



WVU Healthcare

# Dealing with Problem Employees Effectively

## Legal Tips and Challenges

# ***Goals for Presentation***

- Review typical challenges in coaching, counseling and discipline conversations
- Provide tips for handling or avoiding typical challenges
- Create awareness but not fear of legal issues

# ***Beth's Theory***

***Fairness + Respect = Few Legal Issues***



# Intro to Legal Rights

- Employees in West Virginia are generally “at will, meaning they may be discharged or resign without cause or notice
- “At will” exceptions:
  - Employment Agreements/Collective Bargaining Agreements
  - “Public policy” exception
  - Discrimination and other protective laws

# Examples of Protective Laws

West Virginia Human Rights Act - Civil Rights Act of 1964 - Americans with Disabilities Act -Age Discrimination in Employment Act – Family and Medical Leave Act – Equal Pay Act – Uniformed Services Employment and Reemployment Rights Act – Occupational Safety and Health Act – Genetic Information and Nondiscrimination Act – Fair Labor Standards Act – Employee Retirement Income Security Act – Executive Order 11246 – Bankruptcy Code – Immigration Reform and Control Act – West Virginia Whistleblower Law – West Virginia Patient Safety Act – West Virginia Workers’ Compensation Act – Federal and State laws protecting jury duty – Federal and State laws prohibiting discrimination based on wage garnishment – West Virginia Use Of Tobacco Products – West Virginia statutes protecting political views

# **Legal FAQs**

## **(Frequently Asked Questions)**

# Legal FAQs

- *Should I document a coaching or disciplinary conversation?*
  - Scripts or talking points are helpful if you are nervous or uncomfortable
  - A memo confirming the meeting can clarify the message
  - Undocumented conversations are easily denied or misunderstood

# Legal FAQs

- *What if the employee asks for a representative or witness?*
  - Absent a contract that states otherwise, employees do not have any legal right to a witness or representative in a coaching, counseling or disciplinary conversation
  - Consistent practice of not permitting representatives or witnesses is recommended
  - Special circumstances should be considered

# Legal FAQs

- *Should I have a witness with me for difficult conversations?*
  - A fellow member of management may help in delivering the message
  - Having a witness for some conversations and not others might give appearance of discrimination
  - Use good judgment
  - Be conscious of intimidation

# Legal FAQs

- *What if the employee wants to tape the conversation?*
  - Under WV law, one-party surreptitious recording is permitted
  - You are not required to give consent to tape recording (I recommend you do not)
  - Remember that audio recording can be manipulated

# Legal FAQs

- *What if person being coached or disciplined raises new information or allegations?*
  - If new information, listen and acknowledge and look into it after the meeting
  - All allegations of unlawful harassment or discrimination must be reported/investigated

# Legal Tips for Staying Out of Court

# Legal Tips

- Do NOT retaliate for **protected activities**
- Some examples of **protected activities**
  - Raising safety concerns
  - Questioning legality of payroll practices
  - Complaining about unlawful discrimination or unlawful harassment
  - Whistleblowing as to illegal conduct

# Legal Tips

- Coaching conversations should be based on *performance* and NOT protected activity or status like --
  - FMLA leave or other protected medical leave (like workers' compensation)
  - Protected categories (age, race, religion, pregnancy, union activities, etc.)
  - Protected activities (explained on previous slide)

# Legal Tips

- Treating the same performance challenges differently is an invitation for a discrimination claim
- Delaying coaching, counseling or disciplinary action for problem conduct or performance sets the stage for an employment claim

# Legal Tips

- Use email wisely and sparingly (when in doubt, delete before sending)
- Remember that your employee is NOT your patient in a coaching conversation – be compassionate but not clinical

# Typical Challenges

# *Typical Challenges*

## Challenge and Impact

- Unacceptable conduct tolerated for extensive period of time
  - Intervening events pose risk of discrimination or retaliation scenarios
  - Difficult to explain past lack of action

## Leadership Opportunity

- Investigate and change course to remedy situation
- Acknowledge past inaction and emphasize new commitment



# *Typical Challenges*

## Challenge and Impact

- Written performance evaluations are inconsistent with coaching or corrective action
  - Mixed message
  - Importance of coaching undermined
  - Almost impossible to explain in litigation

## Leadership Opportunity

- Be consistent and accurate in all communications
- Not communicating is communicating
- Make sure right folks are evaluating performance



# *Typical Challenges*

## Challenge and Impact

- Individuals who receive reward and recognition are not solid or high performers
  - Mixed message
  - Positive message contradicts and overrides constructive feedback

## Leadership Opportunity

- Be honest
- Recognize solid and high performers appropriately
- Performance encompasses competence, behavior and attitude



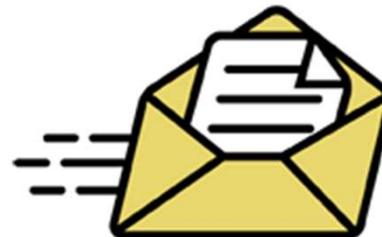
# *Typical Challenges*

## Challenge and Impact

- Over-reliance on email communications for difficult conversations
  - Easily misinterpreted
  - Email “strings” can create unintended message
  - Can provoke “ranting” or endless debate

## Leadership Opportunity

- Communicate directly and in person
- Confirmation by email is OK, but first deliver difficult messages in person



# *Typical Challenges*

## Challenge and Impact

- Performance standards and expectations are not consistently upheld in department or across organization
  - Promotes perception of “favorites” and “double standards”
  - Harms morale
  - No benefit seen to improving performance

## Leadership Opportunity

- Be consistent
- Be aware of perceptions of inconsistencies and unfairness and address them
- Uphold accountability



# Guidelines for Disciplinary Documentation

# *Documentation Guidelines*

- Developing a “template” for disciplinary documentation is nearly impossible
  - Every situation should be analyzed individually
  - Use extreme caution with “cutting and pasting” from prior documents
- Applicable policies must be identified by name in the document

# *Documentation Guidelines*

- Description of incident(s) should be concise, factual, objective and free from assumptions or exaggeration
- Level of detail should be minimum necessary to explain the situation
- If investigation has been conducted, retain supporting documents in investigative file

# *Documentation Guidelines*

- NO confidential information (like medical information) in disciplinary documentation
- Avoid abbreviations and slang
- Use correct grammar and proper sentences
- Does your document make sense to a person not familiar with your department?

# *Questions and Discussion*