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Tips for Minimizing Litigation Risk



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Scope of Class

- Employees have right to challenge workplace/management issues in EEO, MSPB, FLSA, etc. - encourage them to use the tools
- Goal of management is to create work environment where employees don't perceive a need for outside help – minimize mission distractors
- If we do need to go into litigation – timely action, unemotional decision making and good documentation can minimize costs and compelled personnel actions

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Tip # 1 – You can't know everything, so it's okay to ask for help

- Dealing with employees with varied experiences and backgrounds can be complicated. You don't have to be an expert.
- The “dumbest” questions are those unasked.



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Key Advisors: Employment Law Attorneys, LMER and EEO

- Employment Law attorneys handle all EEO complaints, adverse actions, Federal court litigation and cases where there may be significant liability, and review disciplinary actions and PIPs.
- LMER generally handles all disciplinary actions, drafts letters of counseling, FMLA questions, leave restrictions and PIPs.
- EEO can assist in determining reasonable accommodation which can/should be provided.



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Tip #2 - Communicate

- DO communicate:
 - What's going on in the office/school
 - Your expectations
 - Your standards of integrity and performance
 - Positive contributions
 - Constructive criticism

ACTIVELY LISTEN to employees – if you know there's a concern, you can address it before it rises to adversarial levels.

Be PROFESSIONAL: Praise in public, counsel in private; don't criticize an employee to coworkers.

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Tip #3 – Keep the workplace free from discrimination (or things which could FEEL discriminatory)

- Discrimination based on race, color, sex, national origin, religion, disability, age, retaliation for EEO activity, or genetic information is prohibited.
- Walk through your area of responsibility – be alert to inappropriate posting, inappropriate comments, email signature blocks, etc. Management held responsible for acts which it knew OR SHOULD HAVE KNOWN about
- Correct small things when you see them. Tolerance can be perceived as permission.
- Different treatment based on different job performance, conduct or training needs is fine.

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Tip #4 – Respect employee's privacy

- Many reasons why managers could have employee's medical documents: SL, FMLA, Reasonable Accommodation, etc.
- Do not discuss employee's medical information with other managers or subordinates unless there is an absolute **NEED TO KNOW**, and then do it privately
- Keep any medical records locked in a separate file from personnel records.
- ASK before you share information about employee's personal issues, even if your motivation is good, e.g. to be supportive, give flowers, etc.



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Tip #5 – Be Professional in Your Email Practice



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- Assume that all of your emails will be entered into evidence – consider if your emails show you to be respectful, clear, logical, etc.
- Electronic discovery – emails are routinely requested. If management can't produce them, adverse inference.
- Metadata – Be aware that your documents can show earlier versions of the document



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Tip #6 – Document, Document, Document

“The palest ink is better than the sharpest memory.” –possible proverb

- Record your direction to employees, it helps to ensure that you each understand the tasking the same way, adjust as necessary
- Write contemporaneous MFR. Email to yourself or digitally sign to demonstrate when created. Contemporaneous records are more credible.
- Be specific – say what was wrong, who/what it affected, and what employee should do.

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Some Things NOT to Record

- Some employees or managers may want to surreptitiously record counseling. DON'T.
- CA requires permission of both parties to record; also reasonable for manager to expressly prohibit recording. Document instruction to your employee(s) not to record without permission.



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Tip #7 – Be Knowledgeable with Things Which Matter to Employee

What Matters?

- LEAVE - annual, sick, court, military, leave without pay, Family Medical Leave (FMLA), advanced leave, administrative Leave, compensatory time off
- Money – WIGI, QSI, Performance Awards, Rank Advancement
- Status – Rank Advancement, title
- Training
- If you don't know all the rules (and you don't need to, see Tip 1) ASK – to avoid inadvertently hurting an employee

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Annual Leave

- Encourage scheduling in advance, but also be prepared to react to changed circumstances.
- Generally employees are not required to provide a reason for annual leave.
- If you deny annual leave, make sure that you have a very good reason, based on workload considerations or operational necessity. Do not base on factors like family status or, religion.
- If annual leave is denied, the Agency is not liable for any funds lost by the employee, but the employee will be less motivated.



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Family & Medical Leave Act

- Entitlement to 12 weeks of unpaid leave for:
 - Birth of a child and care for that child;
 - Placement of child for adoption or foster care;
 - Serious health condition;
 - The care of a spouse, child or parent of the employee with a serious health condition.
- Entitlement applies to a year (any 12 month period)



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Tip #8 Make Productive Assumptions

- Start from the assumption that few people got up and went to work with the goal of messing up, causing problems and lying – therefore, there MIGHT be something of merit in the employee's complaints
- Check for understanding – does the employee understand what you wanted them to do?
- Is there something else going wrong in the workplace or the employee's life which is manifesting in poor behavior?
- Try to determine what might be true about employee's complaint – explain and correct as possible

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Tip #9 – Take Action When faced with misconduct or poor performance

Problems do not normally self-correct. The earlier you take action regarding misconduct or poor performance, the better.

LISTEN – It could be that conduct/performance is based on mistaken understanding.

Address *conduct* problems through *discipline*, and *performance* problems through the *performance improvement process*.



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Some Ways to Prevent Poor Performance

- Communicate clear performance standards and expectations.
- Make sure information flows from higher authorities to lowest level – an uninformed work place can be an unmotivated workplace.
- Provide regular and frequent feedback on performance.
- Reward and recognize good performance.
- Make full use of the probationary period for new employees.
- Taking action early is always better than waiting.

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Performance Counseling Tips

- Conduct in a private place.
- Try to get a dialogue going, rather than lecture.
- Clearly state performance expectations and seek confirmation that the employee understands.
- Focus on the poor performance, not personalities or other distractions.
- Always maintain a constructive tone, a calm, professional demeanor.
- See cooperation, not confrontation.
- Have specific examples of poor performance ready in case the employee asks, "What do you mean?"

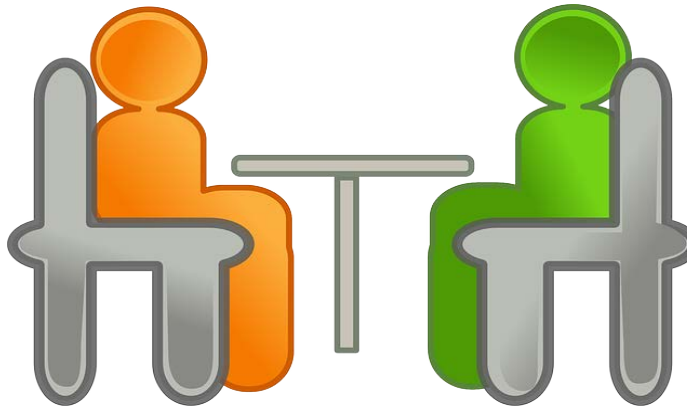
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Performance Counseling Tips

- Try to end the session on a positive note by emphasizing that your mutual goal is to improve the employee's performance.
- Follow up. If the employee shows improvement, let him or her know immediately. If the employee continues to struggle, talk again.
- Immediately after the discussion, make notes of what was discussed. If you think it would help, share your notes with the employee.



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Consider When Contemplating Discipline

- Discipline is to correct behavior, not to punish.
- Needs to be a nexus between the misconduct and the efficiency of the service at the job. Think it through and record how/why the behavior adversely impacts mission performance. DOCUMENT (Tip #4)
- Generally use progressive discipline—Letter of Reprimand, suspension, removal.



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Tip #10 – Take prompt corrective action when you learn of a hostile work environment claim

- If an employee tells you that they are being subjected to a hostile work environment, you must take prompt corrective action. If you do not, Agency may be liable. Investigate promptly, thoroughly and impartially.
- If you see something that may constitute a hostile work environment, take immediate action. Raise it up your chain of command.



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Hostile Work Environment Claims

- Let the employee know you will look into it and get back to them.
- Take steps to monitor the alleged harasser's interactions with the victim unless or until you are satisfied that harassment is not occurring. For example, ask the victim to keep you apprised if anything further occurs.
- If you determine that the alleged harasser and victim should be separated, move the alleged harasser, not the victim.



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Hostile Work Environment claims

- Keep notes of all of your actions in response to the allegation and provide them to all investigators.
- Let the employee know that you will ensure confidentiality to the extent that you can. Do not discuss with anyone who doesn't have a "need to know."



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Army Anti-Harassment Policy

- US Army prohibits harassment even if it does not rise to the level of actionable harassment under the law.
- Policy prohibits harassment *by or of* any employee, supervisor, manager, contractor, vendor, applicant, or any person with whom Army employees come into contact by virtue of their work with the Army.



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Common Pitfalls for Supervisors in Harassment Cases

- Failure to take complaints seriously.
- Failure to contemporaneously document oral complaints.
- Failure to take prompt corrective action.
- Failure to recognize that their own actions or inaction can be considered harassment.
- Failure to monitor the alleged harasser.



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Preventing Harassment

- Be familiar with Army and DoD policy statements.
- Watch for risky behavior
 - Would the behavior be acceptable if the person's grandmother was standing next to him or her?
 - How would you feel if someone acted that way towards your significant other or teenagers?
 - Would the person say it to someone who is the same sex?



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Tip #11 – Respect the EEO process; let your respect show

- Actions or comments by a supervisor regarding an employee's EEO activity could constitute per se retaliation.
- EEOC looks to see if comments could have a chilling effect on the complainant or others from engaging in EEO activity.
- Most EEO cases which DOD loses are based on retaliation or reprisal.



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Suggestions on How to Prevent Claims of Retaliation

- Do not share information about the EEO activity with any other managers or subordinates – the fewer the people who know of EEO action, the fewer who could be alleged to be retaliating;
- Avoid reactive behavior such as denying the employee information, equipment or benefits provided to others performing similar duties;
- Don't isolate or refuse to meet with the employee.



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Tip #12 – Follow these “dos and don’ts” when an employee files an EEO complaint

- **Do** remember, it’s not personal. Employees have a right to file EEO complaints, and some of the Agency’s best leaders have had many complaints filed against them.
- **Don’t** treat employees differently because they filed an EEO complaint or are participating in the EEO process.
- **Don’t** ask employees about the status of their EEO complaints or tell them to drop them – EEOC will likely view these statements as having a “chilling effect.”
- **Don’t** joke about or ridicule employees who use the EEO process.

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More Dos and Don'ts

- **Do** fully cooperate with the EEO Investigator. Respond PROMPTLY and FULLY to the investigator's phone calls and emails.
- **Do** prepare an affidavit that tells the full story.
- **Don't** work from memory. Get documents that may refresh your memory before preparing your affidavit.
- **Don't** require an employee to follow the chain of command before going to the EEO office. An employee does not need to follow the chain of command in order to contact the EEO office, and requiring them do so may result in a finding of retaliation.



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More Dos and Don'ts

- **Do** know that after you submit your affidavit, you may never hear about the matter again.
- **Do** call the Employment Law attorney assigned to the case if you have questions about the EEO process or are feeling frustrated about the process and need to vent.
- **Don't** vent to other managers or employees about the EEO complaint or the employee who filed the complaint.



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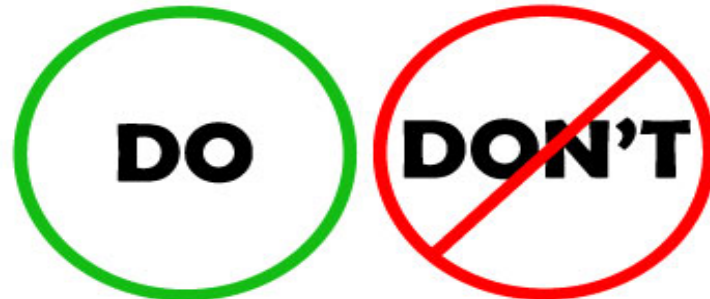


Still More Dos and Don'ts

- **Don't** delay discipline or performance improvement measures just because the employee has a pending EEO complaint. As long as you can show that you have a Legitimate, Non-Discriminatory Basis for your actions, and would have done the same thing even if there was no EEO complaint, then you don't need to worry about a retaliation claim. Consult with LMER or an Employment Law attorney before taking action.
- **Do** consult with LMER or an Employment Law attorney about **any** questions or concerns.



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Tip # 13 – Promptly Act on reasonable accommodation requests



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- Next to retaliation/reprisal, failure to reasonably accommodate is the next most common reason DOD loses EEO cases
- Respond promptly to requests for accommodation (disability, religion).
- If you can easily make the accommodation, do so. Be alert to whether you would (or have) made similar accommodations. If possible, provide a temporary interim accommodation.
- If you have questions about the accommodation requested or it is something that your office cannot easily do, contact the EEO Reasonable Accommodation Program Manager (Sergio Ornelas).

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Tips When Dealing with a Accommodation Request

- Employee must request, but no magic words required.
- Don't raise medical issues. If the need for an accommodation is not obvious, contact the EEO Reasonable Accommodation Program Manager for assistance.
- Agency must engage in an interactive process with employee to clarify needs and identify an appropriate reasonable accommodation
- Employee is entitled to an effective accommodation, not an accommodation of choice.



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**QUESTIONS, COMMENTS
OR CONCERNS?**



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