Addressing Sexual Abuse of Youth in Custody

Module 16: HUMAN RESOURCES ISSUES



Proactive vs. Reactive Thinking

Proactive: What is Ideal
Designing policies
Screening at hiring stage

Reactive: Dealing with the here and now

- Investigations
- Discipline and termination of employees

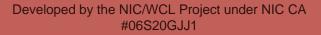


Employment Context Different legal considerations apply depending on whether you are:

Public or private Public (government) employer or private facility or private sub-contractor

Union or nonunion

Union environments lessen employer flexibility, but there are ways to work with unions on these issues



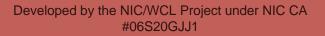


Key Issues for Public Employees

Proactive Off duty conduct rules Employee surveillance

Reactive

- Employee surveillance in investigation context
- Due Process Rights in discipline and termination





Some Key Issues For All Employers

Proactive

Reference checks and defamation issues

Reactive/Proactive

 Sex/race discrimination charges (Title VII) in the context of discipline and termination actions



Key Issues in the Union Context

Proactive

Dealing with the Union in making policy changes and collective bargaining agreement modifications

Reactive 8

Dealing with the Union in investigations

Dealing with the Union in grievance and arbitration proceedings concerning employee discipline/termination



Public Employer Issues

- Provisions of federal and state Constitution apply
 - 1st Amendment freedom of association
 - 4th Amendment privacy, surveillance
 - 5th, 14th Amendment due process, equal protection

Balancing test – courts will weigh intrusion on employee's constitutional rights against weight of employer's interest

Employer Interests that Can Support Off-Duty Conduct Rules

Interests in on-the-job performance

Interests in off-the-job conduct that implicates officer's fitness for duty

Interests in public reputation of correctional institution



Litigation Results

Off Duty Conduct Rules Generally

Many court cases involving police and corrections officers uphold policies regulating off-duty conduct

E.g., disorderly conduct, association with criminal activities, places or persons, etc.



Litigation Results

Rules regulating corrections officers' off-duty contacts with former or current clients or others with involvement in criminal justice system

Somewhat more mixed results, but generally no-contact policies are also upheld by reviewing courts



Litigation Results for no contact policies

Courts of appeals have tended to uphold policies that prohibit corrections officers from contact with current or former clients in light of the security interests involved

- There are a few contrary trial court decisions with specific facts
- This is an evolving area of the law
- Good, sound, well thought out-policies are best protection
 - Think through the connection between rules and policies and the goals or interests being enforced



Employee Surveillance

Key issues under balancing test is "reasonableness":

- Notice
- Methods
- Random vs. targeted
- Objective cause
- Balance between intrusiveness and employer need



Privacy

"Reasonable expectation of privacy"

Depends heavily on work context

- Corrections officers working in secured areas have low expectations of privacy
- Probation officers and others working in the community may have higher expectations of privacy

E.g., Personal or apparently "personal" cars Developed by the NIC/WCL Project under NIC CA #06S20GJJ1



Proactive Steps: Employee Surveillance

Provide general notice about employee surveillance methods

Restrict surveillance methods to those reasonably necessary

Use even-handed procedures for selecting surveillance targets



Investigations and Discipline

- Think through whether the case will be handled as a criminal or administrative matter
 - Garrity issues cannot use information obtained through threat of job action in subsequent criminal proceeding

Due process rights will apply, but this does not necessarily prevent administrative suspension pending resolution of investigation in appropriate circumstances Developed by the NIC/WCL Project under NIC CA

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Reference Checks

Area in which employment lawyers are very (too?) wary because of potential defamation concerns

Use of waiver forms in which job applicant agrees to waive all legal rights based on reference given; applicant must present this to former employer



Reference Checks

Nonofficial, back channel communications preferred but these cannot be written down or invoked later in explaining why an applicant did not get the job, which raises its own set of problems

Negligent Hiring – must check available public records for problems before hiring and must attempt to check former references



Sex/Race Discrimination Charges

Plaintiff must show that employer treated him or her differently than others similarly situated but of a different sex, race, national origin, or religious category

This is hard to do; most discrimination cases are lost and most lawyers hesitate to file beyond administrative level without very strong evidence

Pretext: is the employer's stated reason the REAL reason?

To Protect Against Successful Discrimination Cases

Maintain consistency in treatment across cases, incidents, and employees, and review cases for consistency

- Individual discretion by varying supervisors can be problematic
- Unstated rules e.g., credit for longstanding clean record – can also be problematic; either make the rule an explicit one or don't use it

Contemporaneous and clear articulation of reasons for employment actions

To Protect Against Successful Discrimination Cases

Maintenance of detailed personnel files that include contemporaneous documentation of problems, even relatively minor ones

These files should be treated as confidential (secured access) with access rights limited to those with real reason to need them



Consistency Makes Good Policy Proactively

Training supervisors

Minimizing managerial discretion

Treat like cases alike

Consistently enforce disciplinary rules

Consistency Makes Good Policy Proactively

Maintain up-to-date personnel files

Keep contemporaneous documentation of all infractions, even minor ones

Protect employment information from general discussion

Union Issues

Contractual obligations created through collective bargaining agreements (CBAs)

Proactive: review CBAs for inconsistent provisions and work to reconcile



Modifying Inconsistent CBA Provisions

Best option: Rely on Management Rights clauses

If new or expanded policy is presented to union reps and they don't object, good argument exists that the policy change was within the scope of management rights



Modifying Inconsistent CBA Provisions

Second best options

Request mid term modification
Bargain for changes at contract renewal

Both are less ideal options because they require trading



Investigations

Union representation – Weingarten rights

Employee has right to have union rep. present during interview

Role of the union rep. is to facilitate the process and help the employee understand what is going on



Investigations

Union rep. may not obstruct proceedings and may be asked to leave if he or she is doing so

Good, well trained union rep. can facilitate the process; it is worth investing energy in developing good relationships with union reps.

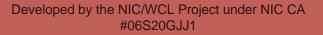


Arbitration

Both sides have the right to legal representation and to present evidence

Employer may not interfere with right of employees to testify at arbitration hearing

Arbitrator is not required to follow finding of misconduct in another forum, even a criminal court





Union Duty of Fair Representation

Unions are legally required to represent all of their members fairly (even if they think the member is guilty of misconduct, and even if they think the misconduct is reprehensible)

Unions have an interest in eliminating "bad apples" from their midst, just as management does

Vigorous union advocacy on behalf of an accused employee does not mean the union believes the employee does not deserve discipline or termination



Proactive Steps in Union Context

Run training sessions, which include clear statement of disciplinary rules

Give union policy statements on disciplinary procedures for staff sexual misconduct

Review collective bargaining agreement for inconsistent terms; request modifications if necessary

Assume and expect professionalism by union reps.; understand their constraints and duties

