

Workplace Nightmares...

The Employee Who Haunts Your Dreams

Presented by:

Neil Alexander, Littler

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Neil Alexander
Shareholder
Littler Mendelson, P.C.
Phoenix Office
602.474.3612
nalexander@littler.com



**The Employee Who Haunts Your
Dreams: *Hot Topics***

The (Medical) Marijuana User



What Is the Arizona Law?

- Jeff Spicole, your summer intern, has tested positive for marijuana following a workplace injury. What do you do next?
 - Can require valid card
 - Non-discrimination of employees and applicants
 - Transfers



What is the Arizona Law?

- It's not set in stone:
 - Does it matter he is an intern?
 - Safety-sensitive exception
 - Handbook policies
 - Privacy issues

**The
“Gun-totin”
Worker**



Scenario

- Dirty Harriet carries a gun regularly for safety. She works at the Circle Q as a manager and insists on bringing the gun onto the premises. She says “We have a lot of robberies in this and nearby locations. I feel safer having that weapon just in case I ever need to protect my employees.”
- What are your options?



What Are Your Options?

- On your premises
- In your parking lot
- Does it matter if you don't own the building or parking lot?
- Vehicle exceptions and requirements
- Handbooks and postings

The FORMERLY Undocumented Employee



Scenario

- Your employee Mork visits human resources and claims he is “now legal.” The employee presents a driver’s license and Social Security card bearing a name and Social Security number different from what is listed on his seemingly accurate and complete I-9 form.



Why Do We Care?

- Short Answer: Immigration and Customs Enforcement (AKA “ICE”)
 - Investigative branch of Department of Homeland Security (DHS)
 - “Enforces the law and engages in effective worksite enforcement” to reduce “the demand for illegal employment and protects employment opportunities for the nation’s lawful workforce”
 - Civil enforcement, including Form I-9 inspections, administrative fines, and federal contract “debarment”
 - Criminal prosecutions of employers, including those that “utilize unauthorized workers as a business model”

Recent Fiscal Year “Accomplishments”

- ICE served 3,004 notices of inspection resulting in \$12,475,575 in administrative fines
- ICE made 520 criminal arrests tied to worksite enforcement investigations
 - 240 owners, managers, supervisors, and human resources employees faced charges of harboring, identity theft, and Social Security fraud
- ICE debarred 376 individuals and businesses as a result of administrative and criminal violations



What Are Our Options?

- Option 1:
Terminate employment
 - Proper Basis = Dishonesty, falsification of records, violation of integrity policies
 - Why?
 - Improper Basis = Not (previously) authorized to work in the United States
 - Why?
 - Terminations highly scrutinized



What Are Our Options?

- Do **NOT** follow Option 1 if the employee works in California!
- California Labor Code
 - Contains a provision prohibiting employers from discharging or taking any other adverse action against an employee “because the employee updates or attempts to update his or her personal information based on lawful change of name, Social Security number, or federal employment authorization document”

What Are Our Options?

- Option 2:
Continue employment
 - Other than if you have a California-based employee, when would this option be the better of the two?
 - How do we proceed?



How Do We Proceed?

1. Form I-9

- Employee should complete Section 1 of the current version of the I-9 form using the “new” information
- Employer representative should review an original List A document OR an original List B document and an original List C document
 - Do not back date the form
- Retain this form with the original I-9 form; it is advisable that the employer create an accompanying “note to the file” documenting the reason for the new form



How Do We Proceed?

2. E-Verify

- Current employee
- Correcting I-9 v. new hire

3. To discipline or not to discipline



The Social Media User and Abuser, Whiner and Complainer



If My Employee Complains About Work on Facebook I Can Fire Her, Right?

A: Not so fast! Any chance this is “protected concerted activity?”

Q: Not if my employees aren’t in a union right?

A: Wrong! Even non-union employees have rights under the National Labor Relations Act



Protected Concerted Activity- NLRA Rights



- *“Employees shall have the right . . .*
 - to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and . . .
 - *to engage in other concerted activities for the purpose of . . . mutual aid or protection”*

Protected Concerted Activity



- Two Parts:
 1. *“Why?”*
 - Must be engaged for the purpose of “mutual aid or protection” – an issue regarding terms/conditions of employment
 2. *“How?”*
 - The activity must be concerted – that is, raised by (or impliedly on behalf of) more than one – “group-minded”

“Protected” – Think Broadly

- Mutual aid or protection means that issue goes beyond an individual complaint; applies to at least two
- Employees (even non union!) have the right to:
 - Protest working conditions
 - Express dissatisfaction with working conditions with one another or to management
 - **Discuss compensation, policies, treatment with one another**
 - Complain about work matters including perceived favoritism
 - Criticize management
 - Enlist outside support

“Concerted”

- If it:
 - Involves two or more employees
 - Grew out of prior group activity
 - Employee acts formally or informally on behalf of a group of employees
 - Employee solicits other employees to engage in group action, even if rejected
 - Employees don’t have to agree on all terms of the protest – they just need to oppose the employer’s actions regarding working conditions generally
 - On Facebook- Did someone like the post? What were the comments?

Loss of Protection

- Employee can lose protection based upon misconduct in delivery
- RARE circumstances under this Board when loses protection
- What about defamation
- What if messages are all mixed together – name calling and protected complaints



Social Media Policy



- “Likes” on Facebook can be protected concerted activity
- Look closely to see what specific posting or comment the employee has “liked” – one “like” does not mean approval of the entire comment chain
- Look to see who is posting – more risk if employees liking the post of other employees posting about work conditions

Scenario



- An employee becomes frustrated with her manager's lack of explanation regarding her commissions. She logs on to Facebook and posts: "My manager is an a**hole!" Another employee "likes" the comment. They are both eventually terminated for "performance reasons."

This Situation Really Happened!

- ALJ determination . . .
- NLRB affirmed. *Why?*



Lessons Learned

- Watch out if you are taking actions based on employee's speech about the workplace, their working conditions, or their supervisors
- “Like” = speech
- Just because you don't have a union, doesn't mean your employees don't have NLRA protection
- Keep an eye on those social media policies!

You Can't Make Me Come To Work!

- An employee has requested full time telecommuting as an accommodation because:
 - Her expensive chair at home better relieves back and neck pain
 - The stress from commuting to work in traffic is unhealthy
 - The employee uses oxygen tanks which are allegedly not safe to transport during cold winters in the mornings
 - Workplace allergies, or indoor air pollution, she breaks out in rashes and watery eyes after 6 hours at work.



Toxic Employees
How To Spot Them?
How To Deal With Them?

What Are the “Warning Signs” of a Toxic Employee?

Some common characteristics include, but are definitely not limited to:

- **Gossips**
- **Badmouths (and backstabs)**
- **Cliquish**
- **Play favorites**
- **Stirs the pot**
- **Fails to take ownership**
- **Fails to take responsibility**
- **Wastes time**
- **Rude**
- **Quick to anger**

When and How to Deal with a Trouble Employee?

- Spot them at the hiring stage! But how?
 - Reference checks
 - Interviews, including behavior-based questions
 - Setting down clear expectations
 - Other strategies?



Performance Management, Performance Management, Performance Management!

The “Top 10” Best Practices for Performance Management

- 10. Utilize objective criteria when possible and evaluate using a detailed rating system**
- 9. Immediately document and address unsatisfactory performance; do not wait until the annual evaluation**
- 8. Allow employees the opportunity to provide feedback regarding their evaluations and any performance management**
- 7. Detail material performance shortcomings in the evaluations and any performance management documents**
- 6. Provide underperforming employees with specific expectations of improvement**

Performance Management, Performance Management, Performance Management!

The “Top 10” Best Practices for Performance Management

- 5. Provide assistance to underperforming employees to help them achieve the performance expectations you set**
- 4. Follow through on performance improvement plans**
- 3. Adhere to company policies on evaluations and other performance management processes**
- 2. Avoid comments that one could misinterpret as discriminatory or retaliatory in nature**
- 1. Ensure that performance evaluations are accurate, honest, and thorough; avoid grade inflation and sabotage**

A Note on “Pretaliation”

- Employee makes statements subtly threatening claims of discrimination, harassment, workers’ compensation, whistleblowing, etc.
 - Avoiding pretaliation claims
 - Performance management!
 - Responding to pretaliation claims
 - **Be Prepared**: Training, policies, performance evaluations
 - **Be Patient**: Avoid premature adverse action
 - **Be Careful**: Give yourself a Miranda warning
 - **Be Diligent**: Take complaints and accusations seriously
 - **Be Focused**: Keep your eye on performance issues

Termination Best Practices



1. Have a clear understanding of the specific reason(s) for termination
2. Ensure you have support for the decision, preferably with a paper trail (such as performance reviews, performance improvement plans, write-ups)
3. Make sure the process you follow is consistent with relevant policies and procedures
4. Check for and account for potential litigation landmines
5. Mitigate risk with effective communication of the decision

Questions?



Thank
You!



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