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So Long, Farewell:
The Legal Challenges of Employee Departures

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Discussion Topics

- **Performance Management**
 - *Avoiding issues where possible*
 - *Could we have done something differently?*
 - *What tools should we be using?*

- **Voluntary Departures: A Checklist**

- **Involuntary Departures: A Step-By-Step Guide**
 - *Communicating the decision to the employee*
 - *Communicating the decision to our community*
 - *Severance*

- **Common Pitfalls**
 - *E.g., forgetting to check your “blind spots”*

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Ever-Present Considerations

■ Culture is Queen

- What is acceptable performance/behavior in **OUR** school?
- What exit strategies work in **OUR** community?

■ Risky Business

- There is no such thing as “zero risk” when managing a workforce, especially when ending the employment relationship.
- Requires constant risk assessments
 - If we terminate Problem Employee, he may sue. If we don't, he may continue to drag down our business practices.

■ Is the Left Hand Talking to the Right Hand?

- Are we using consistent management strategies?
- Are we coordinating efforts?
- Is our documentation coordinated (handbooks, agreements, policies)?

■ Don't Forget Why We Are Here.

- If something is not right, let's fix it.



Performance Management (or “PM”)

■ What is Performance Management?

- It is the management of our employees for the purpose of ensuring that goals and objectives are being reached efficiently and effectively.
- *It’s an art, not a science.*

■ Why are we talking about this?

- You didn’t hire them to fire them.
 - Being “self-aware” and using PM can help us:
 - Retain talent
 - Avoid unnecessary terminations
 - Avoid unnecessary surprises when we have necessary terminations
- Effective PM helps limit liability for the school.

Performance Management Toolbox

- **What tools can help us get the most from our workforce, while limiting liability for the school?**
 - Communication
 - Coaching
 - Reviews/Appraisals
 - Discipline
 - Documentation
 - Performance Improvement Plans

- **By inspiring and encouraging and rewarding great performance, we retain great talent.**

- **By training where necessary, we avoid unnecessary issues.**

- **By monitoring and communicating, we can avoid surprises, and limit liability when we've reached the end of the road.**

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Effective Use of PM Tools

■ Supervision/Monitoring

- It takes a village!
- We need eyes open – *everyone's* eyes: we need to train our supervisory employees to monitor behaviors and performance.
- Early detection of issues helps us:
 - Address molehills before they become mountains
 - Weed out problems before they become liabilities
- Hindsight is 20/20, but were we paying attention?
 - *The Creepy Teacher*
 - *The Bully Employee*
- Cascading Supervision
 - Supervisors have supervisors too.
 - How often are we checking in?

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Effective Use of PM Tools Continued ...

■ Communication

- **When?**
 - Real-Time, Responsive; *and*
 - Scheduled

- **About What?**
 - Take a holistic approach.
 - Be honest.

- **Why?**
 - Personnel Relationships are like Personal Relationships (*Employees! They're Just Like Us!*)
 - *Two-way communication is essential to PM.*
 - We can limit surprises (for us and them).
 - Surprises lead to lawsuits.
 - Communication reduces liability in the event of a lawsuit.
 - We can get them thinking!

Effective Use of PM Tools Continued ...

■ Documentation

- Examples:
 - Confirmations of Conversations
 - Notes to File
 - Written Warnings
 - Performance Improvement Plans

- Be honest, thoughtful, and make it meaningful.
 - ***“You don't write because you want to say something, you write because you have something to say.”***
 - Don't fake it.
 - Papering the file, implementing sham plans

- When thinking about what to write, think about what is productive and helpful, and realistic.
 - E.g., Not helpful to ask someone to “be better” in a PIP.
 - E.g., Not productive to write “looks like a liar ” in note to file.
 - The “papered file” is a bonus (and we, your lawyers, may thank you, depending on what you write!)

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Voluntary Departures

■ Our Checklist

- **“Self-reflection”**
 - Always ask ourselves: “Why?”
 - What can we learn from this?
 - What could we have done differently?
- **Communication**
 - Do we have a plan for communicating this to our community?
- **What do we owe them?**
 - Check applicable wage payment and benefit-related laws.
 - Check our policies (vacation, references).

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Voluntary Departures Continued ...

■ Our Checklist Continued ...

- **What do they owe us?**
 - School property (computers, phones, passwords, key cards)

- **Do we need additional measures to protect the school?**
 - Cutting off email access
 - Other restrictions/limitations
 - Separation Letter
 - Follow-up on accusations (e.g., harassment)

- **Did we document important facts?**
 - Note to file re: reason for leaving
 - Saving resignation letter

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Involuntary Departures (“ID”): A Step-By-Step Guide

- **Step One: Assess the situation.**
 - Are we done? Why?
 - Have we considered other options?

- **Step Two: Check your blind spots.**
 - Precedent:
 - Have we experienced this issue in the past with another employee? If so, how did we handle it?
 - If not, are we prepared to set a precedent now?
 - Beware of hidden promises!
 - Documentation (Policy & Issue-Related):
 - Have we reviewed all documentation relevant to discipline and termination?
 - » Offer letter/employment agreement
 - » Handbook/employment policies
 - Have we reviewed all documentation created by us related to this issue?
 - » Oh wait – do we even have any?!
 - Consider meeting with the supervisor
 - Have we overlooked any facts?

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“ID” Steps & Guidance Continued ...

- **Step Two Continued: (Check your blind spots)**
 - What other risk factors are involved?
 - Anything to give rise to an inference of discriminatory intent?
 - Any recent complaints, leaves of absence?

- **Step Three: Determine the type of separation.**
 - Non-renewal
 - Termination with notice
 - Termination without notice

- **Step Four: Consider severance or other benefits.**
 - Do we want to offer any payments or other benefits to which the employee is not entitled?
 - Consider past practice
 - Do we want a release?
 - Consider risk related to departure.
 - How much time are we offering for review of the release?
 - Federal law requires 21 days when “older workers” waive age claims.



“ID” Steps & Guidance Continued ...

- **Step Five: Make a plan for informing the employee.**
 - Create the plan in advance.
 - The “Meeting”
 - How and when are we setting up the meeting or call?
 - Who will be present?
 - What are our talking points?
 - We want honesty, but not detailed discussion.
 - What options will we offer regarding the “immediate exit” details?
 - When/how to collect belongings
 - Collecting the computer
 - Do we have a policy on this?
 - Beware of security issues and preservation of evidence.
 - Beware of the downfall of an “Off With Her Head!” approach.
 - What options will we offer related to community communication?
 - What options will we offer related to references?
 - Be consistent with policy and prior practice.



“ID” Steps & Guidance Continued ...

■ Step Six: Execute the plan!

- Where possible, have more than one person in the meeting/call.
- Documentation:
 - Document the meeting/call (in real-time, or directly thereafter) with notes for the file.
 - Consider a termination letter.
 - May include the effective date, reminder of the confidentiality obligation, any other agreements or restrictions
 - Retain documentation.
- Follow-through on promises and requests.
 - References, computer or other school equipment

■ Step Seven: Comply with the law.

- Wage payment
- COBRA
- OWBPA

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“ID” Steps & Guidance Continued ...

- **Step Seven: School Security**
 - Assess whether any other measures are necessary to protect the school.
 - Account access
 - Building security
 - Investigation
 - Training
- **Step Eight: Community Communication**
- **Step Nine: Monitor the Transition.**

Remember:

There is no “one size fits all” approach to separations!

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Common Pitfalls

■ DELAYED COMMUNICATION OR NO COMMUNICATION AT ALL

- Molly Manager is one busy lady. Her task list would give you night-sweats. Molly oversees an entire department—the very department in which Tardy Tina works. Molly keeps meaning to address Tina’s tardiness, but, well, the task list is never ending and the days are too short (even shorter for Tina, due to her tardiness). Molly finally decides she’s going to meet with Tina on Tuesday. That Monday, Molly stops Tina in the hall to tell her about a health problem that could be considered a short term disability under the law.
 - Molly’s message now looks bad & received differently. If we need to terminate, Tina may claim it’s related to her health condition.

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Common Pitfalls Continued ...

■ THE “FRIEND-FIRST” SUPERVISOR

- Friendly Freddie likes everyone. And the feeling is mutual. All in all, it makes for a pretty nice working environment. Sure, it’s frustrating that Magpie Magda talks through all of his trainings, group meetings, and is often late to events due to chatting with students and colleagues in the hall, but Magda is one of Freddie’s best friends, so he lets it slide. Eventually, Magda’s performance issues affect other people, and the school has had enough. It’s termination time. Magda is replaced with a very qualified, but younger woman, Maddie, so she naturally assumes she was terminated due to her age. If her performance was such an issue, surely her supervisor would have addressed it with her!
 - When asked, Freddie explained he was just being friendly, and didn’t want to upset the apple-cart.

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Common Pitfalls Continued ...

■ FAILING TO CHECK YOUR BLINDSPOTS

– Betty is a new business officer, and she's in charge of human resource issues. Betty is READY! Her first month, she identifies an employee that simply must be suspended, and, ultimately, terminated. She's going with her gut on this one. Unfortunately, while Business Officer Betty's gut instincts may be pretty good, her decision is contrary to the process set forth in the employee handbook, and the measures taken are harsher than the measures taken with another employee, just six months prior, for the exact same issue.

- What if the subject employees were different genders? Inconsistencies can create liabilities (and the inference of discrimination).
- Are there other issues that should be part of the risk assessment (e.g., harassment complaint)?

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Common Pitfalls Continued ...

■ NO DOCUMENTATION

- Honest Abe is, well, honest. And he assumes everyone else is too. Abe is also the athletic director and he has implemented routine procedures for all of his staff. Delinquent Delia keeps missing deadlines and strays from procedure. Abe has had several discreet, but firm and clear (and, of course, honest) conversations with Delia about her performance, but Abe doesn't see the need to document. Giving Delia a piece of paper seems harsh. Jotting it down in a file seems unnecessarily time consuming. Eventually, unable to manage her performance effectively and see improvement, Abe must recommend Delia's termination. Turns out, not everyone is as honest as Abe, and Delia finds a lawyer willing to make the case that she was terminated due to her sexual orientation—a factor not once even considered by ole Abe. Abe swears up and down that he met with Delia numerous times (rebutting the claim of discriminatory intent), but there are no emails, no notes, no documentation. Classic he-said-she-said.



Common Pitfalls Continued ...

■ PREJUDGMENT & FAILURE TO ADDRESS ACCUSED

- The rumor mill is hot that Sally was arrested for stealing cosmetics when she was in college. Sally is now in charge of ordering our supplies for our faculty. Mysteriously, supplies begin to go missing under Sally's watch. Naturally, knowing the rumors, we assume that Sticky Fingers Sally is up to her old ways. So, we make the call and terminate her.
 - Performance Management has an element of Law and Order: we do our best to maintain some level of innocent until proven guilty, and we must address accusations with the accused.
 - Investigations are an important element of addressing allegations of misconduct.
 - Investigations themselves could get their own concurrent session, but, in short, review investigation best practice tips before diving in, including the pro tip to address allegations with the accused and document the meeting.

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Common Pitfalls Continued ...

- **Failing to explore alternatives to termination**
 - *Off With Her Head!*

- **Or, waiting TOO long to explore them**
 - There are no prizes for endurance!

- **Making promises that can't be kept**
 - *Don't worry, you won't get fired.*
 - *You will definitely lose your job if you don't improve ... oh wait, just kidding. But the next person will definitely lose her job. And, then she will sue us.*

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Common Pitfalls Continued ...

- **Failing to understand the interplay between disability, job-protected leave, complaints, and PM**
 - When does the performance issue require an accommodation?
 - When does the need for leave or accommodation create risks?
 - When do employee complaints create risks?
 - When do we need to continue with stern measures anyways?

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In the end, remember your ABC's

- **Assess**
- **Breathe**
- **Communicate**

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