Here Are The 10 Biggest Mistakes Employees Make

HR's loyalty and legal obligation is to the employer, not its employees

Last week I wrote about 10 common employer blunders. When I asked my team for their thoughts on employee gaffes, I received 10 columns' worth of material. That makes some sense since employers have the advantage of legal advice and are less likely to be driven by emotion.

1) Thinking HR is your friend, or at least a neutral interlocutor

With apologies to all of my HR clients, let's be straight: HR is retained to assist the company, not its employees. And when it comes to employment law issues, that means ensuring the company is not sued and defending any existing lawsuits and severance offers. About 90 per cent of the time, HR's role in the severance process is to resolve cases for as little money as possible, and part of that is gaining employee trust. But their loyalty and legal obligation is to the employer, not its employees.

2) Believing that a workplace investigator is neutral or 'just wants to get to the truth'

If HR reps favour employers, investigators do so with rabid devotion. Their appointment depends on giving the recommendations that the employer wants, and if they do not, they will never receive another brief from that employer, let alone referrals to others. Their job, more often than not, is to assist the employer in building a case for cause.

I had one rather tragic recent case where the investigator obtained evidence from the investigated employee, and then kept going back for rebuttal evidence until the employer's case was ironclad. Meanwhile, the employee was told, on pain of termination, that they could speak to no one about the issues.

By contrast, in the litigation process, both sides get to examine the other and you only get one kick at the can – not continual meetings until the employee calls uncle. None of the procedural protections of a lawsuit exist in the investigation context. Investigations have become the modern day equivalent of a corporate lynching.

If you are investigated, be careful what you say. Obtain counsel and know that the

investigator is there to create a case for cause. Few investigated employees ever return to the workplace, and the investigator ensures that result.

3) Not contacting a lawyer the moment you are under investigation

Despite the procedural disadvantages of the investigation process, a lawyer can, at least, keep the proceedings fairly honest and ensure the investigator knows that a certain level of fairness will be required. A lawyer can also be there to assist when you are almost inevitably fired at its conclusion. The existence of a lawyer makes it more likely the employer will not argue cause, or will at least offer severance.

4) Asking the employer for a contract

This is one of the more calamitous errors employees make. Unless you are in the C-Suite and have unusual bargaining power, and often not even then, employment contracts are written for the very purpose of removing the rights that courts provide employees. Very few employees have the bargaining power to negotiate a contract that provides them as many legal rights as they would have without one. Indeed, employers approach contracts by considering what rights the employees legally have that they would like to take away – and their contracts do just that, whether it be in termination pay, non-competition, the right to layoff, and more.

5) Relying on severance pay calculators or any algorithm

There is no formula that accurately predicts what you will receive in court, and such formulas either understate the amount, resulting in your accepting less than your entitlement, or, more commonly, overstate it, resulting in unnecessary expectations and litigation. Speak to a seasoned employment lawyer for the range of what you might be entitled to, and use that as a basis for settlements.

6) Negotiating your own severance settlement

There are too many blunders and potential admissions that an employee might make during the settlement process, which will come back to haunt them if litigation becomes necessary. Also, when an employee negotiates on their own, the employer's assumption is that they are not prepared to pay for litigation, resulting in the employer "low-balling" them. If an employee threatens to go to counsel if the offer is not high enough, the employer won't quite believe them.

If the employee does go to counsel later, the employer will have already taken a position as to how high they will go and, for credibility reasons, will resist raising their offer relative to what they would have done had they been dealing with counsel from the outset. Also, there are many things that experienced counsel might ask for that would not occur to the employee.

Not much different than acting for yourself is hiring inexperienced counsel or a general practitioner or a friend who is a lawyer. The same applies to not getting advice before you make a claim for constructive dismissal, as many employees' view of harassment or ill treatment does not meet the legal test.

7) Not listening to counsel

This takes many forms, but includes doing things that unnecessarily offend your former employer, so as to make settlement more difficult. This includes listening to friends who tell you your case is worth more than counsel advises, so that a settlement does not occur.

8) Waiting too long to act after problems arise

If there is conduct deleteriously affecting your work such that it might, for instance, cause a constructive dismissal, you have to act on it. If you do not, you will have condoned the conduct and lost your opportunity to sue. This can include changes to your duties, position, hours of work or even toxic treatment. You must take issue with the problems shortly after they occur to be able to rely upon your legal rights.

9) Signing an employment contract when already employed

For a contract to be enforceable, it must have what is called "consideration." That means the employee must receive something in return for what the contract has them give up. A contract signed by an existing employee with nothing new provided is unenforceable and, for that reason, employers provide something in return, such as an annual raise or a bonus. But what is provided in return never approximates what the employee just gave up.

If an employer asks an existing employee to sign a contract, the employee is almost invariably better off refusing it. And, if the employer fires them in response, that will be a grounds for wrongful dismissal – which is far better than signing a contract reducing their severance to employment standards' minimums (say, one quarter of what they would have received without a contract) and then being fired.

10) Not documenting concerns in the workplace when they occur

If you are going to allege harassment or events causing a constructive dismissal, you can assume that the employer's witnesses will deny your allegations. You are much more likely to succeed if you have contemporaneous recordings of what occurred, so that you can be very specific and far more credible in your allegations.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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