TEXAS LAWYER

JULY 29, 2019

An ALM Publication

How to Avoid Top 5 Mistakes Employers Make

An employer should decide early on which type of response to make and consistently remain in that camp.

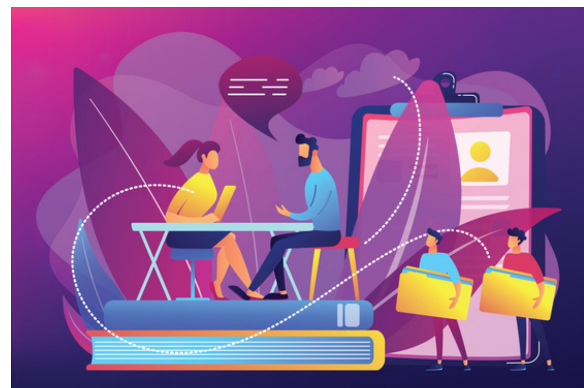
By Stewart Hoffer and Kasi Chadwick

Employment-related lawsuits remain a staple of dockets, often because employers repeatedly make the same mistakes. Below are some of the most common (and avoidable) pitfalls faced by Texas employers and how to steer clear of them.

1. Inadequate background checks

The best way to avoid a problem employee is not to hire one. Often, the problem employee who later morphs into the litigious former employee has a history of such behavior. Public information (e.g., criminal history, litigation history) is available, but many employers fail to do the research. Moreover, background checks can help avoid the (now) increasingly common negligent hiring claim. While the practice of conducting background checks does not insulate an employer from liability for negligent hiring, employers often stand a better chance when they conduct reasonable investigations on prospective employees.

Employers should note that certain laws apply to background checks. The Fair Credit Reporting Act applies to the use of consumer report information for employment-related purposes. Also, some courts have held that an employer's refusal to hire someone who has sued for employment discrimination can be unlawful retaliation. Finally, "ban the box" laws are popping up all over the country (at both the state and municipal levels). These laws limit



Credit: Visual Generation/Shutterstock.com

what an employer may consider in the application process. The specifics as to how to conduct lawful background checks are beyond the scope of discussion here, but employers should consider implementing them after consultation with experienced counsel.

2. Ignoring policy, failing to document

Defense lawyers often encounter evidence that the employer had multiple, valid reasons for discharging/disciplining an employee before the incident giving rise to the lawsuit, but the employer did not take action in an effort to "be nice." Bad idea. Juries expect employers to discipline employees who engage in misconduct and to keep contemporaneous records of those activities. Employers should neutrally, timely, and consistently apply their disciplinary policies, all the time, every time.

Similarly, when disciplining an employee, choose the language in the documentation carefully. An employer should never suggest that an employee "violated the law." That conclusion is often wrong, and when made, employers often omit other valid reasons for termination. When an employee has engaged in misconduct that justifies discipline, employers should discipline because the employee's conduct violates *company policy*. Nothing more; nothing less.

3. Failing to coordinate response

Often, HR and front-line supervisors each have information that the other does not. Before making employment decisions, management and HR should coordinate to ensure all relevant information is considered. Additionally, whenever an employer is asked to respond to a formal charge—or even just questions from a governmental agency enforcing employment statutes—employers should inquire with all relevant stakeholders so that correct, *and consistent*, responses may be prepared. Though there may be many reasons for an employment decision, inconsistencies often create fact issues that lead to the denial of motions and provide fodder for the enterprising plaintiffs lawyer to make the employer look dishonest. See *Burrell v. Dr. Pepper/Seven Up Bottling Grp.*, 482 F.3d 408, 412 n.11 (5th Cir. 2007) ("[A]n employer's inconsistent explanations for its employment decisions at different times permit[ ] a jury to infer that the employer's proffered reasons are pretextual"). Accidentally omitting a reason in the preliminary stages of a dispute can detrimentally affect the defense.

4. Not taking complaints seriously

Typically, the law, and jurors, favorably treat employers who take prompt, remedial action in response to workplace harassment claims. Employers should take all complaints of harassment seriously; conduct a prompt, thorough, impartial, and confidential internal investigation; and discipline those employees found to have violated policies. Not only does this practice give the employer a chance to document a complainant's allegations should litigation ensue, but it will often provide evidence that can allow for quicker disposition of the case. Third-party investigation services and other law firms can be helpful here.

5. Being a litigation chameleon

To minimize the cost of defending employment cases and ensure the least disruption to employers, it is important to have a resolute, consistent response to these cases.

There are basically three types of employer responses to employment cases. In the first, the employer is convinced of its innocence and will demand to "fight this all the way, no matter what the cost." Given the meritless nature of many cases, this is an understandable response.

The second is to approach these cases from a purely economic view. If a case can be settled for less than defense costs, this employer will seek to settle early. Conversely, if the employee's demand is not grounded in reality, then this client is willing to head to the courthouse.

The third is a combination of the previous two. The employer starts out ready to fight, but along the way (usually after defense

costs mount), thinks better of it and wants to settle. Less often, employers will shift gears the other way as they learn more of a plaintiff's wrongful conduct in discovery.

Keeping in mind that preparing for trial is very different from preparing for settlement, an employer should avoid being the third type. An employer should decide early on which type of response to make and consistently remain in that camp. If the employer chooses a "fight at all costs" approach, defense counsel will handle the case accordingly, collecting all necessary witnesses, documents, case law, and evidence necessary. Conversely, if the employer views the case through a purely economic prism, then defense counsel will likely defend the case strategically, limiting their efforts to only those tasks necessary to effectuate a quick resolution. It becomes more difficult—and expensive—to resolve cases when both sides have invested time, energy, and dollars for a protracted battle. Sometimes, dollars spent to vindicate the wrongly accused can be used to resolve the case early. Alternatively, deciding midstream to change course, while possible, can be challenging depending on the stage of the case. Picking and sticking with a strategy will provide the best chance to quickly and more economically resolve an employment dispute successfully.

*Stewart Hoffer is a partner with Hicks Thomas in Houston, board certified in civil trial law, who represents employers in labor, employment and commercial litigation. He can be reached at **shoffer@hicks-thomas.com**. Kasi Chadwick is a senior counsel with Hicks Thomas in Houston, representing employers in employment and commercial litigation matters. She can be reached at **kchadwick@hicks-thomas.com**.*

Reprinted with permission from the July 30, 2019, edition of Texas Lawyer. © 2019 ALM Medial Properties, LLC. All rights reserved.