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## AVOIDING EMPLOYEE “PRETALIATION” AGAINST UNSUSPECTING MANAGERS AND SUPERVISORS

Leading defensively requires managers in the current corporate environment to be more aware of how sophisticated workers have become in using the legal system against their companies. In addition, you need to acknowledge that you can't do this alone—you've got an affirmative obligation to disclose certain matters to HR, your boss, the legal department, an ombudsman, or some other compliance officer when certain facts arise that require assistance from a third party, impartial observer, and witness. Finally, you need to create a record—both verbally and in writing—to ensure that the company is positioned in the best light possible should litigation later arise.

Statistically, one in four managers will become involved in some form of employment-related litigation during their careers, and that's an awfully high percentage, especially if you live outside of high-litigation states like California or New York. Therefore, your ability to spot problem issues, escalate them appropriately, and resolve them fairly on the spot or prepare the appropriate record for litigation becomes a critical leadership attribute that, once mastered, will benefit you for the rest of your career.

Workers are sophisticated consumers, and whether they figure this out on their own or get tips from plaintiffs' attorneys coaching them on the sidelines, just waiting for the person to get fired so they could initiate litigation, it's your responsibility to spot issues and involve the appropriate internal parties to support you from the very beginning. For example, suppose an employee is afraid she's going to be fired or suspects that her boss is somehow out to get her. She may reach out to a lawyer to see if she has any legal protections, and that's where plaintiff lawyers' advice and counsel can get really interesting: "Well, I probably can't help you until the company takes some adverse action against you, such as termination, but let me ask you this: Do you know who your internal HR representatives are? Have you spoken with them about your problem, and if so, what did they say?" This question seems fairly straightforward and benign, the assumption being that the employee should try to resolve the matter internally with HR before hiring an attorney to sue the company.

But there's more to this question than meets the eye: in many instances, attorneys instruct a potential plaintiff client (such as your employee) to initiate a "preemptive strike" against the manager by complaining about the manager's conduct *before* the manager has a chance to take further punitive action regarding the employee's performance. The result of such "retaliation" is that workers who are performing poorly can potentially "reverse engineer" the record and put the company on the defensive. With that record in place, it becomes much more difficult for the company to terminate the individual because such actions may appear to be retaliatory. Here's what it looks like in chronological order:

1. An employee senses she's about to be disciplined or terminated for substandard job performance and reaches out to an attorney for help.

2. The attorney encourages the employee to complain to HR about the manager’s conduct, specifically using words like *hostile work environment, harassment, intimidation, bullying, or retaliation*.
3. The company has a more difficult time terminating the employee due to the recent harassment claim that the employee initiated against the manager.
4. The plaintiff’s attorney wins either way: if the termination is delayed for the time being, a strong trust builds between the lawyer and the client because the attorney gave great advice that benefited the client; if the termination goes through, the attorney has another arrow in her quiver to shoot back at the company in the litigation phase in the form of retaliation.

You, the manager, may be acting in good faith in disciplining this employee only to find yourself the target of an investigation from HR because of the employee’s complaint.

This situation occurs again and again in corporate offices, with managers inadvertently stepping on land mines and not realizing until after the fact that a bomb went off.

Here’s how you’ll know when this situation is at hand: HR receives an employee complaint about a manager’s conduct and calls a meeting with the manager and the manager’s boss. The HR person opens the meeting by saying, “Joe, we’ve received a complaint of harassment from one of your employees regarding how you manage them, and we need to explain the nature of the complaint and also to learn your side of the story.”

The manager asks who lodged the complaint and is told it was Heidi Jones. He becomes furious and replies, “It was Heidi? You’ve got to be kidding! I was just about to come to HR to discuss

placing her on a final written warning because she's such a poor performer. She comes in late, leaves early, and . . .”

*Boom!* The land mine just exploded. The employee—either on her own or under an attorney's guidance—figured out that by launching her claim first about her boss's conduct, she could turn the tables on the record that was being created regarding her performance. She engineered a perfect scenario for a retaliation claim later, and the manager didn't even see it coming.

The lesson? Don't fall prey to a preemptive strike. When your gut tells you there's a problem with someone's performance or you sense the person may be speaking with a lawyer, contact HR right away. After all, whoever gets to HR first gets the ball rolling in terms of how HR conducts its investigation: If you initiate the matter with HR and focus on your subordinate's substandard *performance*, then HR moves in one direction. But if the employee meets with HR first to complain about your *conduct*, then HR moves in a different direction in terms of opening an investigation surrounding potential managerial misconduct. Timing, it turns out, is one of the most critical elements in determining what type of record is made in many employment-related situations.

Finally, don't manage by fear of a lawsuit. Lawsuits are part of the cost of doing business in corporate America from time to time, and managing by fear rarely has positive results. Instead, just be sure that if a lawsuit comes your way, you're getting sued on your terms rather than theirs. The most successful way to do this is to act professionally, demonstrate respect for those you supervise, and enlist the services of internal support teams (such as HR) that are there to help you through these very types of situations. It's okay to take things “outside the family” and partner with HR when your gut intuition is telling you that something may be amiss. Always consider the record that is being created, and get that hot potato

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off your lap and share it with the department responsible for engaging in these very activities—HR. (If your organization doesn’t have an HR department, bring the matter immediately to your supervisor’s attention and seek the support of your internal legal counsel or external law firm.) You’ll find that a winning strategy like this will allow you to thrive in your career without any of the angst, drama, or histrionics that plague certain managers who opt to go it alone or refuse help.