

INVESTING IN MANAGEMENT – PROVIDING TRAINING AND CONDUCTING 360 REVIEWS

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I. INTRODUCTION

A. The Life-Cycle of a Manager

1. Employees who become managers are often promoted due to seniority in a particular position rather than their superior ability to manage employees.
2. The skills needed to be a good manager are not always the same as the skills required to perform the business function of a particular role.
3. Managers tend to have extensive training in their field, but not as much training about managing people. This can lead to costly litigation for the company as well as the individual manager.

B. By training employees as they rise through the ranks, an employer can ensure that it is getting the most out of its employees—both managers and non-managers.

II. THE IMPORTANCE OF TRAINING MANAGERS TO IDENTIFY WORKPLACE ISSUES AND UNDERSTAND THEIR ROLE IN MITIGATING LEGAL LIABILITY

A. Unique Position of Managers

1. Extension of the organization

- a. Managers are an extension of the organization, meaning decisions made by managers acting with authority are considered decisions made by the company under the law.

2. Personal liability for what managers do – and what they don't do

- a. In addition to creating liability for the company, managers can sometimes be held personally liable for their actions/inactions and the actions/inactions of employees.

B. The conduct of Managers can impose liability on the company or mitigate risk.

1. Unlawful Discrimination – Title VII, Age Discrimination in Employment Act (ADEA), Americans with Disabilities Act (ADA), Equal Protection Act (EPA)

- a. Under Title VII, ADEA, ADA, and EPA, an Employer can be held liable for the discriminatory acts of the Manager. However, if the manager takes prompt remedial action to stop the unlawful conduct and prevent it from continuing, then this can create a defense to such liability.

2. Protected Classes under Federal Law: race, color, religion, sex (including sexual orientation, gender identity, and gender expression), national origin, citizenship, ancestry, physical and mental disability, veteran status, military status, pregnancy, age (40+), and genetic information.
3. Additional Protected Classes under Michigan Law: height, weight, familial status, marital status, and misdemeanor arrest record.
4. Discrimination includes:
 - a. Disparate Treatment: Unfair treatment due to employee’s membership in a Protected class (often intentional); and
 - b. Disparate Impact: Applying a facially neutral policy or procedure in a way that has a disparate impact based on employees’ protected class (often unintentional).
5. Harassment includes:
 - a. Quid Pro Quo: This type of harassment occurs when “submission to or rejection of conduct by an individual [based on such person’s protected class] is used as the basis for employment decisions affecting such individual.”¹ This kind of harassment requires some kind of adverse action or damage to support the claim.
 - b. Hostile Work Environment: when conduct based on a protected class “is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.”² No specific economic injury or adverse action is required in claims of hostile work environment.
 - c. Harassment is unlawful, whether by managers, co-workers, or others in the workplace, when due to employee’s membership in a Protected Class. Managers must be aware of the impact not only on those directly involved but also those observing because, “[t]he victim does not have to be the person harassed, but can be anyone affected by the offensive conduct.”³
6. Accommodation of Disabilities and Sincerely Held Religious Beliefs
 - a. Qualified individuals with disabilities are entitled to reasonable accommodations that permit them to perform the job, provided that it does not present an undue hardship on the company or pose a risk to the safety and health of employee or others.

¹ <https://www.eeoc.gov/harassment>

² <https://www.eeoc.gov/harassment#:~:text=Harassment%20becomes%20unlawful%20where%201,intimidating%2C%20hostile%2C%20or%20abusive.>

³ *Id.*

7. Family and Medical Leave Act (“FMLA”)
 - a. Within five days of learning that an employee has a need for leave under FMLA, the employer must provide the employee with a Notice of Rights & Eligibility. Companies may also request supportive documentation from the employee to justify their request for this leave. If the leave is requested based on the employee’s own medical condition, provide the employee’s job description to the physician as part of the medical certification process.
 - b. Managers must be aware of employees’ rights during an FMLA leave and not infringe on the employee’s rights to take that time off work.
 - c. Upon return from FMLA leave, employers must comply with their obligations to return the employee to their former position, with the same pay and benefits.
8. National Labor Relations Act (“NLRA”)
 - a. Although based on union law, this statute applies to employers without any unions. It establishes the rights of non-management level employees to engage in protected concerted activity, including talking about their wages. This law has significant implications and has been applied to scenarios where employees post about their workplace on social media and in instances where a business’ policies are interpreted as being overreaching. Managers must understand when this law may be implicated and be careful not to take adverse actions against employees who are engaging in protected concerted activity.
9. Occupational Health and Safety Act
 - a. Managers must know how to report and respond to accidents and injuries in the workplace. Businesses also must understand their obligations to maintain a safe workplace during the COVID-19 pandemic.
 - b. Managers have a duty to keep the workplace safe
 - i. Managers cannot deter injury and illness reporting or retaliate against employees for reporting unsafe requirements.¹⁰
 - ii. In 2020, OSHA received a record number of whistleblower complaints.⁴
10. Health Insurance Portability and Accountability Act (HIPAA)

⁴ <https://whistleblowersblog.org/osha-whistleblowers/first-year-of-pandemic-led-to-record-number-of-osha-whistleblower-retaliation-complaints/>

- a. Managers cannot disclose medical information about employees, unless the information is necessary to process requests for accommodation, leave, FMLA, etc.
- b. Generally, managers should not request information about an employee's specific diagnosis.

11. Retaliation is a separate charge or claim, independent from the underlying unlawful conduct, and occurs when an adverse action is taken because an employee engaged in some protected activity (*e.g.*, firing an employee because they complained about job discrimination or assisted in a job discrimination proceeding such as an investigation or lawsuit).

- a. Although close timing between the protected activity and adverse action is typically not enough in itself, it is circumstantial evidence that may be persuasive of a retaliatory motive.

C. The Importance of Training

1. Managers are the leading cause of employment law violations.⁵
2. Properly training managers can reduce the risk of employee complaints and the potential for liability in the event of a complaint.
 - a. Workplace retaliation complaints have increased significantly over the past 10 years.⁶
 - b. Retaliation complaints make up the majority of EEOC charges both nationally and within Michigan.⁷

III. THE INDIVIDUAL LIABILITY MANAGERS CAN FACE BASED ON THEIR ACTIONS (OR FAILURE TO ACT)

A. Promotions Come with Risk and Exposure – “With Great Power, Comes Great Responsibility”

1. An employer is typically defined as any person acting directly or indirectly in the interest of an employer in relation to an employee.⁸
2. Under this definition, a manager can be liable for acts the manager takes using his or her authority as manager.

B. Managers can be held personally liable under certain statutes, including, but not limited to:

⁵ <https://www.hrdiver.com/news/how-managers-cause-fmla-lawsuits-and-10-ways-to-get-them-to-stop/525942/>

⁶ <https://www.dol.gov/sites/dolgov/files/general/budget/2022/CBJ-2022-V1-01.pdf>

⁷ <https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2020>

⁸ 29 U.S.C. 203(d); 28 U.S.C. 2611(4)(A)

1. The Fair Labor Standards Act (FLSA)
 - a. A supervisor may be held personally liable for improperly reporting and/or paying hours worked, including overtime discrepancies.⁹
2. Family Medical Leave Act (FMLA)
 - a. Interfering in an employee’s legal right for medical leave.¹⁰
 - b. Discriminating or retaliating against an employee who has requested medical leave.¹⁰ above
 - c. Inconsistently enforcing leave policies. For example, managers should require employees to follow call-in procedures and fill out necessary paperwork so that if an employee is terminated for excessive absences, appropriate documentation supports the termination.¹¹
3. Uniformed Services Employment and Reemployment Rights Act (USERRA)
 - a. It is illegal to discriminate against employees and applicants because of their military service.
 - b. The Equal Employment Advisory Council proposed a regulatory definition of employer that explicitly *excluded* managers or supervisors from the definition of “employer” because those individuals are not responsible for paying wages. The Department of Labor, however, explicitly rejected the proposal.
4. Occupational Safety and Health Act (OSHA)
 - a. Although not specifically included in the definition of “employer,” OSHA has attempted to hold corporate owners, officers, directors, and managers personally liable for employee health and safety matters in when there has been an extreme disregard for legal obligations under the act.
5. State statutes prohibiting discrimination and harassment, such as Elliott Larsen Civil Rights Act (“ELCRA”)
 - a. Under the ELCRA, an “employer is defined as “a person who has 1 or more employees, and includes an agent of that person.” MCL 37.2201(a). Case law has interpreted this

⁹ <https://www.dol.gov/agencies/whd/compliance-assistance/handy-reference-guide-flsas>; <https://eafinc.org/supervisors-personal-liability/>

¹⁰ <https://eafinc.org/supervisors-personal-liability/>

¹¹ <https://www.hrdiver.com/news/how-managers-cause-fmla-lawsuits-and-10-ways-to-get-them-to-stop/525942/>

to mean that a supervisor may be held individually liable for unlawful discrimination and harassment under the ELCRA. However, the individual must have notice of the unlawful action (*e.g.*, knew or should have known) and failed to take corrective action in order to be held responsible.

C. Appropriately Responding to a Complaint/Concern to Avoid Liability

1. Respect: listening to the various perspectives to learn the facts with an open mind
2. Restraint: prevent any unlawful conduct from continuing and disclose information on a need-to-know basis to maintain confidentiality to the extent possible
3. Rules: evaluate application of the handbook
4. Respond: be swift in investigation and taking appropriate remedial action, if necessary
5. Record: document
6. (no) Retaliation: do not take adverse action against complainant (who makes a claim in good faith) or witness participating in an investigation
7. Confidentiality cannot be guaranteed, but should be maintained to the extent possible, while still conducting a thorough and appropriate investigation.

IV. HOW MANAGERS CAN BEST INTERVENE AND ENGAGE WITH EMPLOYEES TO OPTIMIZE THEIR TEAM

A. Hiring and Firing Employees – Training Managers on Disciplinary Issues

1. Need for managers to identify problems, sit with employees to manage the conduct.
 - a. Give frequent, regular, and direct feedback.
 - b. Manage poor performance or behavior with consistency across the organization
 - c. Document performance or behavior issues, including follow-up to hold employees accountable.
 - d. Comply with employee complaint procedure, escalate issues when appropriate, properly investigate and follow-up, and do not retaliate against employee engaging in protected activity.
 - e. Complete an incident report for the personnel file.
 - f. Involve HR for leave or accommodation-related issues, changes in schedule, etc.
2. Terminating Employees:

- a. Review performance history.
- b. Identify potential red flags.
- c. Address logistical issues.
- d. Reflect on how the performance/behavior has been addressed by others in the agency.
- e. Involve appropriate leadership.

B. 360 Reviews – The Need for Feedback¹²

1. A 360-performance review provides feedback about an employee’s performance, skills, and contributions from a variety of coworkers and managers who interact with the employee. It is called a 360 review because the feedback comes from all directions in the organization.¹³
2. As leaders rise through the ranks of employment, they tend to receive less feedback about themselves and their performance.¹⁴
3. Benefits:¹⁵
 - a. Increases self-awareness
 - i. Receiving feedback from multiple viewpoints exposes managers to others’ perceptions about the manager’s behavior.
 - b. Clarifies behaviors
 - i. The more feedback a manager receives, the more specific insight a manager will get on how they interact with others.
 - c. Measures how success is achieved
 - i. Too often performance reviews focus on the outcome rather than the process.
 - ii. 360 feedback helps leaders understand the methods that are used for success, rather than focusing on results.

¹² <https://www.forbes.com/sites/victorlipman/2016/08/08/65-of-employees-want-more-feedback-so-why-dont-they-get-it/?sh=12d3c73c914a>

¹³ <https://lattice.com/library/the-pros-and-cons-of-360-reviews>

¹⁴ <https://decision-wise.com/360-degree-feedback/explained/>

¹⁵ <https://decision-wise.com/benefits-of-360-degree-feedback/>

- d. Promotes dialogue
 - i. Creating a culture of feedback encourages meaningful conversations between employees and managers.
- e. Improves working relationships
 - i. Unlike a one-side performance review, a 360-review is a mutually beneficial exchange.
 - ii. The feedback shows how managers interact with others and highlights the areas that impact the relationships.
- f. Encourages personal development
 - i. Constant, meaningful feedback results in development and growth.
 - ii. Can identify weak areas and specific training needs, both individually and across teams.
- g. Increases employee engagement
 - i. By establishing a culture of feedback, an employee feels heard and has a sense of belonging.
- h. Enhances performance
- i. Provides insights into Employee's Work
 - i. Employers are able to see and understand an employee's role in the company, outside of what they can see through completed tasks or assignments.
 - (A) This includes how a worker may fit within a team or other nuances that may not translate or be obvious in the finished product of a work assignment.

4. Managers

- a. According a Harvard Business Review study, more-effective leaders have more-engaged direct reports.¹⁶

¹⁶ <https://hbr.org/2020/12/what-makes-a-360-degree-review-successful>

- i. When a leader improves effectiveness, the entire organization benefits, not just the employees under the manager.
 - ii. When a leader improves, others are motivated to do the same.
 - b. 360 reviews can help identify what specific competencies are needed for future leaders when succession planning.
 - 5. Employees
 - a. Poorly administered employee evaluations can lead to issues including unsupported explanations for an adverse employment decision.
 - b. Employees who do not feel supported are more likely to leave the organization.
 - c. Without transparency and a lack of trust in those who administer the 360 reviews, respondents won't offer honest and useful feedback.
 - i. Additionally, if employees believe this data is being used for performance or compensation input, they could potentially adjust their responses of their peers to make themselves appear better than others.
- C. Mistakes When Implementing 360 Reviews and How to Avoid Them¹⁷
 - 1. Failing to explain the purpose of the 360-review process.
 - a. If employees are not provided with information as to why the process is being implemented, there can be distrust and suspicion as to the intent of the process.
 - b. To avoid this, make sure you provide clear and detailed communications regarding how the process will work and the benefits it can provide.
 - i. Keep an open line of communication regarding the process that allows employees to ask questions and raise concerns.
 - ii. Create a process that permits the questions and concerns to be raised anonymously.
 - 2. Creating a process that is too onerous for employees and managers.
 - a. If the process is so intricate or requires too much time and effort, employees are less likely to participate in a meaningful way.

¹⁷ <https://www.managementcenter.org/wp-content/uploads/2018/09/TMC-360-Feedback-Field-Guide.pdf>

- b. To avoid this, be selective about who is participating and create meaningful questions which call for feedback that can actually be implemented.
 - i. Try to narrow down the list of individuals responding so that each individual can provide meaningful feedback without overwhelming the manager with responses.
 - ii. Keep the number of questions limited to two-four.
 - iii. Try to keep the estimated time to complete the survey to around 20 minutes.
- 3. Failing to take the responses and implement them in a meaningful action plan.
 - a. If managers receive feedback but are not coached on how to incorporate the feedback, the survey is useless. On the other hand, creating a system where managers capitulate to every demand of employees in the surveys creates a broken chain of management.
 - b. To avoid this, incorporate the feedback into employee reviews by having the manager summarize the feedback into a few sentences demonstrating strengths and areas for development.
 - i. This encourages managers to see and articulate patterns from the review;
 - ii. Demonstrates to employees that the 360 review is a key input, but just one input, in the overall evaluation; and
 - iii. Discourages managers from using the feedback as a substitution for their own judgment.