Legal Issues in Human Resources Management

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Overview

- Be prepared
- Five basic steps to remember
- Labor & employment hot spots
- Settlements
Be Prepared

Familiarize yourself with relevant policies and procedures, including:

– Security and safety procedures.
– Personnel policies & procedures, particularly related to:
  • Leaves
  • Discipline
  • Separation
– Policies prohibiting discrimination, harassment, and retaliation and procedures for handling such complaints.
Five Steps To Remember

1. Ask key questions
2. Develop the facts in context
3. Spot issues
4. Call on resources
5. Follow through
1. Ask Key Questions

- Is a UC employee involved?
- Is the employee…
  - Staff? Academic? Represented?
- What happened and when?
- Who is involved?
- Has anyone else been notified?
1. Ask Key Questions

- Who do I need to involve?
- Is any immediate action required?
  - Safety and security concerns
  - Harassment concerns
  - Retaliation concerns
- Should we do a formal investigation?
- Is there a simple way to fix this?
1. Ask Key Questions

- Is there a Whistleblower or False Claims Act issue?
- Is the employee disabled?
- Does this employee qualify for leave?
- Is there a Worker’s Compensation claim?
2. Develop the Facts in Context

- Investigate and, when appropriate, seek assistance.
- Look at the complete picture.
- Service record is important!
- Analyze how the facts of the situation impact the operation of your unit.
2. Develop the Facts in Context

Investigate

- Generally, employees are required to cooperate with employer’s investigation.
- Represented employees have right to have union representative present if employee has reasonable belief that discipline (or other negative consequences) could result from meeting.
2. Develop the Facts in Context

**Investigate**

- Public employee may be compelled by threat of job discipline to answer employer’s potentially incriminating questions without a formal grant of immunity – so long as employee is not coerced into waiving his 5th Amendment rights. *Spielbauer v. County of Santa Clara* (2009) 45 Cal. 4th 704.
  - This ruling reversed lower court decision holding that employee’s refusal to answer questions could not be grounds for discipline unless employee first received an affirmative offer of immunity from criminal use of his statements.
3. Spot Issues

- Analyze the facts you’ve gathered.
- What labor/employment issues are presented?
4. Call on Appropriate Resources – You have a Safety Net

- Human Resources
- Academic Personnel
- AA/EEO Office
- Title IX Officers
- Employee Relations
- Labor Relations
- Risk Management/EHS
- Internal Audit
- Campus Counsel
5. Follow Through

- Inaction is a decision. Ignoring an employment problem has real consequences:
  - Harder to discipline or terminate employee later if there’s no record of the problem or a record of continued tolerance of it.
  - Adverse effects on coworkers, students, third parties, your unit’s operations, etc.
  - Grievances, legal claims.
5. Follow Through

- Manage the situation.
  - Candidly evaluate performance annually.
  - Give ongoing feedback.
  - Use progressive discipline.
  - Stay on top of absenteeism.
Labor & Employment
Hot Spots
Discrimination/Harassment

Protected categories include:

- age (over 40)
- ancestry
- citizenship
- color
- religious creed
- disability (mental or physical)
- marital status
Discrimination/Harassment

Protected categories include:
– medical condition (cancer and genetic conditions)
– national origin
– pregnancy
– race
– religion
– service in the uniformed services
– sex (includes gender identity)
– sexual orientation
Retaliation

Protected Activities include:

- Filing a claim of discrimination, harassment or retaliation in an administrative agency or court or as part of an internal grievance process.
- Testifying or in any such proceeding.
- Opposing a practice that is unlawful under a nondiscrimination statute or that the person reasonably believes to be unlawful under such a statute.
Whistleblower Retaliation

Protected Activities include:

- Good faith disclosure of
  - improper governmental activity
  - condition that may significantly threaten the health or safety of employees or the public if the disclosure is made for purpose of remedying that condition.
- Refusing an illegal order.
Discrimination/Retaliation

Legal standard used is whether employee was subjected to an “adverse employment action” because of protected status or protected conduct.

- “Adverse employment actions” are actions that are sufficiently harmful that they might “dissuade a reasonable worker from making or supporting a charge of discrimination.” *Burlington Northern and Santa Fe Railroad Co. v. White* (2006) 548 U.S. 53.
Harassment

• Harassment based on any protected status is prohibited, although focus is often on sexual harassment.

• Two types of sexual harassment:
  – Quid Pro Quo
  – Hostile environment
Harassment

• Same-sex sexual harassment is prohibited under both federal and California law.
• Harassment need not be sexual in nature to be prohibited.
  – For example, an employee could claim hostile environment sexual harassment if treated less favorably than coworker who is romantically involved with their supervisor.
Harassment

- Legal standard used in court is “severe or pervasive.”
- But, UC has an obligation, under policy and the law, to take all reasonable steps to prevent harassment.
  - Prompt investigation of claims
  - Appropriate action when claims are substantiated
Strict Liability

- Under California’s FEHA, the University is strictly liable for unlawful harassment by supervisors.
  - No defense to liability.
  - Possible defense to damages under the doctrine of “avoidable consequences.” *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026.
Potential Personal Liability

- Supervisors and coworkers may be held personally liable for harassment.
Some protection from personal liability…

Disability Issues

- Americans with Disabilities Act (ADA)
- Section 504 of the Rehabilitation Act of 1973
- California Fair Employment and Housing Act (FEHA)
- California Worker’s Compensation Laws (Labor Code section 110, et seq.)
Disability Issues

- General principle: Employer may not discriminate against a qualified individual with a physical or mental disability.
- With the passage of the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), the federal protections for the disabled became much broader and more in line with the protections already available under California’s FEHA.
Disability Issues

- Under FEHA, mental/physical disability need only “limit” a major life activity, not “substantially limit.”
- Major life activities include working, studying, and even social activities.
Disability Issues

- Mitigating measures (e.g., glasses, medication, hearing aid, etc.) are not considered when assessing whether employee is disabled.
- A condition may be a disability under FEHA even if it is temporary in nature.
  - Analyzed on a case by case basis.
Disability Issues

Key Questions:

- Is the individual disabled?
- Is the individual qualified to perform the essential functions of the position with or without reasonable accommodation?
- Did the individual request an accommodation or do we have reason to know that one is needed?
Disability Issues

Employer is required to engage in the Interactive Process (IP) to determine whether there is a reasonable accommodation (or accommodations) that would enable the employee to perform the essential functions of the position.
Reasonable Accommodation

Interactive Process

- Communicate with employee (or his/her representative) to explore possible accommodations.
  - Consider enlisting assistance of Disability management and/or Voc Rehab.
Reasonable Accommodation

Interactive Process

– Consider any accommodation requested by the employee.
  • Good faith consideration of employee’s requested accommodation requires more than an uninformed rejection. Gather sufficient information to determine the proposed accommodation’s effectiveness.

– Offer reasonable accommodation(s).
Reasonable Accommodation

Interactive Process

– It is not a “reasonable” accommodation if employer would suffer undue hardship.
  • But it’s very difficult to establish undue hardship.
Reasonable Accommodation

Interactive Process
The accommodation must work effectively. If not, try again. The process should continue until (a) employee no longer needs accommodation, (b) employee refuses to participate in the process in good faith, or (c) we determine there is no reasonable accommodation.
Reasonable Accommodation

Interactive Process

- Reassignment to a vacant position can be a reasonable accommodation.
  - The employer must make an active effort to find the alternative position.
  - Not enough to provide a list of vacant positions and tell the employee to apply.
Reasonable Accommodation

Interactive Process

Leave(s) of absence may be a reasonable accommodation.

- Employee may also have right to a leave under the federal Family and Medical Leave Act (FMLA) and/or the California Family Rights Act (CFRA).
Disability Issues

- Exercise caution with:
  - Pre-placement medical exams
  - Fitness for duty exams
- Be careful about privacy:
  - What information does employer have a right to know?
  - Always keep medical records separate from other personnel records.
Prevent Discrimination Claims

- Identify and eliminate barriers to equal opportunity and access.
- Be sure job descriptions and postings accurately reflect the position’s requirements
  - Essential vs. nonessential job functions
  - Focus on outcomes instead of “how”
Family & Medical Leave (FML)

- Employee is eligible for FML if employee:
  - Has 12 months of University service (which need not be consecutive) and
  - Worked 1,250 hours in the 12 months immediately preceding the leave. (Actual time worked.)
Family & Medical Leave (FML)

• FML can be taken:
  – For employee’s own serious health condition
  – For employee’s pregnancy-related disability
  – To care for a family member with a serious health condition
  – To bond with employee’s newborn or adopted child (within 12 months of birth or placement)
  – For qualifying exigencies relating to a family member being called to active duty in the military (Qualifying Exigency Leave)
  – To care for a family member who is a covered service member with a serious injury or illness (Military Caregiver Leave)
Family & Medical Leave (FML)

• FML is usually for up to 12 workweeks per calendar year.
  – Exception: Up to 26 workweeks of Military Caregiver Leave in a 12-month period.

• Leave may be taken
  – In blocks
  – Intermittently
  – By working a reduced schedule
Family & Medical Leave (FML)

• Extensive FML resources in At Your Service (click on Administrator tab).
  – All the necessary forms – notices, certifications, declarations.
  – Step-by-step guidelines
  – Sample letters.
Free Speech

Statements made by public employees pursuant to their official duties are not protected under the 1st Amendment and such communications are not insulated from employer discipline. *Garcetti v. Ceballos* (2006) 547 U.S. 410.
Religious Speech in the Workplace

- Balancing test:
  - The employee’s right of free speech and free exercise of religion vs. the public employer’s right to avoid a claim that it is endorsing a particular religious viewpoint.

- Was the employer’s restriction reasonable, given the circumstances?
Union Issues

• Higher Education Employer-Employee Relations Act (HEERA)
  – Covers organizing and bargaining
  – Prohibits unfair practices by University and by unions
• Collective bargaining agreement (CBA) applies to unit employees
  – If no CBA or CBA has expired: Status Quo
• Strikes and other concerted activity – whether protected or unprotected depends on circumstances
Wage & Hour

- Timely payment of wages
- Exempt/Nonexempt Designations
Five things to remember:

- **T** is for Truth
- **E** is for Evidence
- **R** is for Respond to a request
- **M** is for Malice: not allowed
- **S** is for Scope
References


• Release/waiver provides protection.

• Incorrect information given in a reference check is not actionable where the mistake was inadvertent error, and there was no evidence of malice. *Noel v. River Hills Wilsons, Inc.* (2003) 113 Cal.App.4th 1363.
Settlements

**Why settle?**

- The 3 questions: Are you right? Can you win? How would it play in Peoria (the media)?
- Cost/Benefit analysis: In context, is the case worth the cost of litigation?

**Be aware of the Regental policy regarding approval needed for separation and settlement agreements.**
QUESTIONS?

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