




# How to avoid employment lawsuits

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# 3 Keys to avoiding employment litigation

- ▶ Identifying potential legal issues before they arise
  - ▶ Knowing when and how to ask for legal advice
  - ▶ Understanding people
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# 4 major categories of employment litigation

- ▶ Wrongful termination
- ▶ Discrimination
- ▶ Hostile work environment/Sexual Harassment
- ▶ Retaliation



# Wrongful Termination

- ▶ Wrongful termination claims can take many forms and include:
  - ▶ Appeal of termination to Fair Dismissal Appeals Board
  - ▶ 1983 Civil Rights Action (violation of due process, free speech, etc)
  - ▶ Breach of Contract
  - ▶ Discrimination
  - ▶ Retaliation
  - ▶ Whistleblowing



# Discrimination

- ▶ Any adverse action by the employer that can be attributed to an employee's membership in a protected class has the potential to lead to litigation
- ▶ Adverse actions may include decisions involving hiring, promotions, discipline, termination, pay, benefits, job training, and other aspects of employment.
- ▶ Protected classes include but are not limited to: Race, Color, National Origin, Sex (including pregnancy-related conditions), Sexual orientation, Religion, Marital status, Age, Disability, Veteran status, Military status, association with a person in a protected class



# Hostile work environment/sexual harassment

- ▶ A hostile work environment arises when a person is harassed because of his or her membership in a protected class, and the harassment rises to a level that alters the terms and conditions of the individual's employment.
- ▶ Harassment is actionable when it is (1) unwelcome, (2) subjectively and objectively offensive, and (3) severe or pervasive.
- ▶ Sexual harassment claims may also arise when an employer bases employment decisions on a person's submission to or rejection of sexual advances or if submission to sexual advances becomes a term or condition of employment.



# Retaliation

- ▶ Retaliation claims arise when employees are terminated, disciplined, or have the terms or conditions of their employment changed because they exercised a legal right or engaged in protected activity.
- ▶ Protected activities include but are not limited to:
  - ▶ Filing a complaint
  - ▶ Taking medical leave
  - ▶ Requesting an accommodation for a disability
  - ▶ Opposing discriminatory or other unlawful employer practices
  - ▶ Whistleblowing
  - ▶ Testifying in court or legislative proceeding



# Preventing Legal Problems: 3 Key Alerts

- ▶ Almost all employment lawsuits involve one or more of the following 3 factors:
  - ▶ Decisions regarding termination, discipline, changes in terms and conditions of employment
  - ▶ An employee's membership in a protected class or association with people in a protected class
  - ▶ An employee's exercise of a legal right or protected activity
- ▶ Any situation involving one of these three factors should alert the employer to the need to be on the look out for potential legal issues





# Preventing Legal Problems: 2 Questions That Must Always Be Asked

- ▶ Generally speaking, there are two categories of legal problems:
  - ▶ Procedural problems
  - ▶ Substantive problems
- ▶ Upon recognizing that a situation has the potential to present legal problems, Districts need to be asking themselves two questions:
  - ▶ Are we following all the right procedures?
  - ▶ Is the decision we are preparing to make legally correct or justified?



# Are we following the right procedures?

- ▶ Answering this question is easy *if* you know what the applicable procedural requirements are.
- ▶ Procedural requirements may arise from District policy, state statute, administrative rule, the state and federal constitutions, and case law.
- ▶ If you are not 100% positive that you know the applicable procedural requirements seek legal advice



# Is the substance of our decision legally correct/justified?

- ▶ Answering this question requires knowledge of the law and knowledge of the facts.
- ▶ Need to make sure that you are evaluating your decision based on the correct legal standard.
- ▶ Need to be certain that you have concrete documented evidence that shows the applicable legal standard has been met.
- ▶ If you have any question in your mind regarding the applicable legal standard for evaluating your decision seek legal advice before acting.
- ▶ If you are uncertain as to whether you have sufficient information to meet the applicable legal standard seek legal advice before acting.



# Identifying Procedural Issues: Example # 1

- ▶ **342.835 Probationary teacher.** (1) The district board of any fair dismissal district may discharge or remove any probationary teacher in the employ of the district at any time during a probationary period for any cause considered in good faith sufficient by the board. The probationary teacher shall be given a written copy of the reasons for the dismissal, and upon request shall be provided a hearing thereon by the board, at which time the probationary teacher shall have the opportunity to be heard either in person or by a representative of the teacher's choice.
- ▶ Does the hearing need to occur before or after the Board makes the termination decision?



# Example 1: Continued

- ▶ **342.895 Contract teachers; procedure for dismissal or contract nonextension; appeal.**
- ▶ (3)(a) At least 20 days before recommending to a board the dismissal of the contract teacher, the district superintendent shall give written notice to the contract teacher by certified mail or delivered in person of the intention to make a recommendation to dismiss the teacher. The notice shall set forth the statutory grounds upon which the superintendent believes such dismissal is justified, and shall contain a plain and concise statement of the facts relied on to support the statutory grounds for dismissal. If the statutory grounds specified are those specified in ORS 342.865 (1)(a), (c), (d), (g) or (h), then evidence shall be limited to those allegations supported by statements in the personnel file of the teacher on the date of the notice to recommend dismissal, maintained as required in ORS 342.850. Notice shall also be sent to the district school board and to the Fair Dismissal Appeals Board. A copy of ORS 342.805 to 342.937 shall also be sent to the contract teacher.
- ▶ (b) If, after the 20-day notice required by paragraph (a) of this subsection, the district school board takes action to approve the recommendation for dismissal from the superintendent, the dismissal takes effect on or after the date of the district school board's action, as specified by the board. Notice of the board's action shall be given to the contract teacher as soon as practicable by certified mail, return receipt requested or in the manner provided by law for the service of a summons in a civil action.



# Identifying Procedural Issues: Example 1: Continued

- ▶ John is employed by District X as an administrator under a three year probationary contract. The three-year probationary contract expires June 30, 2018. The Superintendent is pleased with John's performance and the School Board votes to issue John a three-year administrator contract that will take effect July 1, 2019. In April of 2018, John fails to complete several very important tasks on time, gets into an argument with the Superintendent, and becomes the subject of several serious complaints from teachers. The Superintendent decides he needs to terminate John.
- ▶ What is the procedure for terminating John?
- ▶ What determines the answer?

# Identifying Substantive Issues: Example

- Superintendent has received complaints about how an administrator named John is handling disciplinary issues with teachers. The Superintendent gives John a directive, both orally and in writing, to not hold any disciplinary meetings with teachers without meeting in person with him first. One day the Superintendent is out of the office and a student comes running into the office alleging that a teacher just hit him. John immediately gets someone to cover the classroom and tells the teacher to get their union rep and meet with him in his office immediately. John then proceeds to meet with the teacher without talking to the Superintendent, contrary to the Superintendent's clear directive. When the Superintendent returns to school and learns of the situation, he is furious and wants to terminate John.
- As a contract administrator, John may only be terminated for: (a) inefficiency, (b) immorality, (c) insubordination, (d), neglect of duty including duties specified by written rule, (e) physical or mental incapacity, (f) conviction of felony, (g) inadequate performance, (h) failure to comply with such reasonable requirements as the board may prescribe to show normal improvement and evidence of professional training and growth; or (i) any cause which constitutes grounds for revocation of TSPC licensure.
- Is termination for legally justified in this circumstance?
- What facts are determinative of the answer?



# The Third Question That Must Always Be Asked

- ▶ Even if a District has followed the right procedures and is confident that a given decision is legally justified, there is a third question that needs to always be asked before action is taken:
- ▶ Is there a reasonable basis for someone to conclude that the decision is being made “because of” an employee’s membership in a protected class or “because of” an employee’s decision to engage in protected activity.
- ▶ If the answer to this question is yes: seek legal advice before proceeding.





# How to ask for legal advice

- ▶ The quality of the legal advice you receive is highly dependent on the quality of the information you provide the attorney. If you provide bad information, you are going to get bad advice.
- ▶ Take the time to prepare a written timeline-narrative of the circumstances you are dealing with before contacting an attorney.
- ▶ Tell your attorney the whole-truth – even if it is ugly or casts you or the District in a poor light. The information is attorney-client privileged and your attorney needs all the information – good and bad – to properly advise you.
- ▶ Be candid about the outcome you want and try to determine what questions you want the attorney to answer before you ever call.




# Understanding people

- ▶ While being able to identifying potential legal issues and knowing when and how to ask for legal advice is important, understanding people is the real key to avoiding employment litigation.
- ▶ Employees sue when they are angry or hurt.
- ▶ Not every employee who has a legal claim chooses to assert it.
- ▶ Districts that understand people and treat them appropriately under the circumstances are often able to avoid litigation that other Districts cannot.



# Understanding people: Consistency

- Document performance consistently
  - Be consistent in your standards
  - Consistently follow procedures
  - Be consistent in your discipline
  - Be consistent in your interpersonal interactions
  - Be consistent in your evaluations
  - Be consistent in your employment terms
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# Understanding People: Communication

- ▶ Many employment disputes are attributable to poor communication
- ▶ When employees lack information they make assumptions, speculate, and often assume the worst.
- ▶ Employers can avoid many employment disputes by improving communication
- ▶ Communication can be improved by:
  - ▶ Making sure that all employees who need information receive it
  - ▶ Making sure that the information employees receive is consistent
  - ▶ Making sure that employees receive regular feedback on their performance
  - ▶ Making sure that employees are told when there is an issue – whether performance related or not.
  - ▶ Make sure that communications with employees are honest (employees can smell a lie a million miles away and this erodes trust).



# Understanding people: Power of honesty

- ▶ Being honest and upfront with employees helps build trust
- ▶ When you think an employee is headed toward termination: tell them.
- ▶ When you don't think an employee is necessarily on a termination path, but really does need to work on a few things and improve: tell them.
- ▶ Maintain employee confidences. When an employees tells you something in confidence – keep it in confidence.
- ▶ When an employee isn't terrible but you would prefer to hire someone else and go a new direction: tell them.
- ▶ When an employee has undermined you or upset you in some way and you are mad at them for it: tell them (instead of passive/aggressively being rude to them or trying to do them in).
- ▶ When you can't or don't want to give an employee certain information or an answer to something: tell them you can't give them the answer or information they are seeking instead of sidestepping.



# Understanding people: Respect and civility

- ▶ Treating employees with respect and civility no matter the circumstances truly does wonders.
- ▶ Do not gossip or talk about other employees behind their back except in appropriate supervisory circumstances
- ▶ Don't play favorites with employees at work – even if you are close personal friends outside work.
- ▶ Make people feel heard even if nothing they say is going to change the outcome.



# Understanding people: Identifying common interests and aligning incentives to achieve results

- ▶ Example: Getting an administrator to leave the district by threatening plan of assistance or non-renewal
  - ▶ Need to apply pressure but also need to leave employee with outlet
  - ▶ Need to understand that District and employee have a common interest on a certain level
- ▶ Resignation and release of employee's claims in exchange for compensation is often mutually beneficial
  - ▶ Even a legal "win" can sometimes represent a practical "loss"



# Understanding people: The importance of having a spine

- ▶ Districts that are managed by people who are not willing to stand up to employees or groups of employees when they are wrong or disruptive typically encounter more employment litigation than other districts.
- ▶ A common example is the situation where a building is led by a weak principal for many years who lets the teachers do whatever they want. After the weak principal leaves, the teachers run one administrator out of town after another and resist all changes to bring their performance up to where it needs to be. When this occurs, grievances and lawsuits inevitably result.
- ▶ Another common example is where a District tries to pacify parents who cannot be pacified and ends up completely disrupting the workplace and creating litigation.
- ▶ “Having a spine” should not be interpreted as being harsh or unfair, but rather, being willing to make do what needs done and make decisions that are in the best interest of the District in the face of criticism or controversy.





# Understanding People: Timeliness

- ▶ Failing to timely respond to issues when they arise may give employees the impression that certain conduct is condoned, even when it is not
- ▶ Failing to conduct timely investigations results in claims that parties were injured because investigations were not conducted in accordance with timelines set forth in policies, creates memory issues, and creates potential to overlook very serious issues.
- ▶ Use employee probationary periods for their intended purpose by timely evaluating their performance during this period instead of waiting until they have obtained contract status to seriously consider their performance.



# A final piece of very sound advice

- Think before you text
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