



Annual Meeting 2011
DENVER OCT 23-26
Where In-house Counsel Connect



Training Your Supervisors – Your First Line of Defense

Association of Corporate Counsel
Annual Meeting
Denver, CO
October 25, 2011



Annual Meeting 2011

DENVER OCT 23-26
Where In-house Counsel Connect



<p>Melanie Sims Frank Assoc. General Counsel TVG Network/Betfair US 6701 Center Drive West, Suite 160 Los Angeles, California 90045 (310) 242-9518 - Phone (310) 242-9501 – Fax MFrank@tvq.com</p>	<p>Amy Elizabeth Loggins AVP - Corporate Counsel Crawford & Company 1001 Summit Blvd. Atlanta, Georgia 30319 (404) 300-1028 - Phone amy_loggins@us.crawco.com</p>
<p>Richard L. Rainey Womble Carlyle Sandridge & Rice, PLLC One Wells Fargo Center Suite 3500 301 South College Street Charlotte, NC 28202-6025 (704) 331-4967 - Phone (704) 338-7835 - Fax email: rrainey@wcsr.com</p>	<p>Alonda W. McCutcheon Bass Berry & Sims PLC 150 Third Avenue South, Suite 2800 Nashville, TN 37201 (615) 742-7717 - Phone amcutcheon@bassberry.com</p>



THE CHALLENGE

- The actions of managers, especially front-line supervisors can create legal liability without any involvement of the Human Resources Department or in-house counsel.



- **Scenario 1** – John comes to his front line supervisor and says: “I know we are scheduled to work overtime this Saturday but my religion prohibits work on the Sabbath. Can I have off?” The supervisor having heard for years that he needs to treat everyone the same replies, “No, HR tells me I need to treat everyone the same. If I gave you the day off, I would have to give everyone else the day off. If you don’t show, I’ll have to fire you.” John goes to file a charge with the Equal Employment Opportunity Commission the next day.



- **Scenario 2** – Rebecca asks to meet with her supervisor and tells him that: “Steve is making fun of me and other women saying we all should go back to the kitchen. He’s doing some other things we don’t like that I’m embarrassed to talk about.” The supervisor knows Steve and considers him to be a bit of a jerk but relatively harmless, he replies, “You know Steve’s always joking around. Just ignore him.” The next year, Rebecca is the lead plaintiff in the class action harassment case brought against the company.



- **Scenario 3** – Mary has had some off and on attendance issues and has been given some disciplinary warnings in the past. She approaches her supervisor and tells her, “My son’s been diagnosed with asthma so I’ll have to miss a day or two every once in a while when he has an attack. Is that okay?” The supervisor remembers the attendance problems Mary has had and says, “I am sorry to hear that. It’ll just be treated like any other absence under our absence policy.” When Mary gets fired for attendance issues the U.S. Department of Labor is very interested in her claim that she wasn’t given FMLA leave when she requested it.



- **Scenario 4** – Steve is a good worker but has experienced some recent health problems. He reports to his supervisor that, “My high blood pressure medicine takes a while to become effective in the morning. Can I work a modified schedule so that I come in an hour late and leave an hour later?” The supervisor doesn’t want it to appear that he’s giving Steve favorable treatment and says, “Sorry, the schedule is the schedule.” Steve contacts an advocacy group for disabled individuals.



- **Scenario 5** – Joe’s supervisor is preparing Joe’s annual review and, frankly, Joe hasn’t been doing a very good job. However, our supervisor hates the idea of having to tell Joe that so he gives Joe an overall satisfactory rating but notes that production has slipped and “Joe may be getting too old for this job.” The performance review is Exhibit A in Joe’s age discrimination suit the next year.



Staub v. Proctor Hospital 131 S. Ct. 1186 (March 1, 2011)

- The court recognized the “Cat’s Paw” theory of discrimination. An employer may be held liable for the otherwise non-discriminatory actions of a decision maker if the decision maker was influenced by the discriminatory actions of lower level supervisors.



IDENTIFYING THE SOLUTION

- Training puts supervisor in a position to be your early detection system.
- Training can also be a shield to punitive damage awards.
- But, it's impossible to train all the time on everything
- You need a focused approach to what training you provide and how you provide it.



Annual Meeting 2011
DENVER OCT 23-26
Where In-house Counsel Connect



Consider your structure: Public or Private Company? Family-owned? Foreign-owned?

- SEC reporting obligations
- Insider Trading
- Codes of Conduct
- Ethics/Conflicts of Interest
- Sarbanes-Oxley
- Centralized functions?
- Franchisor?



Consider your footprint: Domestic or Multinational Company? Which states?

- Foreign Corrupt Practices Act
- UK Anti-Bribery Act
- Country-specific laws
- Do you need multiple languages?
- Country-specific regulations re: training of employees (Labor Boards)
- Cultural issues/barriers
- State-specific laws & regulations?
- Licensing requirements/issues?



Annual Meeting 2011
DENVER OCT 23-26
Where In-house Counsel Connect



Consider your clients/customers: Government Contractor? Contractual requirements? Public Accommodation?

- Conflicts of Interest
- Social Media policies/practices?
- Gift-giving to gov't employees
- Drug-Free workplace
- Required postings
- E-verify
- Billing specifics



Annual Meeting 2011
DENVER OCT 23-26
Where In-house Counsel Connect



Consider your workforce: employees? Independent contractors? Unionized?

- IRS regulations
- NLRB regulations
- Solicitation policy
- Benefits?
- Workers compensation/RTW programs?
- Who is a supervisor?
- Personal liability for non-compliance?
- Exempt or non-exempt?
- Industry being focused on by gov't?



Your Specific Red Flags

- “Red flag” issues will vary from company to company depending on the nature of the business and your workforce.
- What types of lawsuits or charges do you get?
- What sort of questions you get from supervisors and the HR team?
- Where is your biggest exposure?



L&E Red Flag Examples

- Overtime (wage & hour)
- Reasonable accommodation requirements under the ADA & Title VII
- Harassment Complaints
- FMLA Requests
- Use of contractors



Annual Meeting 2011
DENVER OCT 23-26
Where In-house Counsel Connect



Examples of Labor & Employment Training Opportunities



Train on your specific Policies & Procedures

- Supervisors need to
 - understand not only external requirements (the law) but the company's own internal requirements;
 - know how to “issue spot”;
 - understand who the “go to” people are for specific issues; and
 - understand that they “are” the company in their locations and their actions can and will be imputed to the company.



Train on Evaluation Techniques

- Understanding the performance review and management processes.
- Focusing on performance indicators that are objective & avoiding the subjective.
- Avoiding the “Lake Wobegon syndrome.”
- Avoiding the use of inappropriate factors



Train on Evaluation Techniques

- **Measurable:** The end result can be identified in terms of quantity, quality or timeline (or applicable standard of writing). If it is not measurable, how do we know its value?
- **Observable:** The witnessing and/or gathering of descriptions of the work performance and comparing it with accepted “benchmarks” (standards). Actions, words, gestures, procedures with which the person being evaluated can identify with. Should be used so they can take appropriate action to maintain or improve the work behavior
- **Behavioral:** Actions which are observed, described and can be changed or corrected with instructions or self discipline



Evaluation Pitfalls to Avoid

“Halo Effect”. This is the tendency to overrate a favored employee. This can happen because of:

- **Effect of Past Record**. Good work in a previous rating period tends to carry over to the current period
- **Compatibility**. People who please are sometimes rated more highly than they deserve
- **The Blind Spot**. In this case, the Manager is blind to certain defects because he or she possesses them



Evaluation Pitfalls to Avoid

“Horns Effect”. This is the tendency to rate a employee lower than circumstances warrant. Some causes of this are:

- **Perfectionism**. The Front Line Manager may have an unrealistic expectation
- **Dislike**. The employee is contrary or is not always agreeable with manager or employees
- **Guilt by association**. A person who is friends with someone who is perceived as a troublemaker may also be perceived as a troublemaker



Evaluation Pitfalls to Avoid

- **Stereotypes**. This pitfall involves basing evaluations on fixed perceptions of performance rather than actual performance and is typically “looking for facts to fit theory” reason. Objective criteria must be applied to performance
- **Bias/Prejudice**. Things we tend to react to that have nothing to do with performance such as: race, religion, education, family background, age and/or sex
- **Over-emphasis on favorable or unfavorable performance**. On one or two tasks, this leads to an unbalanced evaluation of the overall contribution
- **Bad Impression**. Relying on impressions rather than facts
- **Uncontrollable circumstances**. Holding employees responsible for the impact of factors beyond their control



Train on how to discipline and document

- How to establish a proper paper trail without over-documenting.
- How to give notice and an opportunity to correct.
- How to coach and counsel (not only via email)



Annual Meeting 2011
DENVER OCT 23-26
Where In-house Counsel Connect



LOGISTICS and PRACTICAL CONSIDERATIONS



How do you get buy-in from your clients?

- Know your business
 - Revenue considerations
 - Time spent out of operations
 - Technology capabilities
- Explain the risks (with numbers)
 - Personal liability of executives
 - Avoiding gov't investigations
 - Public Relations issues
- Culture of Compliance and Integrity
- Costs of Litigation
- Costs associated with employee morale
- Can't be too theoretical or lawyerly – has to matter to the business



Consider WHO you need to train

- Executives?
- Managers?
- Front-line Supervisors?
- All employees?
- Don't forget your shared services operations (Finance, IT, etc.)

Probably depends on the topic.



Annual Meeting 2011
DENVER OCT 23-26
Where In-house Counsel Connect



Consider who will OWN training

- Compliance Dept.
- Risk Management
- Operations
- Human Resources



Consider **HOW** you want to Train

Different Learning Styles:

- Learn by doing: Hands-on
- Learn by Reading or Seeing: Visual (Powerpoints or Reading Materials)
- Learn by Hearing: Auditory (conference calls)
- Maybe use multiple avenues for training/communicating



Consider HOW you want to Train

- Shorter vs. longer program?
- Periodic vs. one-time?
- In-person vs. online? (Consider whether employees have computers)
- Allow questions or discussion?
- Lecture (classroom-style)
- Practical vs. theoretical
- Reinforce and refresh



Consider WHO will provide training

- Law Firm
- Online vendor (e.g. Corpedia, LRC, etc.)
- Internal Source (e.g. in-house counsel, HR professional)
- Who will draft materials?



Other Logistics

- Cost and Budgeting
- How often will you provide a course (e.g quarterly, monthly, etc.)?
- How will you track completions?
- How will you ensure compliance?
- Consequences for non-compliance?
- Escalation of non-compliance issues
- Tone from the Top



Annual Meeting 2011
DENVER OCT 23-26
Where In-house Counsel Connect



Better Training Produces Better Outcomes



- **Scenario 1** – John comes to his front line supervisor and says: “I know we are scheduled to work overtime this Saturday but my religion prohibits work on the Sabbath. Can I have off?” The supervisor has a red flag go off because he has been trained on the need to consider reasonable accommodation of religious beliefs and practices. He tells the employee that he will talk to HR about the request. The supervisor and HR are able to work out a shift swap so that John doesn’t have to work on Saturday. John never goes to the Equal Employment Opportunity Commission.



- **Scenario 2** – Rebecca asks to meet with her supervisor and tells him that: “Steve is making fun of me and other women saying we all should go back to the kitchen. He’s doing some other things we don’t like that I’m embarrassed to talk about.” Supervisor consults the company’s harassment policy and gets Rebecca’s complaint to the right person. Complaints are investigated and Steve is given a verbal warning about making inappropriate remarks in the workplace. The supervisor checks back with Rebecca and she reports that the problem has stopped.



- **Scenario 3** – Mary has had some off and on attendance issues and has been given some disciplinary warnings in the past. She approaches her supervisor and tells her, “My son’s been diagnosed with asthma so I’ll have to miss a day or two every once in a while when he has an attack. Is that okay?” The supervisor, having been trained that an employee doesn’t have to specifically mention the FMLA in order to invoke their rights for leave, sends Mary to HR to fill out the FMLA forms and get a medical certification. The days that Mary misses for her son’s asthma is not counted against her for attendance purposes.



- **Scenario 4** – Steve is a good worker but has experienced some recent health problems. He reports to his supervisor that, “My high blood pressure medicine takes a while to become effective in the morning. Can I work a modified schedule so that I come in an hour late and leave an hour later?” The supervisor has been trained on the employer’s duty to engage in an interactive discussion of disability accommodation issues. He works with HR to consider whether a modified schedule is possible.



- **Scenario 5** – Joe’s supervisor is preparing Joe’s annual review. Based on the training he’s received the supervisor knows that he needs to address Joe’s slipping performance. He gives Joe a below average ranking for production and cites objective production numbers to support the ranking. The supervisor will monitor Joe’s performance moving forward to see if he improves or needs to be given a performance warning.



QUESTIONS?