NATIONAL ASSOCIATION OF
Community Health Centers

Important Content Note:

This technical assistance resource was developed prior to the August 2017 release of the Health Center Compliance Manual by the Health Resources and Services Administration's (HRSA) Bureau of Primary Health Care (BPHC). The BPHC Compliance Manual, issued August 2017, indicates where PINS, PALs and other program guidance are now superseded or subsumed by the BPHC Compliance Manual.

See: https://bphc.hrsa.gov/programrequirements/pdf/healthcentercompliancemanual.pdf

NATIONAL ASSOCIATION OF Community Health Centers

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Managing Employment-Related Risk

This risk management advisory provides an overview of several legal issues that may arise in the context of health centers' employment relationships. Other information bulletins in this series will provide additional information regarding specific laws such as the Fair Labor Standards Act, Discrimination and Harassment, and the Americans with Disabilities Act, as well as provide strategies designed to address employment-related risks.

LEGAL BASIS FOR EMPLOYMENT-RELATED CLAIMS

While a health center spends significant amounts of time and money to comply with numerous complex federal, state, and local health care laws, regulations, and policies, often times strained resources prevent a health center from focusing on the fact that it, like most corporate employers, is also subject to a myriad of laws addressing its employment relationships. With employment-related litigation on the rise, managing this risk has become essential for health centers. Although health centers may make significant efforts to comply with employment-related laws (such as Title VII of the Civil Rights Act and the Occupational Safety and Health Act), health centers do get sued by their employees and these suits may be financially devastating. While it is impossible to eliminate all employment-related risk, this information bulletin provides tips and techniques for managing this risk through carefully crafted and implemented changes to health center policies and practices.

A health center may be sued by its employees (or more often its former employees) based primarily upon three theories of law: statutory claims, contract actions, and tort claims. The remedies available to employees under each of these types of claims vary considerably from state-to-state.

Note that in all Information Bulletins:

The term **"health center"** refers to public or private nonprofit entities that: (1) receive grants under Section 330 of the Public Health Service Act (Section 330), including Sections 330(e), 330(f), 330(g) and 330(h) (collectively "Health Center Program Grantees"); and (2) entities that have been determined by the Department of Health and Human Services (DHHS) to meet the Section 330-Related Requirements to receive funding without actually receiving a grant ("health center look-alikes").

The term **"Section 330-Related Requirements"** refers to requirements set forth in:

- Health Center Program Statute: Section 330 of the Public Health Service Act (42 U.S.C. §254b),
- Program Regulations: 42 CFR Part 51c and 42 CFR Parts 56.201-56.604
- Health Center Program Requirements: http://www.bphc.hrsa.gov/programrequirements/index.html

The term **"Grant Requirements"** refers to Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards: 2 CFR Part 200, as adopted by DHHS at 45 CFR Part 75.

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Consequently, this bulletin focuses primarily on the federal statutes that regulate employer-employee relations. Be sure to consult with qualified legal counsel when updating relevant policies and when presented with an employment-related claim.

Statutory Claims

The vast majority of employment law cases arise under a statutory cause of action. A statutory claim is one in which an employee alleges that the health center has breached a duty or obligation that is created by a federal (and, though beyond the scope of this information bulletin, state and local) statute(s). The most common statutory employment claims are employee discrimination cases in which the employee alleges that he/she was harassed or discriminated against because he/she is a member of a class (such as race, gender, national origin, etc.) protected by a specific law.

The following is a brief description of the federal laws most commonly relied upon by employees (or former employees) bringing claims against their employers. It is important to note that many of these laws have state or local law counterparts that reach beyond the federal statutes to create even greater protections for employees.

- **Civil Rights Act of 1866,** 42 U.S.C. § 1981
  This statute prohibits discrimination on the basis of race in hiring, promotion, terms and conditions of employment, and termination.

- **Civil Rights Act of 1871,** 42 U.S.C. § 1983
  This Act provides a remedy against persons acting under color of state law who deprive another of federally-protected rights. The Act also specifically prohibits conspiracies, by private persons, to deprive another person of equal protections and equal privileges and immunities under the laws.

- **Title VII, Civil Rights Act of 1964,** 42 U.S.C. § 2000e-2, 2000e-3(a)
  Title VII covers employers of 15 or more employees and prohibits discrimination on the basis of race, color, religion, sex, or national origin, in all aspects of employment. In addition to prohibiting discrimination, Title VII includes "whistleblower" protection that prohibits employers from retaliating against employees for exercising their Title VII rights.

- A**ge Discrimination in Employment Act of 1967,** 29 U.S.C. § 623, 631, 633(a)
  The ADEA applies to employers with 20 or more employees and prohibits them from discriminating against employees forty years of age or older on the basis of age. The ADEA also prohibits employers from retaliating against employees for exercising their statutory rights.

- **Americans with Disabilities Act,** 42 U.S.C. § 12112
  The ADA prohibits employers with 15 or more employees from discriminating in all aspects of employment against disabled individuals who are otherwise qualified for the job and who can perform the essential functions of the job with or without a reasonable accommodation.

- **Rehabilitation Act of 1973,** 29 U.S.C. § 793
  This Act prohibits federal contractors, subcontractors, or any program or activity receiving federal financial assistance from discriminating against a disabled individual in employment opportunities.

- **Equal Pay Act,** 29 U.S.C. § 206(d)
  Part of the Fair Labor Standards Act, the Equal Pay Act prohibits employers from discriminating in pay practices based upon employees' gender for employees who perform equal work on jobs that require equal skill, effort, and responsibility and are performed under similar working conditions.

- **Immigration Reform and Control Act,** 8 U.S.C. § 1101 et seq.
  Employers with three or more employees are prohibited from discriminating against individuals based upon their citizenship.

- **Family and Medical Leave Act,** 29 U.S.C. § 2616
  The FMLA requires employers who employ 50 or more employees to provide eligible employees with up to 12 weeks of unpaid leave during any 12-month period (1) for the birth of a child or placement of child with the employee for adoption or foster care; (2) to care for a spouse, child or parent of the employee that has a serious health condition; or (3) for the employee's own serious health condition which prevents him/ her from performing the functions of the employment position. The FMLA requires employers to reinstate returning employees to the same or equivalent position at the conclusion of leave. Employers are also prohibited from terminating employees for exercising statutory rights.

- **Genetic information Nondiscrimination Act of 2008,** 42 U.S.C. § 2000ff et seq. (GINA)
  This Act prohibits employers from requesting or using genetic information, including among other things an applicant's family medical history or information about the individual's genetic tests, in making hiring and other employment-related decisions

Contractual Actions

A contractual claim is a claim that is premised upon an express or implied agreement between an employee and employer. An employee who wishes to sue his/ her employer under a contract theory of law must begin by establishing that he or she is covered by an employment contract, as opposed to being employed at-will. Under the employment-at-will doctrine, employers are free to terminate employees at any time, for any lawful reason (or no reason), and employees are permitted to resign at any time and for any reason. The exception to this rule occurs if an employee and an employer have a contract (express or implied) that modifies the at-will doctrine. This contractual modification might be found in contracts and/or policies indicating that the employer and the employee have agreed that the employee will work for the employee for a defined period of time, that the employee may be fired only for certain specified reasons, that the employer will not terminate the employee until certain steps are taken, such as providing the employee with notice or severance, or any other provision that prevents the employer from acting "at will." Employees may establish the existence of an employment contract in one of two ways.

- First, employees and employers frequently execute written contracts that are clearly intended to govern the employment relationship. An employee may then sue for breach of this contract and the court will be asked to determine whether the employer violated a term of the contract.

- Second, and more complex, are cases in which an employee alleges that he or she has an "implied contract" with his/her employer. Employers may create "implied contracts" that modify an employee's "at-will" status through either oral or written communications with an employee. For example, employees alleging the existence of an implied contract frequently claim that their employee handbook created a contract. Other communications may be less direct such as when a supervisor or manager who has (or appears to have) authority promises an employee that he or she will only be fired only "for cause." In cases such as these, courts will closely examine employee handbooks or personnel policies to determine whether the employer violated its own policies or whether the supervisor had, or was perceived to have, the authority to make employment-related decisions.

Tort Claims

Tort claims arise when an individual alleges that he/she suffered a legal wrong as a result of his/her employer's actions. The "wrong" may be either a direct invasion of an employee's legal right (such as libel or defamation) or a violation of a duty that the employer owes to the employee (such as the right to maintain an employee's confidentiality with respect to his/her medical information). Employees' tort claims are based upon state laws, which vary considerably. In some states, for example, employees may sue their employers for the tort of wrongful discharge alleging that their employers violated a public policy, such as a whistleblower protection, when firing or demoting the employee. In addition to wrongful discharge claims, state laws may permit employees to sue based upon a tort suffered at work,[1] such as an invasion of privacy. Tort claims are the least common of employment-related claims.

MANAGING RISK

Managing employment-related risk is, simply stated, a sound business practice. Employee claims against employers have been steadily climbing along with jury awards to employees. A health center is best served by reviewing its existing policies and practices to ensure that they comply fully with applicable laws. A health center should examine its management practices at every stage of employment from hiring through separation. Sound management policies and procedures will frequently help deter employees' claims and successfully refute any claims that employees might bring.

The Hiring Process

Well-defined, carefully considered hiring practices are the first step in avoiding problems. Hiring practices should be designed to ensure, that by providing fair, objective hiring criteria, the health center does not discriminate against applicants. There are four primary areas of risk related to a health center's hiring practices: applications, interview procedures, reference and background checks, and requirements under the Immigration Reform and Control Act.

Applications

Application forms may create a risk for a health center if the forms pose questions that are illegal or lead to questioning by an interviewer that is illegal. Application forms should focus on one thing: job-related criteria. Questions that are not directly related to job qualifications may lead applicants to allege that the center made its hiring decision based upon an illegal criterion. For example, the Americans with Disabilities Act prohibits questions regarding applicants' health status in order to protect employees from employers using that information for inappropriate purposes. Consequently, questions regarding an applicant's medical history, number of children, or marital status are illegal. Similarly, as noted, the Genetic Information Nondiscrimination Act of 2008 prohibits the use of genetic information, including family medical history, in making hiring and other employment-related decisions.

1 Personal injury cases are usually not based upon a physical injury as physical injury claims are generally precluded under State workers' compensation laws.

How may a health center reduce risk relating to application forms?

1. All applicants should be required to complete an application form, regardless of the position sought. This will protect the health center against allegations that only applicants of a certain race, health status, etc. were required to provide specific types of information to the employer.

2. Application forms should clearly state that the health center is an Equal Opportunity Employer that complies with the Immigration Reform and Control Act.

3. Application forms should include a statement clarifying the health center's at-will policy in order to ensure that everyone who is hired understands that he/she may be terminated at any time and to provide clear evidence if an employee alleges that he/she was promised he/she would be fired only "for cause."

4. Application forms should contain a clause that authorizes the health center to conduct any necessary background and reference checks (including drug testing, if applicable), and releases the health center from liability for using the personal information obtained for any lawful purpose.

5. Application forms should require all applicants to verify that the information provided is true and accurate and that any false or incomplete information will result in termination.

Interviews

Interview procedures create risk for organizations in two ways: first, when interviewers ask questions that are improper or illegal, and second, when interviewers make promises regarding employment or job security.

A health center must ensure that persons conducting employment interviews are trained regarding what questions are illegal or inappropriate. Unfortunately, the legality of a question is not always obvious. For example, most interviewers recognize that asking an applicant his or her "native language" is illegal. However, many interviewers are not aware that asking women about their marital status or intentions regarding having a family are also illegal. The following list provides examples of other types of questions that should never be asked:

- Age
- Religion
- Race
- National origin or citizenship
- Marital status, including "living arrangements"
- Pregnancy Status
- Family Plans
- Medical or Health Status

The second risk regarding interview procedures arises when interviewers promise applicants that, once they are hired, they will have a "permanent" position or that they will only be fired "for cause." In fact, any statement, regardless of how casually uttered, that implies that the health center only fires employees "for cause" is problematic if the health center intends to create an "at-will" relationship.

What may a health center do to minimize risk during interviews? As stated above, the most effective way to reduce this type of risk is to ensure that those individuals conducting interviews are well trained regarding state and federal employment law with regard to permissible interview questions and how to focus the interview on job-related questions.

References and Background Checks

Reference and background checks are both an effective risk management tool and a risk for a health center. Reference/background checks are an effective risk management tool because they may produce information about an applicant that might cause the center not to hire the applicant. On the other hand, a health center may be at risk if it fails to conduct an appropriate reference/ background check or fails to appropriately respond to other organizations' reference inquiries.

Criminal Background Check

State and local laws increasingly are requiring health care providers to conduct criminal background checks on all employees or on employees who will interact with patients. Regardless of the reason why a center chooses to conduct a back-ground check, a check will assist the health center in determining whether an applicant is unfit for a particular position. For example, a criminal background check may lead the health center to an applicant's dangerous criminal history. However, note that the Equal Employment Opportunity Commission ("EEOC") prohibits employers from automatically disqualifying a job candidate solely because he or she has a criminal record, particularly if that record has no relation to the job he or she has applied to fill.

Employee Physicals and Drug-Testing

In addition to requiring background checks, state and local licensing laws frequently require that health care entities arrange for employee physicals, vaccinations, and/or drug testing. It is important to note that the Americans with Disabilities Act prohibits employers from discriminating against applicants (and employees) based upon a disability. For that reason, a health center should be sure that employee physicals and drug testing are not conducted until after an offer of employment has been made. Offers of employment may then be contingent upon an employee's successful completion of a drug test and, in some cases, a physical.

Credentialing of Health Care Providers

Regardless of whether a health center is required to conduct a criminal background check for its applicants/employees, all health centers are required to credential health care providers, including verifying applicants' references and querying the National Practitioner Data Bank.[2] It is important to note that a health center that fails to verify an employee's references or query the appropriate data banks may, under certain circumstances, be liable if a problem arises due to that employee's actions. This tort, termed "negligent hiring" is not actionable in all states but may result in significant liability if a health center could have reasonably determined, through a reference check, that the prospective employee posed a risk.

Requests about Previous Employees

Finally, a health center should be mindful of its practices in responding to inquiries regarding former employees. A health center employee that makes derogatory or untruthful remarks regarding a former employee could create liability for the health center.

2 *See,* BPHC PIN 2001-16; BPHC PIN 2002-22.

A health center may manage this type of risk in two ways. First, the center could institute a policy that it will only confirm a former employee's dates of employment, location of employment, and position title. Alternatively, the health center could require that any former employee seeking a reference sign a form releasing the health center from all liability associated with the provision of the information. While neither alternative will eliminate a health center's risk entirely, they will allow the health center to control the amount of risk it assumes.

Immigration Reform and Control Act

Another area of significant risk for health centers during the hiring process concerns the requirements of the Immigration Reform and Control Act ("IRCA").[3] The IRCA requires that, among other things, employers verify potential employees' eligibility to legally work in the United States. Employers must be mindful of these requirements because knowingly hiring or continuing to employ an individual not authorized to work in the U.S. will subject the employer to civil and, in certain cases, criminal penalties.

The IRCA requires that employers verify employees' eligibility through use of an I-9 form. The I-9 form, which is available on the internet at www.uscis.gov/i-9 must be completed for each employee, the employee's identification must be verified, and the forms must be retained for three years from the date employment commences and for one year following termination of employment. In other words, health centers are required to have an I-9 form for every current employee and for certain of its employees who have been terminated, i.e. those employees who have been terminated one year ago or less and who were hired three years ago or less. A health center should make completing I-9s a regular part of orientation for every new employee to ensure that its employees are eligible to work in the United States. If employees are unable to provide the health center with adequate identification, they should not be permitted to work.

WORK PERFORMANCE

A health center's consistent application of sound policies and procedures minimizes the risk associated with the employment relationship. The most substantial areas of risk concern a health center's adherence to the Fair Labor Standards Act and allegations of workplace discrimination and harassment.

The Fair Labor Standards Act

Despite the fact that it was passed over seventy-five years ago, the Fair Labor Standards Act, 29 U.S.C. § 215 et seq. ("FLSA") remains one of the most confusing, and therefore misunderstood, employment laws in effect. The FLSA's premise is simple. It is intended to ensure that:

- Employees are paid a minimum wage,
- Employees are fairly compensated for hours worked, and
- Employers keep accurate and truthful records regarding employees' time. However, these three simple requirements can be challenging to implement and consequently, create a great deal of risk for employers.

First, a health center is required to pay non-exempt employees an hourly rate no lower than the federal minimum wage, currently $7.25. The federal minimum wage rate is a floor and many states have chosen to mandate a minimum wage that is higher than the federal rate. The health center should check state law on this issue and ensure that its pay practices comply with this requirement.

3 8 U.S.C. §§ 1324(a) et seq.; 8 C.F.R. § 274(a).

Second, a health center must pay employees for all of the hours they work. This means that the health center must compensate all nonexempt employees for the time they are required to be on duty, on the employer's premises, or at a prescribed place of work, the time they actually work, and pay time-and-one-half an employee's hourly rate for any hours (or fractions of an hour) worked over forty hours in any workweek. This results in three primary areas of risk for a health center: employee classifications, pay administration practices, and over-time practices.

Employee Classification

Employee classification refers to the legal designation of job positions as exempt or non-exempt under the FLSA. An "exempt" position is one where the job duties described in a position description and performed by an employee meet one of the exemptions described in the FLSA. If a position is exempt, the person filling the position is not entitled to minimum wage or overtime pay. Those exempt under the FLSA include executive, administrative, and professional employees (along with several other specific job classifications that are beyond the scope of this bulletin, such as railroad employees, casual babysitters, and seamen).

With the exception of physicians, teachers, lawyers, and persons working in certain computer-related occupations (primarily programmers paid an hourly rate of currently $27.63 or higher), employees must be paid a salary in order to qualify for an exemption. In addition, the positions must meet the specific requirements described in federal regulations found at 29 C.F.R. § 541.300 et seq.

A health center's improper classification of employees may result in liability for back pay, including overtime, owed to employees mistakenly classified as "exempt." In addition, the health center may be liable for damages equal to the amount owed to employees if its actions are egregious or if the center repeatedly violates the FLSA.

To minimize the risk resulting from improper classification, a health center should audit its existing classifications and be sure that they comply with the law.

Pay Administration Practices

Under the FLSA, an employee is entitled to be paid for all time he/she spends to the benefit of his/her employer that is considered a "principal activity" of the employee.[4] Principal activities include all duties, tasks, or functions that are an integral part of an employee's job. Whether an activity is a principal activity is largely a fact-based determination but may turn, in part, on whether the activity in question is for the benefit of the employer or the employee. For example, setting up an exam room or donning protective equipment would likely benefit a health center and be considered compensable, while drinking coffee or reading the newspaper would not. However, employers are not required to pay employees for the time spent traveling to and from work.

Though a health center is not obligated to compensate employees for time traveling to and from work, it is required to pay employees for all time an employee "suffers" or is "permitted" to work regardless of whether the health center specifically requested the work. In other words, the health center must pay an employee for work that the health center does not direct but allows the employee to complete. For example, if a health center schedules a non-exempt employee's starting time for 8:30 a.m. but the employee comes to work at 8:00 a.m. to complete job-related paperwork, the health center must ensure that the employee is

4 *See*, 29 U.S.C. § 203(g); 29 C.F.R. § 785.6.

compensated for the unscheduled half hour, including overtime if applicable. This is true even if the employee failed to sign in or clock in for the time, if the health center knew or should have known the employee was working.[5]

Consequently, a health center should review its policies and procedures, along with its actual practices, to ensure that it is paying employees for the time they spend working. This includes reviewing whether employees are clocking in or signing in when they arrive or when they begin work.

Overtime Practices

An important component of reviewing a health center's pay practices should include reviewing overtime practices. Under the FLSA, employers cannot require employees to work more than forty hours unless the employee is paid for the hours exceeding forty at a rate equal to one and one-half times the employee's regular rate of pay. Practically speaking, what does this mean for a health center?

1. A health center is prohibited from calculating overtime on a bi-weekly basis. Health centers, like all employers, must define their "workweek" and utilize this workweek definition for purposes of computing overtime.[6] In other words, a health center can't "average" the hours worked over a two-week pay period when calculating overtime.

2. Compensatory time (i.e., allowing non-exempt employees to take time off in lieu of over-time) is only available to a public agency that is a state, a political subdivision of a state, or an interstate governmental agency. Organizations, such as health centers, that do not meet this definition cannot provide compensatory time in lieu of over-time.

3. A health center that allows its exempt employees to take time off when they work significantly more than 40 hours in a week should not call it compensatory time. Instead, the health center should call it "flexibility" time (i.e., rewarding employees for their flexibility) to reflect the fact that it does not refer to compensatory time (as it is defined by the FLSA) but to an entirely different employee benefit.

4. An exempt employee's pay cannot be docked for coming to work late or leaving early. Docking an exempt employee's pay may convert him or her to a non-exempt employee, entitling him/her to back-pay for uncompensated overtime for time worked.[7]

5. Finally, note that a health center must comply with the FLSA's detailed record-keeping requirements. For example, a health center must maintain accurate information regarding employees' legal names, addresses, and wages.[8]

5 *See*, 29 C.F.R. § 785.11.

6 A workweek is a period of 168 hours during 7 consecutive 24-hour periods. Most employers utilize a Sunday-to-Sunday workweek. However, this is not a legal requirement. The workweek may begin on any day of the week and at any hour of the day established by the employer. Generally, for purposes of minimum wage and overtime payment, each workweek stands alone; there can be no averaging of 2 or more workweeks.

7 A health center may be permitted to dock an exempt employee's leave time but should consult with a competent attorney regarding this practice.

8 *See*, 29 C.F.R. § 516.3

Discrimination/ Harassment

Since the passage of the Civil Rights Act of 1866, Congress has been attempting to provide protection for employees against discrimination based upon personal characteristics, racial basis, or religious practices. Chief among the laws that proscribe employers' illegal actions regarding hiring, firing, promotion, demotions, and other decisions is Title VII of the Civil Rights Act of 1964, which protects employees from discrimination based upon their race, color, national origin, sex, or religion. It is also Title VII that shields employees from sexual harassment in the workplace, considered to be a form of sexual discrimination. Though there are other statutes that protect employees against discrimination based upon factors such as age (such as the ADEA) or disability (such as the ADA), Title VII accounts for the largest percentage of employment-related litigation. As a result, a health center must ensure that it understands Title VII and the many court cases that have interpreted this important statute.[9]

Title VII's Protections

Title VII defines an "employer" as any organization that has fifteen or more employees for each working day of twenty or more weeks of the current or preceding calendar year. The term "current year" refers to the year in which the alleged discriminatory action took place.

Employees may bring two types of discrimination claims under Title VII:

- Claims that allege disparate treatment and
- Claims that allege disparate impact.

Under the so-called disparate treatment theory, employees must establish that they have suffered a negative job action as a result of their race, sex, religion, or national origin. For example, a Catholic employee who is demoted because his/her employer wanted to promote a Protestant employee may allege that he/she was demoted in violation of Title VII.

An employee bringing a claim based on a disparate impact theory must demonstrate that his/her employer's policies or practices have the unintentional effect of discriminating against a particular group. Once the employee has established this, the burden shifts to the employer to show that it had a "legitimate business purpose" for the policy or practice. For example, an employer that utilizes a physical test (such as the ability to lift 35 pounds) to evaluate applicants for a nursing position that excludes a disproportionate number of women must demonstrate that the test serves a legitimate business purpose, such as, for example, ensuring that nurses are able to assist patients in getting onto the center's exam tables, or the test will be determined to violate of Title VII.

Sexual Harassment

Title VII's prohibition against sexual harassment is premised upon a 1986 Supreme Court decision holding, for the first time, that Title VII's prohibition against sex discrimination also included sexual harassment. In Meritor v. Vinson, the Supreme Court defined two types of sexual harassment, *quid pro quo* harassment and hostile work environment.[10] Following the Court's decision, the EEOC issued numerous guidance and policy notices that further define sexual harassment. The EEOC defines sexual harassment as: An unwelcome sexual advance, request for sexual

9 We have provided a summary of Title VII's requirements below. However, due to Title VII's complexity, we have included in this series of risk management bulletins a bulleting entitled "Discrimination and Harassment," which provides extensive information on this topic.

10 *See,* Mertitor v. Vinson, 477 U.S. 57 (1986).

favors, and other verbal or physical conduct of a sexual nature when:

1. Submission to such conduct is made either implicitly or explicitly a term or condition of employment;

2. Submission to, or rejection of, such conduct by an individual is used as the basis for employment decisions affecting such individuals (such as *quid pro quo* harassment); or

3. Such conduct has the promise or effect of unreasonably interfering with the individual's work performance or creates an intimidating, hostile, or offensive work environment.

It is important to note that, although the elements of a "harassment" claim have largely been developed in the context of sexual harassment, the prohibition against harassment extends to all types of harassment. Specifically, courts have repeatedly held that employers may be subject to "hostile work environment" claims any time one employee has harassed another employee based upon the targeted employee's status as a member of a protected class.[11] As in sexual harassment hostile work environment claims, an employee need not suffer a negative job action but may succeed in a case simply because the harassment is so pervasive or severe as to create an abuse or hostile working environment.

Determining what types of actions constitute illegal harassment is a fact-by-fact determination that is not specifically defined by statute or regulation. For example, court cases have held that conduct such as touching a person's body, pinching someone, or telling sexual jokes or stories may be actionable. However, the Supreme Court has held that a single or isolated event or joke may not constitute harassment. It is clear that, in order to be illegal, the alleged harasser's actions must have been unwelcome from the victim's perspective and the perspective of a reasonable person in the victim's situation.

A health center may be subject to "strict" liability for harassment when an individual in a supervisory or managerial role subjects an employee to harassment or if, upon notice that one employee is creating an abusive work environment for another employee, the supervisor or manager fails to take appropriate corrective action. In order to protect against harassment claims, the health center should:

1. Develop and disseminate a clear non-harassment policy. This policy should define and strongly prohibit all forms of harassment, sexual or otherwise, and describe a specific mechanism for employees to report incidents of harassment, including an alternative should the employee be reticent to report the claim according to this procedure. The policy should state that violators will be disciplined and assure that complainants will not be retaliated against.

2. Inform employees that their confidentiality will be protected to the extent possible. The health center should not guarantee confidentiality because complete confidentiality may be impossible given the center's duty to investigate the complaint. Finally, the health center should require that employees acknowledge that they have received and understand the center's non-harassment policy.

3. Follow its procedures – the most important aspect of a health center's non-harassment policy. Numerous courts have held employers liable for failing to follow a stated harassment policy by neglecting to investigate or resolve a complaint. This is a risk that is easily managed by properly training health center employees regarding the center's non-harassment policy and strictly enforcing the policy.

11 *See* e.g., Dennis v. Fairfax, 55 F.3d 151 (1995)(applying the elements of sexual harassment to a race-based claim); Venters v. Delphi, 123 F.3d 956 (1997)(upholding a hostile work environment claim based upon religious harassment).

TERMINATION OF THE EMPLOYMENT RELATIONSHIP

While the above discussion has focused on managing risk throughout the employment relationship, there are times that the employment relationship must end. An employment relationship generally ends one of three ways: the employee resigns, the employee is fired, or there is a reduction-in-force. Regardless of the reason for the termination, a health center must treat the termination process and decision with care and manage the risk associated with it.

Resignation

While it is true that a health center generally has less risk when an employee resigns, an employee's resignation does not necessarily shield the center from liability. This is true because, in many states, an employee who resigns may sue his or her employer under a tort theory of "constructive discharge." In a constructive discharge, an employee alleges that his/her work environment was so impossible to tolerate that the employee was compelled to resign rather than continue to suffer. While this is a difficult claim to prove, a health center should be mindful of this risk.

In an effort to manage its risk, a health center should:

- Require all employees who resign to submit a written letter of resignation,
- Conduct exit interviews with all departing employees to explore whether an employee is leaving voluntarily or due to a hostile work situation,
- Consider asking all departing employees to sign a separation agreement attesting to the voluntary nature of their separation and releasing the health center from any liability.

Discharge

A health center's level of risk substantially increases whenever it terminates an employee. Regardless of the reasons for the termination, any time a health center terminates an employee there is a possibility that the employee will decide to sue the center. Employees most frequently argue that their termination was improper based upon either the contractual theory that the health center violated its established policies or a statutory theory that he/she was fired for an illegal discriminatory reason.

As described above, an employee who argues that the health center failed to follow its policies and procedures must allege that there was an agreement between the employee and the health center that the health center was legally obligated to follow.

To reduce risk, a health center may:

1. Include a clear disclaimer in its employee handbooks that states that the handbook is not a contract and that employees may be fired "at-will,"
2. Establish a progressive discipline policy that provides for increasingly severe consequences to employee misconduct or poor performance prior to terminating an employee. Employees who bring claims against their employers for failure to follow their progressive discipline policies are frequently successful in court because courts view these policies as creating rights for employees. Stated otherwise, courts typically hold that if an employer has a progressive discipline policy in place it should follow that policy prior to terminating an employee. As a result, a health center should consider instituting a policy that describes various types of discipline but clearly states that the system is non-progressive. In a non-progressive disciplinary system the health center remains free to utilize a similar type of system in practice but does not obligate itself to do so. Regardless of the health center chooses to implement, its employee

handbook should state that the health center's disciplinary policy is intended only as a guide and that the health center reserves the right to terminate an employee without any prior notice.

3. Institute a grievance procedure that permits employees who have been terminated to dispute the termination and that requires employees to complete the grievance process prior to seeking redress outside of the organization. In other words, employees should be required to complete the grievance process before filing a claim against the health center. The grievance procedure should include at least two steps,[12] with the final step being an appeal to the Executive Director/ CEO. This will allow the CEO to assess the health center's potential risk and determine if, in fact, the termination should be reversed.

4. Finally, the strongest tool for reducing risk as a result of employee discharges is an effective performance evaluation system. Performance evaluations, if correctly conducted, provide employers with the single best opportunity to effectively manage employment-related risk. This is true because a performance evaluation that accurately reflects a poorly-performing employee's faults provides a strong defense in a lawsuit. This may be particularly true in discrimination cases where, once an employer establishes that it had a non-discriminatory reason for terminating the employee, the burden of proof shifts back to an employee to demonstrate that the employer's reason was merely a pretext for a discriminatory reason. Clearly, this is a difficult burden to meet. However, in contrast, an inflated performance evaluation could prove to be a significant problem for a health center that is attempting to justify why it terminated an employee that it has previously rated as "satisfactory" or "superior."

   Performance evaluations should be conducted periodically. Performance evaluations should be conducted using a rating scale that reviews all areas of performance, including punctuality, professionalism, judgment, and reliability. Employees' job descriptions should provide the foundation for reviewing employees' specific job duties and responsibilities. Most importantly, the individuals conducting the performance evaluation must be carefully trained not to make statements promising or implying job security, as these statements may be used by employees to allege that they were not employed at-will.

5. Once the review has been completed, individuals should be required to sign a form acknowledging that they have received an evaluation. In addition, a health center should consider allowing employees to comment on or to respond to the evaluation they received and include this response in employees' personnel files. This will allow the health center to assemble a complete record regarding an employee's performance history and conduct, including the employee's contemporaneous response to a negative evaluation, and, as stated above, may be strong evidence in defending against an employee's claim against the health center.

12 The recommended level of complexity of a health center grievance procedure varies depending upon a health center's size and/or number of employees. For example, in large health centers, there may be more steps to the grievance procedure that allow the mid-level management to evaluate claims that are easily resolved with the last step being that the CEO's review. In contrast, in small centers, there may be so few employees that the CEO may be the only individual to review the grievance, because there simply may not be any "middle managers."

Exit Interviews

As discussed above, all employees who resign or are terminated should be required to attend an exit interview. An exit interview is an important risk management tool because it creates a systematic way for the health center to complete any necessary paperwork, ensure that information regarding continuing benefits, such as the Consolidated Omnibus Budget Reconciliation Act, is communicated and that the employee returns any health center property in his/her possession (i.e., computers, credit cards, keys, cell phones, employee personnel manuals, etc.). In addition, the exit interview provides the health center with an opportunity to obtain employee input on the organization's management, policies, and operations. If correctly handled, the health center may receive valuable information regarding day-to-day operations from departing employees, including any "red flags" that may be otherwise unknown to senior level managers. Once the interview is complete, individuals should be asked to sign a form attesting that they participated in the exit interview and received the required forms regarding benefits. This form should be included in the employee's personnel file for future reference, if necessary.

Reductions-In-Force

Reductions-in-force ("RIF") are, at times, a necessary part of doing business. However, it is important that the lay-offs be conducted in a fair and unbiased manner. Specifically, a health center must ensure that its RIF is completed in a non-discriminatory manner. This may mean that the health center lays off those employees hired last or eliminates those positions that are clearly no longer necessary. As a final check, the health center should review the list of employees being laid off to ensure that it does not appear that only the oldest employees or all the employees of another protected class were laid off, regardless of whether this was coincidental.

STRATEGIES AND TOOLS FOR MANAGING RISK

The above discussion provides tips for managing specific types of employment-related risk. There are, however, two general tools that all health centers should consider: employment practices liability insurance and a systematic employee training program.

Employment Practices Liability Insurance

Employment practices liability insurance typically covers an employer for the costs associated with defending an employee's claim before an administrative body (such as the EEOC) or court, as well as any settlement or judgment that may result from the claim.

Training

Clear, well-written policies and procedures are completely useless if no one knows that they exist. Too often, the health center CEO or management employees take the time to draft solid polices but then never train employees to implement these policies. From a risk management perspective, not only is this practice a waste of time, it may be very dangerous because it subjects a health center to possible liability for failing to follow its own policies and procedures.

It is not enough to provide a brief orientation to all new employees, hand them a manual, and expect employees to follow procedures. On-going training should occur on a variety of subjects at all levels of the health center. The health center should train employees regarding the policies they expect employees to adhere to and train managers/supervisors on the appropriate way to implement the policies and procedures.

1. Health center supervisors and managers should be trained on how to treat employees with respect. It is well documented that employees often sue employers because they feel a supervisor or fellow employee disrespectfully treated them. Health centers often assume that managers know and understand this simple premise but find out the hard way that they were mistaken.

2. All employees, including managers, should receive orientation and "refresher training" that explains the health center's mission and goals, as well as a comprehensive explanation of the health center's policies and procedures. A number of important policies should be highlighted including the center's:
   - At-Will Policy
   - Anti-Discrimination Policy
   - Non-Harassment Policy
   - Disciplinary Policy

3. One area that frequently is overlooked in training is advising employees about where to get information if they have a question. This may be as simple as explaining that the employee handbook is intended as a resource for employees or it may be more complex such as directing employees to various department managers for information on specific issues such as how to report a needle stick injury. Regardless of the topic, training sessions should provide employees with information on how to get assistance after their orientation session is over.

4. General training on key policies and procedures is not enough. Because it is one of the most frequently litigated issues, and therefore, a significant area of risk for a health center, all employees should receive periodic training about the health center's non-discrimination and non-harassment policy. Supervisors should be trained on how to respond to allegations of discrimination or harassment and all others should be trained regarding how to identify harassment and how to report violations of the center's policies.

5. Everyone attending training sessions should sign a form acknowledging (A) the type of training provided; (B) the date of the training; (C) that the employee attended the training; and (D) that the employee had the opportunity to ask questions if he/she did not understand the training. This documentation will provide the health center with a strong defense should an employee claim that he/she did not know of a specific policy/procedure.

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