

Ten Ways an Employer Can Reduce Their Chances of Being Sued for Discrimination

PLUS Blog

Posted on May 10, 2021 by PLUShq

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As a result of the pandemic, employers continue to face unique challenges as many of their employees continue to work from home. Employers are also facing economic realities, which are resulting in layoffs or elimination of positions. Since the start of the pandemic, there has been an uptick in charges and complaints alleging employment discrimination. It is now common for an employee to allege that they had only positive performance reviews and that the adverse employment decision was pretext for discrimination. These ten tips can help employers reduce their chances of being sued for discrimination claims.

1. **Communicate.** Keeping an open line of communication with your employees and supervisors is key to ensure that they know what is expected of them. With all of the different avenues available today (Skype, Zoom, Microsoft Teams, email, phone, text), it is easier than ever to communicate with others at the press of a button. Although it is human nature for most people to avoid conflict, it is critical that an employer discuss performance issues with their employees as the situation unfolds versus waiting for an annual review. An employee cannot fix a performance issue if unaware of the problem.
2. **Follow Your Policies.** Policies mean nothing if you do not follow them. For instance, if you have a progressive discipline policy, then it should be followed. Let's say the policy provides

that a first infraction results in an oral warning; a second results in a written warning; and the third results in a suspension. If the employer automatically terminates the employee without providing an oral or written warning, that employee will likely argue that the employer failed to provide them with the first two warnings in violation of their policies, and likely that their termination was instead the result of discrimination, i.e. age, disability, race, gender.

3. **Document Everything.** A critical component for all employers is to document, document and document. Contemporaneous documentation is always best practice. Supervisors and managers should be directed to keep documentation in each employee's personnel file. For example, if the employer has a discussion or meeting with an employee about job performance issues, policy violations or a request for an accommodation, that should be documented including date of when the document is being drafted, the author of that document and details of the meeting.
4. **Keep Organized Personnel Files.** While this sounds basic, it is important for employers to keep organized personnel files of each employee including hiring records, performance reviews, disciplinary actions and job descriptions. The Americans with Disability Act requires that employers keep medical records separate from personnel files

including medical information related to a disability-related inquiry, a medical examination, leave, reasonable accommodations and workers' compensation claims. The medical record files are to be treated as confidential.

5. **Be Consistent.** Employers should be consistent in the way they apply their policies. For instance, if a manager writes up an employee for being late, then all employees should be written up for being late. Applying your policies consistently with all employees will help reduce the claim of unequal treatment.
6. **Provide Employees with Explanations.** Employees tend to jump to conclusions that they were discriminated against when employers fail to provide them with an explanation for the adverse employment action. By providing the employee with contemporaneous, written documentation confirming the reason for the adverse employment decision (suspension, termination, etc.), it leaves no room for speculation about the employer's rationale behind such decision.
7. **Train Your Employees.** Employers should require that their employees be provided with discrimination training so that they understand what their policies entail. Your supervisors and managers will be expected to enforce your policies. Thus, employers should also require that their supervisors and managers be trained on how to enforce said policies.
8. **Acknowledgments for Personnel File.** All discrimination policies should be docu-

mented with the employee's signature acknowledging said policies. Further, all training certificates should be kept in the personnel file, which will evidence the employee's knowledge of the discrimination policies.

9. **Schedule Meetings With Your Supervisors and Managers.** Even though we are all bombarded with meetings these days, it is critical to stay in touch with your supervisors and managers. Scheduling weekly or monthly meetings is a great way to stay in touch and ensure that they are communicating with their personnel about their duties and responsibilities, in addition to continuing to document any performance issues.
10. **Hire Counsel.** Before making any adverse employment decision (i.e. demotion, suspension, termination, layoff), contact a local employment attorney to discuss how to best proceed to reduce the chances of a discrimination claim. Such action can help to mitigate what could become a costly claim and eventual lawsuit.



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