



Employment Auditor's Notepad

AN A+ COUNSELING RECORD

As employment attorneys we often hear about employees who have been terminated for excessive absences or performance issues – entirely justified reasons. However, when reviewing the employee's personnel file, we often find a disconnect between the file and the truth. Here are some tips to creating an A+ Counseling Record which can save your company from having to endure future litigation:

- Put all counseling in writing. Even if the counseling was only a casual, "you were 15 minutes late, don't do it again," place a note of your conversation in the employee's file;
- Conduct performance evaluations, require the employee to comment on his/her own performance, and *be honest*. If the performance evaluation is too positive to be accurate, it becomes difficult to argue performance issues;
- When in doubt, involve your employment attorney *before* terminating the employee to determine whether additional documentation will help to protect the company.

Fleming PC regularly conducts employment compliance audits.

California Supreme Court Limits Employment Fee Award

Anyone who has been involved in employment litigation knows that attorney fee awards quickly become a major factor in settlement and potential liability. In litigation involving California or federal wage and hour laws, unlawful discrimination/harassment/retaliation claims, or disability claims, if the plaintiff (employee) is successful in litigation, by statute, he/she is entitled to recover all reasonable attorneys fees incurred. This means that defending a \$5000 wage and hour claim could quickly turn into a \$100,000 or more judgment if the employee prevails. These laws gave employees the ability to apply tremendous pressure on employers, even those who had a truly meritorious defense.

On January 14, the California Supreme Court gave employers some reprieve. In *Chavez v. City of Los Angeles*, immediately upon returning from medical leave, Chavez received a notice of suspension from his employer. Chavez filed a lawsuit alleging discrimination, harassment, and retaliation. A jury decided in Chavez's favor, but awarded him only \$1500 in economic damages and \$10,000 in non-economic damages. Chavez then sought to recover just under \$900,000 in attorney fees. The trial court denied Chavez's fee request in its entirety noting that Chavez failed to present any evidence to contradict the city's expert testimony that he was damaged only in the amount of approximately \$1000. The trial court concluded that Chavez unreasonably failed to file the case in limited jurisdiction court (which provides for limited discovery and shorter time frames). Under Code of Civil Procedure section 1033, the failure to bring a case worth less than \$25,000 in limited jurisdiction court permits a court to use its discretion to deny attorney fees. The California Supreme Court agreed with the trial court's decision to deny Chavez any award of attorney fees. The Supreme Court stated, "[a] fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether." The Supreme Court further noted that Chavez's success was "modest at best." Plaintiffs now have an incentive not to over-litigate or inflate their attorney fees, providing a more level (albeit still unfair) playing field.

FTC's Revised Guides Impact on Internet Policies

At the end of 2009, the FTC issued revised Guides Concerning the Use of Endorsement and Testimonials in Advertising. The Guides now impose liability for false advertising on company employees who endorse products on the internet without disclosing their affiliation with the company. Accordingly, to avoid FTC liability, employers must revise their policies to inform their employees that if endorsing the company's product or services on the internet, the employee must identify himself as a company employee.

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