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Avoid lawsuits with effective employment practices

Want to better your employment practices? How about if it could help increase the odds of a court ruling in your favor if an employee sues on an employment-related issue? "Consistency and documentation are your best friends," said John McKay, an attorney at McKay, deLorimier & Acain in Los Angeles.

Here are ways to improve both at your facility.

"Button up" the hiring process

Create an accurate job description. "This is critical both to effective hiring and future performance evaluations," said Cindi Haney, the regional director for Inns Senior Holdings, which operates nine assisted living facilities in Ohio.

Use an interview team. "Include representatives from human resources, senior management, direct reports and co-workers," said Susan Heathfield, a management consultant and business owner who has covered human resource issues at About.com since 2000. "Get feedback from all but limit the decision to senior staff, HR and the manager."

Prepare for the interview. Develop questions in advance and review for appropriateness. Only ask those that you've cleared ahead of time. "Avoid any that could be interpreted as discriminatory," McKay warned.

The list of topics that could fall into this category is daunting and includes: age, gender, gender expression, marital status, medical condition, national origin and ancestry, physical or mental disability, pregnancy and childbirth, race and color, religion, union activity and veteran status.

Put all interviewees through the same process. "If one candidate has to take a test and go through three interviews, everyone needs to," Heathfield said.

Consider shadowing as part of the process. "Most of our hires are nursing assistants, and many don't have previous experience," Haney said. "Once we've selected finalists, we have them shadow for a true understanding of the job. We also do this for other positions to get a sense of culture fit."

Run a background check on viable candidates only. "This should never be used as an initial screening tool," Heathfield said.

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Keep policies and employees updated

Stay current with state and federal requirements.

"Highlight policies related to legal requirements — for instance, some states require mandatory reporting if there's suspected abuse or neglect of the elderly," McKay said.

Word your employee handbook carefully. "State that you retain the ultimate discretion to make disciplinary and other employment decisions," McKay said. "Have the employee sign an acknowledgment of at-will employment."

"Strike a balance that allows some flexibility to deal with employee issues yet enough guidance so HR concerns are handled consistently," Heathfield said.

Have legal counsel review your handbook periodically and consider making it available to employees electronically, so it's always up to date.

Store personnel records appropriately

Be careful about what goes into the personnel file.

"Employees typically have the right to see this file, and supervisors often get access too, which they shouldn't," Heathfield said. "Don't keep résumés, background checks or anything from the application process here."

Keep information from the application process in separate files that are accessible only to HR and limit the personnel file to documentation of performance and reviews.

When issues arise, follow appropriate discipline procedures

Be consistent, reasonable and logical. "The discipline must fit the extent and gravity of the violation," McKay said. "Consider dividing violations into categories: differentiate between behavioral, performance and dishonesty issues."

In many states, the employer has the burden of proving misconduct, and the bar is often quite high.

Investigate reasonably and thoroughly and treat the employee with respect. "Give the employee notice of the allegation and the chance to tell his or her side of the story," McKay said. "Handle these sessions in private and in person."

Document each corrective or counseling session. Keep a written copy of each incident, warning or written notice in the employee's file. "Ask the employee to sign any written warning or disciplinary action agreement to acknowledge its receipt," McKay said. "If he or she refuses, make a note of the refusal on the warning or agreement."

Follow a consistent termination process

Have a process for orderly termination and ensure it is followed. In most cases, firing should only come after a verbal warning, a written warning and suspension. "Certain situations, such as theft or violence in the workplace, may warrant immediate discharge," McKay said.

A logical, defensible paper trail could bolster your case should legal action result. Your process should mirror that of

a violation: investigate reasonably and thoroughly, give the employee an opportunity to tell his side of the story, treat him with respect and give him notice.

"Firing should be centralized. The designated person must review all documentation and process steps and ensure you're following procedures," Heathfield said.

If possible, consult with your attorney before a termination.

Precautionary measures aren't always enough. "How you deal with the matter might help to determine how it's resolved in court, but it won't necessarily stop an employee from filing suit," McKay cautioned.

Concerns about retaliatory discrimination

Retaliation claims continue to rise. The U.S. Supreme Court has now ruled that retaliation for opposing, complaining about or seeking relief regarding conduct under Title VII of the Civil Rights Act of 1964 (prohibiting race, color, religion, sex and national origin discrimination) must be the reason for an adverse employment action, rather than simply a motivating factor.

That's good news for employers, but it doesn't mean retaliation lawsuits are no longer a problem. "Sometimes there isn't sufficient evidence for the underlying discrimination claim to move forward, but because of the facts, the retaliation claim could be the stronger and make it to trial," said Morgan Godfrey, an attorney with O'Meara, Leer, Wagner & Kohl, P.A. in Minneapolis.

To avoid retaliation claims, Godfrey recommended employers:

- Include an anti-retaliatory provision in the employment manual, provide it to all employees and have them sign a separate acknowledgment.
- Address discrimination complaints quickly and communicate that you take them seriously. "If someone makes a complaint of discrimination, it's best to have two administrators interview the complainant and witnesses," Godfrey said. "Don't promise confidentiality. Keep the complainant informed — if things are taking longer than expected, tell them."
- Remind all involved in the investigation that retaliation is prohibited; ensure that the alleged harasser is not part of the investigating team.
- If immediate corrective action is indicated (e.g., relocation), direct the corrective actions at the alleged harasser and not at the complainant.
- Recognize that timing is everything. If you had planned to take disciplinary action (e.g., to address poor performance) prior to the complaint, you can still do so. However, prior documentation of the problem is important.
- Monitor staff conduct to prevent retaliation after complaint filing.

■ **Resource:** Church Mutual customers can download sample legal forms, such as an at-will employment policy and discipline policy, at no cost at www.churchmutual.com/forms.





Managing Your Risks

Cellphones not just a danger on the road

You've probably seen people use a cellphone to talk or text while driving — maybe you've done it yourself.

The dangers of using cellphones while driving are well known. But did you know that cellphones can be a dangerous distraction at your facility too?

Of course, cellphones can be very useful, providing us with easy access to information and a convenient way to communicate with others. When used appropriately, cellphones can make our lives easier.

But, when used at the wrong time, these devices can cause mistakes at work that might lead to injuries. Using a cellphone to watch videos, check social media channels and text at work can affect a worker's production and distracts him or her from focusing on important job duties — including caring for residents.

For example, an employee responsible for distributing medications could be distracted for just a minute while reading a text message on his cellphone. When he returns to his duties, he might not remember where he left off and could accidentally double a resident's medication dosage or give the resident the wrong medication.

Mistakes like this present significant risk, but they can be easily prevented by putting good policies in place.

Establish and enforce rules for staff, indicating when it is appropriate to use personal cellphones at work — such as during scheduled break times. Remind staff that being distracted by cellphones at work puts them and the residents they care for at risk.

Edward A. Steele
Risk Control Manager

Seasonal Spotlight

Don't let residents fall victim to financial scams

"Grandma, I'm in trouble. Please send money!" What grandparent could resist? Unfortunately, the person on the other end might not be a beloved grandchild.

Online and telephone scams are a huge problem. According to a 2011 MetLife® study, older Americans lost \$2.9 billion that year in elder financial abuse.

Why are the elderly so vulnerable? Many are overly trusting, have physical or mental issues that make it hard for them to discern legitimate requests, are worried about their finances or health care (making "get rich" or insurance schemes particularly enticing) or are just plain lonely — all things that make it easy to be tricked.

Help residents protect themselves:

Educate residents, family and staff. "Meet with the local sheriff's office or police department to learn the latest ploys," said Allen Slagle, a retired crime prevention specialist with the Bristol, Va., sheriff's office who has more than 400 hours of training in this area.

Slagle's most critical piece of advice: "If you didn't make the initial contact, you don't want what they're selling. When a telemarketer calls, hang up. When you get an email you don't recognize, delete it."

Instruct residents never to give out account numbers, Social Security numbers, credit card numbers or Medicare ID numbers — legitimate agencies or companies won't ask the resident to provide this information. Be leery of anything that's "free" but requires a bank account number or other personal information to claim it.

If residents are active on social media, have them review their privacy settings — grandchildren can be a great help with this!

"Stress the importance of verification," Slagle said. "If their grandchild is in trouble, call the child's parents. If an agency claims you owe them money, hang up and call the agency yourself."

Use the Do-Not-Call Registry. Encourage residents to add their names to this list by calling (888) 382-1222.

Pay attention. An excessive amount of mail or unusual requests for stamps or post office visits can be signs that a resident has fallen victim to a scam.

Involve the family. If you believe a resident is the victim of a con, involve his or her family or caregivers. State laws vary. Check with local government agencies to determine what actions can be taken in your state.

Q | A

A Perspective

Effective safety training is critical to the health and well-being of both staff and residents. While most facilities provide training to employees at the time of hire, ongoing refresher courses and updates are just as important.



Michael Plunkett, ALCM, vice president of Cool Insuring Agency Inc. in Latham, N.Y., advises that training should be done to the level that “the desired reaction to every situation is second nature.” Cool is a major provider of insurance and risk management programs for senior living communities.

Risk Reporter: How often should training be updated?

Michael Plunkett: There’s no specific answer. Many states have minimum training requirements — and some are quite extensive — but it’s also important to track and investigate your staff and resident incident and injury rates. These can be a clear indication that you need to evaluate your training. More frequent training isn’t always the answer — sometimes what you’re doing just isn’t effective.

Risk Reporter: How can you improve the effectiveness of your training?

Michael Plunkett: Observation is very helpful. Don’t just tell staff how to do something; have them demonstrate their understanding. Determine whether they’re following the appropriate steps and doing them in order. Make sure department heads and managers are getting the training they need to effectively evaluate and teach your staff and hold them accountable for results. Create a culture where staff knows training — and safety — are taken seriously.

Risk Reporter: Tell us about the importance of ongoing observation.

Michael Plunkett: We find that facilities with the highest rates of observing and correcting behaviors are the ones with the best results. Supervisors should routinely walk the facility and observe staff performing standard tasks. These observations should be ongoing and unannounced. It can be stressful for staff at first, but as this becomes the norm, staff will adjust to it.

Risk Reporter: What kinds of training should be handled by an outside versus inside resource?

Michael Plunkett: When you introduce a new device or equipment, have someone from the manufacturer or distributor come in and train your employees. If the training is related to a policy or procedure that’s specific to your facility, that’s typically handled better internally. If it’s related to ergonomics, lifting, etc., you might be able to address that with your internal physical therapy staff, depending on their availability. It’s key that staff understand which tools should be used to deliver various services and how to use them.

Risk Reporter: In our conversation, you had an interesting comment about the amount of time spent on training to address resident versus staff injuries.

Michael Plunkett: Many facilities struggle with workers’ compensation claims, but until we address these claims with the same level of time, investigation and problem solving that we spend on resident incidents, we’re not going to tackle them. Facilities have to recognize that the health and well-being of their staff is what allows them to deliver exceptional care to their residents and act accordingly.