

## The D's: Guiding Principles For Avoiding Litigation

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Learning the ins and outs of the myriad employment laws and regulations is a daunting task, so I have boiled the details down into nine guiding principles. My “Nine D’s” help managers understand complex rules and avoid most behaviors that encourage lawsuits.

### ▪ D's to Remember

- Dignity
- Discretion
- Disclosure
- Due Diligence
- Due Process
- Documentation

### ▪ D's to Avoid

- Delay
- Discrimination
- Deceit

### *Dignity*



"Don't look at this as a demotion, look at it as the stripping away of your last shred of dignity."

- Treat employees with courtesy and respect
- Listen carefully
- Be as responsive as possible
- Practice the Golden Rule



### *Discretion*



"But I do exercise. I exercise discretion."

- Make sure policies clearly provides discretion to the employer to construe and interpret them
- Employee communications such as handbooks and SPDs should also include discretionary language
- Exercise discretion reasonably and consistently
- Still must comply with contracts, internal policies, and the law

### *Disclosure*



- Rules of conduct and performance expectations should be made clear
- Penalties for infractions should be equally clear
- Plan provisions should clearly spell out eligibility rules, how to apply for benefits, how to appeal denials, and any limitations or exclusions
- Use advance reminders when enforcement has been less consistent than it should have been in the past
- Use all available communications opportunities and frame communications so that they will be most likely to be understood by all



- Avoid legal or highly technical language
- Remember: Communication is a two way street

### *Due Diligence*



"Benson is conscientious  
to a fault..."

- Due diligence means doing your homework
- Investigate thoroughly: don't rely on stereotypes, hearsay, or assumptions
- Due diligence is important in all aspects from the communications effort to the investigation and the ensuring of consistent treatment
- Get appropriate advice before taking the action
- Remember the duty of prudence requires you to retain appropriate expertise if you are not adequately qualified
- You also have a duty to monitor the professionals that you do select

### *Due Process*



- The employee should have known the rules and performance expectations. Where appropriate, these should be in writing or otherwise clearly published



- The employee should be given adequate warning of the consequences of the failure to meet performance expectations or adhere to the rules; likewise of the failure to meet eligibility requirements or failure to follow plan rules, *e.g.*, appeal process
- The employee should be given an opportunity to be heard
- The employee should be given notice of that opportunity
- This notice and opportunity to be heard should come prior to the imposition of discipline or the elimination of a benefit, except in very rare instances
- You should be careful to appear open-minded and even-handed. Make sure to avoid statements or actions that might indicate that you have pre-judged the employee
- The decision should be communicated to employee in a timely fashion

### ***Documentation***



I HAD NO CHOICE, HIS DOCUMENTATION WAS WEAK.

- The reasons for good documentation are many, not the least of which is that judges, juries, arbitrators, and administrative agencies expect it
- Know the difference between good and bad documentation
- Don't promise more documentation than you can deliver
- Document facts rather than conclusions

## *D's To Avoid*

### *Delay*



- Act/respond as promptly as possible under the circumstances
- Always adhere to any time limits set forth in the employee handbook, contract, SPD, or other relevant source
- Document agreements to extend timelines
- Investigations should be as prompt as possible under the circumstances
- Keep employees informed of need for additional time
- Be proactive – try to anticipate potential issues and plan your strategy ahead of time so that you can respond quickly

### *Discrimination*

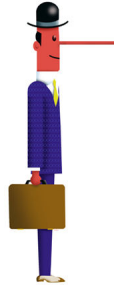


"Why me and not you?"

- Avoid illegal discrimination or the appearance of it. Remember an intent to discriminate is not necessary if there is an adverse disparate impact on a protected class
- Consistency is perhaps the single most important guiding principle in handling workplace issues

- This consistency should include:
  - Consistency with the handbook/policy/contract or Plan/SPD and how it has been previously interpreted and applied to other employees
  - Consistency among departments, divisions, locations
  - Internal consistency vis-à-vis the employee

### *Deceit*



- It is better to say nothing than to lie
- Using a false reason for a job action can cause an inference of discrimination

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  - Due Process
  - Documentation
- **D's to Avoid:**
  - Delay
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  - Deceit

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