

EMPLOYER QUERY: TERMINATION

Employer's "game show" termination plan not a wise strategy

QUESTION: I run a family business, a moving company that I inherited from my grandfather. Because I'm so involved in the day-to-day operations, I don't have much time to deal with personnel issues or documentation of employee performance. However, I've been hearing from several employees that they're unhappy with a co-worker they say isn't pulling his weight. This individual seems to be having a negative impact on employee morale. I trust my employees' judgment and am wondering if it's legal to select an individual for termination by having employees vote out "the weakest link."

ANSWER: It's an interesting concept, but this game show strategy for employee discipline poses many risks for your company. It's no substitute for having clear policies, coaching and counseling employees when performance issues arise, and documenting the disciplinary actions you take.

As an at-will employer, it's up to you to determine how and when you'll discipline or terminate an employee. As long as you're not discriminating or breaching a contract, you can set the rules.

But does this mean you could have employees spin a "wheel of fortune" and terminate the ones who land on "bankrupt?" Or have workers perform "fear factor" stunts and terminate those who chicken out? You'd be placing your company in serious jeopardy (pun intended) of lawsuits claiming that you violated public policy, acted in an outrageous manner, or caused emotional distress.

Similarly, there's no statute on the books that would prevent you from implementing your "weakest link" voting plan, but the idea is fraught with problems. Would you conduct the vote by secret ballot or adopt the TV method and have employees in turn announce their preference as to who gets the ax? Neither method is likely to do much for your morale problem.

Also, do you know the true motivations of your staff in wanting to eject the particular co-worker? Apparently, you haven't observed the performance issues firsthand or investigated the facts. What if your employees have some illegal motive for wanting you to terminate the individual? As an employer, you can't rely on co-worker or customer preference if it results in discrimination.

EMPLOYER QUERY: TERMINATION

Employer's "game show" termination plan not a wise strategy

What if the individual has indicated he has a disability and would be qualified to "pull his weight" if you offered reasonable accommodation? Without counseling the employee and entering into the interactive process, you'd never discover this.

Furthermore, even if the desire to remove this worker has nothing to do with his age, race, religion or other protected class status, can you see why it might appear to him -- or to a jury, for that matter -- that discrimination is involved?

An employee who has never been counseled about performance issues is likely to be shocked when suddenly discharged. If the reason for termination is a mystery to the employee, he's likely to conclude you and co-workers had a hidden or illegal motive.
This isn't to say that feedback from peers should be discounted. On the contrary, many companies today use peer assessment as one factor in evaluating employee performance. Co-worker input, however, shouldn't be used as a substitute for good supervisory practices. And good supervisors don't terminate an employee in front of co-workers like Donald Trump does on Celebrity Apprentice. Allow terminated employees to retain a modicum of dignity in the process and you're less likely to get sued over the termination.

Termination of live-in employee

EMPLOYER QUERY: EVICTION / EMPLOYER AS LANDLORD

Live-in employee gets the boot for sexual harassment

QUESTION: Three of our staff members recently complained to us about sexual harassment by our on site security guard, and after an investigation, we've determined their complaints are valid. We suspended the security guard pending our investigation and have now decided we need to discharge him. The problem is that as part of our employment arrangement, he lives in a building on our property. What kind of process do we have to go through to legally evict him?

ANSWER: When you, the employer, are also a landlord, and your employee's right to occupancy of the premises is conditional upon employment, the arrangement is excluded from the normal Oregon landlord and tenant statutes. Under ORS 90.110(7) and ORS 91.120, you may evict your live-in employee after 24 hours following a written termination notice, or after the period set forth in a written employment contract, if you have one – whichever time period is longer.

Termination for theft

CASE STUDY: TERMINATION FOR "THEFT"

Firing worker for suspected theft can be problematic

QUESTION: Our newest employee, Jason, has become our biggest headache. We believe he's stealing from us. On three successive nights this week, the till has been short by more than $20, and we didn't have this problem before we hired Jason for the evening shift.

We're assuming that theft gives us grounds for termination, but what are the legal requirements? If we let Jason go, do we have to tell him the reason, or can we simply say that things aren't working out? Can we just lay him off? Would he be eligible for unemployment benefits?

ANSWER: You should proceed very cautiously before making the decision to

CASE STUDY: TERMINATION FOR "THEFT"

Firing worker for suspected theft can be problematic

terminate an employee for theft or suspected theft. Many employers in your situation have found themselves in court defending claims of defamation or discrimination.

Oregon statutes don't spell out specific "legal grounds" for termination. Rather, Oregon is an employment-at-will state. How you discipline or terminate employees is up to your company policy -- as long as you're not discriminating, violating an employment contract, or acting contrary to public policy.

Therefore, you can terminate an employee when you suspect theft, but you should have good documentation to support such an action. Consider these questions: Have you thoroughly investigated the circumstances surrounding the till shortages? Do you really have strong evidence connecting Jason to the missing money? Did other employees also have access to the till on the nights in question? Do you have a clear policy on cash handling and till shortages? Are employees aware of the consequences for violating your policy?

If you do decide to terminate Jason, you're not legally obligated to explain the reason, and you could simply say that "things aren't working out." But is it really a good idea to provide an ambiguous explanation or no explanation at all? If the reason for termination is a mystery to the employee, he's far more likely to conclude you had a hidden or discriminatory motive. Also, labeling the termination a "layoff" would not be honest and would likely suggest to Jason that the action is temporary, when in fact you probably have no intention of reinstating him.

Terminations for theft are fraught with legal landmines, so check with your company attorney before making your decision. Often, the way you characterize a termination can cost you a defamation lawsuit. For example, employment attorneys recommend that you not use legal terms like "theft," "stealing" or "embezzlement" unless there's a criminal conviction or indictment. Instead, stick with the facts you can document. If you have evidence that Jason was responsible for the till shortage, you could discipline or terminate him for "failing to balance the till" or "failure to safeguard the funds."

The Oregon Employment Department will decide whether Jason will receive unemployment benefits. The determination is based on whether you can show Jason engaged in "willful misconduct." Since that is a high standard, Jason may be eligible for benefits despite your suspicions.

PERSONNEL RECORDS

Employees' right to view records

Oregon employers must provide employees and former employees a "reasonable opportunity" to inspect or obtain copies of personnel records, pursuant to ORS 652.750.

Upon an employee's or former employee's request, just how quickly must an employer respond? The statute requires that it be done within 45 days absent an agreement with the employee to extend that date. Such agreements should be in writing.

EMPLOYER QUERY: ACCESS TO PERSONNEL RECORDS

Oregon employees are legally entitled to view personnel records

QUESTION: My employee, Lane, is late for work about four to five times a month. Although I've told him this is unacceptable, he hasn't changed his ways. So I sat down with him yesterday and we had a more serious conversation, in which I told him that he would be subject to discipline if the behavior continues. I didn't give him a formal written warning, but I did tell him that I had been making notes about the tardiness in his personnel file. He then angrily retorted that I was breaking the law, and that I didn't have a right to put anything in his personnel file unless he had the opportunity to view it and to write a formal rebuttal. Now he's demanding to inspect his entire personnel file. What are my legal obligations here?

ANSWER: Oregon laws don't require you to advise an employee each time you place something in his personnel file, nor do they require you to allow the employee to submit a rebuttal.

But in Oregon, as in several other states, an employee does have the right to inspect his personnel records, and the employer must provide a reasonable opportunity for the employee to view these records at the workplace.

In addition, at the employee's request, the employer must provide a certified copy of the records. Providing a "certified" copy doesn't entail a complicated legal process. Rather, the person in charge of maintaining the records can certify that the documents provided are a true and accurate copy of the personnel records. The law pertaining to personnel records, ORS 652.750, permits an employer to charge a reasonable fee to recover the actual costs of

EMPLOYER QUERY: ACCESS TO PERSONNEL RECORDS

Oregon employees are legally entitled to view personnel records

making the copies, presumably including actual staff time, postage, supplies, etc.

The law defines "personnel records" broadly as any records "which are used or have been used to determine the employee's qualification for employment, promotion, additional compensation or employment termination or other disciplinary action." So any records you use to monitor or rate Lane's performance fall under this definition.

Note that the definition isn't limited to the contents of the employee's official file. Employers are often surprised to learn that records outside of the personnel file, such as documents in a supervisor's "working file," also fall within the definition of "personnel records" if those documents are used to evaluate the employee.

Other material outside of the physical personnel file – such as notes written on your home computer -- may also need to be included. Say, for example, that you sent an e-mail to Lane's supervisor, asking her if his tardiness has improved. That e-mail, as well as the supervisor's response, is within the definition of "personnel records" if it contributed to any decisions you made about Lane's employment.

There are some limits to this law. It does not require employers to turn over confidential reports from previous employers, nor records pertaining to the conviction, arrest or investigation of illegal conduct. And it wouldn't require you to provide routine records like payroll or insurance documents that aren't used to evaluate the employee. Note, however, that if the employee was disciplined for working unauthorized overtime or time clock policy violations, payroll records might have been relied upon, and would therefore, meet the statutory definition. Be somewhat flexible in your thinking about what constitutes a personnel record.

The bottom line is that you should create any documentation for the personnel file in a neutral, factual and objective manner. Don't write anything in your employee's file -- or anywhere else, for that matter -- that you're not comfortable with the employee eventually viewing.

What about allowing Lane a rebuttal? Some states give employees the right to place a formal rebuttal in the file whenever the employer takes disciplinary

EMPLOYER QUERY: ACCESS TO PERSONNEL RECORDS

Oregon employees are legally entitled to view personnel records

action, but Oregon is not one of them. So unless you have a contract or collective bargaining agreement which allows workers this right, you could refuse Lane's demand. Sometimes, giving the employee this opportunity allows them to vent or gives you further "ammunition" to support the discipline, however, so you may wish to consider allowing it.

In addition, if you choose to allow the employee's written response it shows that you're fair and willing to consider all of the facts, and it doesn't mean you have to retract any disciplinary action. Denying Lane the chance to file a rebuttal is likely only to increase the tension between you. And with most issues in the workplace, you're better off when the emphasis is on greater -- not fewer -- opportunities for communication.

Supervisor's "working file"

EMPLOYER QUERY: PERSONNEL RECORDS

Employee may have right to documents in supervisor's working file

QUESTION: Are we required to provide a terminated employee, at her request, copies of anecdotal notes from her supervisor's file?

ANSWER: Probably – depending on what you mean by "anecdotal notes." A statute in the Oregon wage laws, ORS 652.750, gives employees the right to inspect or receive a certified copy of personnel records.

The statute refers to "records of the employee which are used or have been used to determine the employee's qualification for employment, promotion, additional compensation or employment termination or other disciplinary action."

That broad definition can include documents that are outside of your official personnel file. If the notes contained in the supervisor's working file were used to rate the employee's performance or if they relate to the discipline or

EMPLOYER QUERY: PERSONNEL RECORDS

Employee may have right to documents in supervisor's working file

termination decisions you made, then they are personnel records that the employee has a right to view.

Personnel records statute

ORS 652.750

Inspection of records by employee; furnishing copy to employee; disposition of record on termination of employment; charge for copies; public safety officer records. (1) As used in this section:

(a) "Employer" has the meaning given that term in ORS 656.005.

(b) "Personnel records" does not include records of an individual relating to the conviction, arrest or investigation of conduct constituting a violation of the criminal laws of this state or another state or the United States, confidential reports from previous employers or records maintained in compliance with ORS 351.065.

(c) "Public safety officer" has the meaning given that term in ORS 236.350.

(2) Except as provided in subsection (7) of this section, within 45 days after receipt of an employee's request, an employer shall provide reasonable opportunity for the employee to inspect, at the place of employment or place of work assignment, the personnel records of the employee that are used or have been used to determine the employee's qualification for employment, promotion, additional compensation or employment termination or other disciplinary action. Within 45 days after receipt of the employee's request, the employer shall furnish a certified copy of the records.

(3) Upon termination of employment, the employer shall keep the terminated employee's personnel records for not less than 60 days. Within the 60-day period, the employer shall provide the employee with a certified copy of the records within 45 days of receiving the employee's request. After the 60-day period, the employer shall provide the certified copy within 45 days of receiving the employee's request if the employer has the records at the time of the request.

(4) Notwithstanding the time periods described in subsections (2) and (3) of this section, if the employee's personnel records are not readily available, the employer and the employee may agree to extend the time within which the employer must provide the employee reasonable opportunity to inspect the records or furnish the employee a certified copy of the records.

(5) For the services referred to in subsections (2) and (3) of this section only, an employer may charge an employee no more than an amount reasonably calculated to recover the actual cost of providing the services.

(6)(a) Except as provided in paragraphs (b) and (c) of this subsection, an employer may not place an adverse comment in the personnel records of a public safety officer unless the officer has first read and signed the document containing the adverse

comment.

(b) If a public safety officer refuses to sign a document containing an adverse comment, the employer may place the document in the officer's personnel records with a notation that the document was presented to the officer and the officer refused to sign it.

(c) If a public safety officer is not available to read and sign the document containing an adverse comment at the work location where the personnel files are maintained, the employer may place the document in the officer's personnel records and mail a copy of the document to the officer by regular mail or interoffice mail.

(d) A public safety officer may write a response within 30 days of being presented with a document containing an adverse comment. If a public safety officer writes a response to a document containing an adverse comment, the response must be attached to the original document and placed in the officer's personnel records.

(7)(a) Upon request, a public safety officer may inspect the officer's own personnel records at a reasonable time at the location where the records are kept by the employer.

(b) If, after inspection, a public safety officer believes that any portion of the material is mistakenly or unlawfully placed in the officer's personnel records, the officer may request in writing that the mistaken or unlawful material be corrected or deleted. The request must describe the corrections or deletions requested and the reasons supporting the request and provide any documentation that supports the request. The employer shall respond within 30 days from the date the request is received. If the employer does not correct or delete the material, the employer shall place the request and the employer's response to the request in the officer's personnel records. [1977 c.861 §2; 1985 c.404 §6; 2007 c.276 §1; 2009 c.716 §4]

Retention of records

Although ORS 652.750 requires employers to maintain employee records for only 60 days after termination, other state and federal laws mandate longer time periods for retention of specific types of records.

For example, under Title VII of the Civil Rights Act of 1964, employers must retain all hiring records for a minimum of one year from the date of the hiring decision. Oregon wage laws require employers to retain payroll records for two years (but the statute of limitations for wage claims is six years, two years for overtime claims). Under the federal Fair Labor Standard Act (FLSA), employers must retain general payroll records for at least three years and individual time cards for a minimum of two years. Under the federal Family and Medical Leave Act (FMLA), employers must retain all family leave records for a minimum of three years.

Former employees are entitled to file certain legal claims against the employer several years after the termination of employment:

Types of Legal Action	Statute of Limitations
Contract Claims	6 years
Discrimination Claims	1 year
General Wage Claims	6 years
Overtime Claims	2 years
Tort Claims	2 years

Therefore, a good guideline for employers is to retain all personnel records for a period of at least **seven years** so that documentation will be available to defend against the various types of actions that employees and former employees may bring. The federal Lilly Ledbetter Fair Pay Act extends the limitations period for some discrimination claims if there is a discriminatory paycheck or benefits payment, thus extending the statute of limitations in certain cases into retirement. Indefinite electronic retention of some records may now be advisable.

Note that under ORS 652.750(3), for as long as an employer does retain personnel records, the employer must produce them if a former employee requests to inspect them or to obtain a certified copy.

POST-EMPLOYMENT ISSUES

Payment of final wages

ORS 652.140 sets the following employer deadlines for final paychecks:

REASON FOR SEPARATION	FINAL PAYCHECK DEADLINE
Termination*	End of the next business day**
Quit with 48 hours advance notice	Final work day
Quit without 48 hours advance notice	Five working days, excluding weekends and holidays OR the next regular payday (whichever comes first)

* A termination by mutual agreement of the employer and employee falls into the same category as a regular discharge for purposes of the final paycheck, and the check is due not later than the end of the next business day. ORS 652.140(1).

** Business days are Monday through Friday excluding legal holidays under the final paycheck rules, regardless of whether the employer is open for business on the weekend. Therefore, if an employee is terminated on Friday, the paycheck is due by close of business on the following Monday.

Upon the discharge or resignation of an employee, employers may not hold the final paycheck pending the return of company property still in the employee's possession. Employers are also prohibited from deducting from the final paycheck for uniforms or tools not returned, till shortages, or suspected theft by the employee.

If an employee unlawfully retains company property, customer lists, or trade secrets, the employer may pursue all other legal remedies, including contacting the police or filing a legal action in court to recover the property or damages suffered.

If an employer has made a cash loan to an employee for the employee's sole benefit, the employer may deduct from the final paycheck, if the employee has voluntarily signed a loan agreement. A deduction from the final paycheck for repayment of a loan may not

exceed 25 percent of the employee's disposable earnings or the amount of disposable earnings in excess of $218 per week, whichever is less.

Penalties for late final paychecks: Under ORS 652.150, a court or hearings officer may award the employee a full day's wages (calculated at eight times the employee's regular hourly rate) for each day the check is late, for up to 30 calendar days. Employers can also recover attorney's fees. The penalty may not exceed 100% of the unpaid wages if the employer pays the wages due within 12 days after written notice of nonpayment is sent to the employer – provided the employer has not willfully violated the final pay provisions of the law in the preceding year. If the action for late wages involves the minimum wage rate or overtime claims, there is also the potential for civil penalties payable to the employee under ORS 653.055(1)(b), calculated in the same way as penalty wages under ORS 652.150.

Job references

If a prospective employer contacts you requesting a job reference for a former employee, what information can you legally provide? Will you be liable for defamation if you give a bad reference? Are you obligated to provide any reference at all?

Every employer should determine its policy on how and when it will provide references. It's important to train front-line supervisors on the company's reference policy, as they are often contacted directly for references on former employees. If your organization follows a consistent policy on providing references, it will be less susceptible to claims of discrimination or retaliation.

An example of what not to say when providing a job reference:

"You say you want to know about Wendy? I wouldn't hire her if I were you. We had reason to believe she was a thief. We know *someone* was embezzling from us, and we figure she must have been the one. She makes a good first impression, because she dresses nicely, and she works hard ... but I heard rumors from my employees that she was leading a loose, immoral lifestyle outside of work. This is off the record, but I heard that she belongs to a church that encourages orgies and spouse-swapping! I also found out that she filed workers' compensation claims against her prior employers. When she told me she was pregnant, I knew she'd probably get hurt and file a claim against us, too."

The foregoing "reference" violates just about every rule. The employer provides very little information that is actually job-related. In fact, the only job-related information is that Wendy "dresses nicely" and "works hard," so she may in fact be an excellent employee.

The employer in this example provides mainly unsubstantiated information and speculation, repeats rumors and gossip, speaks about the employee's private life, and discusses a slew of protected civil rights classifications, including religion, injured worker status, marital status, pregnancy and maternity.

The employer also makes legal conclusions, accusing the employee of "theft," apparently with little evidence and without a criminal indictment or conviction.

This reference is clearly a recipe for discrimination and defamation claims.

EMPLOYER QUERY: JOB REFERENCES

Employers should follow consistent job reference policy

QUESTION: What are the rules for giving job references? When an employer contacts us for a reference on one of our former employees, our standard policy is to provide only the basics, such as dates of employment and job title. Do we have any duty to warn a prospective employer about an individual we terminated for poor job performance and bad behavior? If we were to give out negative information, wouldn't we be liable for defamation?

ANSWER: In general, you have no obligation to provide a job reference, and your best bet is to consistently follow your company policy. Only in special circumstances have courts held that a company has a duty to warn a prospective employer.

As an employer, you have three basic policy options for handling reference requests. The first option is the "say nothing" approach, i.e. providing no references at all for any former employees. A second option is to say just a little. Many organizations have adopted the "name, rank and serial number" approach your company has selected. A third option is to provide full, substantive references, in which you discuss the specifics of the individual's job performance.

Many employment attorneys recommend giving out little or no information on former employees, in order to avoid claims of defamation. There is, however, an Oregon statute that provides some protection to employers who choose to provide references. That law, ORS 30.178, states that an employer who discloses information about a former employee's job performance to a prospective employer is presumed to be acting in good faith.

If you provide a reference upon request of the prospective employer or the former employee, you are immune from civil liability, unless the employee can prove you discriminated or knowingly gave false or deliberately misleading information with a malicious purpose.

EMPLOYER QUERY: JOB REFERENCES

Employers should follow consistent job reference policy

You're liable for defamation only when you make an unprivileged, false statement about your former employee to a third party, if that statement damages the individual's reputation.

So contrary to popular belief, it's not illegal to give a bad reference. If your company policy permits you to provide substantive references, you can give job-related, documented, truthful information about your former employee to a prospective employer – even if it's negative information.

The key is to be consistent in how you respond to reference requests. If you deviate from your policy and provide substantive references for some employees but not others, you're susceptible to claims of discrimination or retaliation. Contact your employment attorney for help in crafting a reference policy.

If you do provide references, you may, in rare situations, have a duty to warn a prospective employer about a dangerous employee, and you may be liable for "negligent referral" if you don't. Some courts have held that if you give any positive information about an employee, you also have an obligation to reveal that the individual may be dangerous. This rule could apply if your employee engaged in harassment, fighting, violence or other threatening behavior in the workplace.

In one such case, an insurance company employee engaged in bizarre and threatening behavior at work and was found carrying a gun in his briefcase. The company terminated him. Despite a policy not to write recommendation letters for former employees, the company wrote this employee a recommendation letter stating he had voluntarily resigned because of a restructuring. The company failed to mention any of his threatening activities. Relying on the letter, another insurance company hired him, and after that second company fired him, he shot five supervisors, killing three of them. Their families sued the first company for negligently failing to disclose all of the facts.

Defamation Claims

The main risk associated with giving references is that the employer may find itself defending a defamation claim. An employer's statements that adversely reflect on an employee's abilities or character and that happen to be false may create liability for defamation.

In order to prevail on a defamation claim, an employee must show that the employer (or former employer) made an unprivileged, false and defamatory statement about the employee to a third party which damaged the employee's reputation.

Note that the statement must be false to create liability for defamation, so employers who take care to give out only factual, documented, objective, job-related information will not be liable. "Truth" is a defense to a claim of defamation.

Employers have a "qualified privilege" to communicate negative information about a former employee if the statements are made with a good-faith belief that they are true, serve a business interest or purpose, are limited to that specific purpose, are made on a proper occasion, and are communicated only to proper parties.

If an employee files a defamation suit, he or she may be entitled to a jury trial to decide if the employer has abused the privilege and is in violation of the foregoing guidelines.

Statute on References and Liability

ORS 30.178:

Liability of employer for disclosing information about employee to new employer; no action based on compelled self-publication. (1) An employer who discloses information about a former employee's job performance to a prospective employer of the former employee upon request of the prospective employer or of the former employee is presumed to be acting in good faith and, unless lack of good faith is shown by a preponderance of the evidence, is immune from civil liability for such disclosure or its consequences. For purposes of this section, the presumption of good faith is rebutted upon a showing that the information disclosed by the employer was knowingly false or deliberately misleading, was rendered with malicious purpose or violated any civil right of the former employee protected under ORS chapter 659 or 659A.

(2) A civil action for defamation may not be maintained against an employer by an employee who is terminated by the employer based on a claim that in seeking subsequent employment the former employee will be forced to reveal the reasons given by the employer for the termination. [1995 c.330 §1; 1997 c.754 §1; 2001 c.621 §68]

Tips for Employers on Providing Job References:

1. *Develop a consistent response to all reference requests.*
2. *Route all requests for references to one or two key personnel who understand the legal issues raised by reference inquiries.*
3. *Give only specific, documented facts, not subjective opinions.*
4. *Provide only information that is job-related.*
5. *Provide information only to those who have a business need to know (prospective employers of the individual).*
6. *Obtain signed releases before giving responses to reference requests.*

CONCLUSION

Well-written, clear policies, vigilant supervision, hands-on management, and consistent discipline with documentation to support adverse employer actions are critical to keeping things humming in the workplace. We may want to be fun, popular managers or supervisors, but unchecked problems have detrimental effects on morale and productivity. Misconduct that is not corrected can expose the organization to liability. The primary goals are to correct behavior problems, improve attendance and boost productivity, but these objectives are best met in an environment where the prospects for getting sued are minimized or avoided altogether. By applying the principles in this handbook and keeping staff trained in the ever-changing developments in employment law you will have a better workplace and smoother relationships with co-workers. You will also be better prepared if you end up facing a legal challenge to discipline or termination.

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