

# EMPLOYMENT LAW CONSIDERATIONS

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# Difference between being an employer vs. a law enforcement officer

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- *Garrity*
- *This presentation focuses on employment law issues*

# What is your context?

- *Public employer*
- *Private employer*
- *Unionized employees*
- *Nonunion employees*

# What is your situation?

- *Proactive: developing, instituting, enforcing policies*
- *Responding to allegations: investigation, discipline, termination*

# Public employer

- *Provisions of federal and state Constitution apply*
  - 1<sup>st</sup> Amendment - freedom of association
  - 4<sup>th</sup> Amendment – privacy, surveillance
  - 5<sup>th</sup>, 14<sup>th</sup> Amendment – due process, equal protection
- *Balancing test – weighing intrusion on employee's constitutional rights against weight of employer's interest*

# Freedom of association

- *No contact policies*
  - *Courts of appeals have upheld such policies in light of security interests involved*
  - *But there is one contrary trial court decision*

# Employer Interests that Can Support No Contact Policies

- *Interests in on-the-job performance*
- *Interests in off-the-job conduct that implicates officer's fitness for duty*
- *Interests in public reputation of correctional institution*

# Privacy

- *Reasonable expectation of privacy*
- *Correctional officers vs. community corrections*

# Surveillance

- *Notice*
- *Methods*
- *Random vs. targeted*
- *Objective*
- *Balance between intrusiveness and employer need*

# Proactive Steps: Employee Surveillance

- *Provide general notice about employee surveillance methods*
- *Restrict surveillance methods to those reasonably necessary*
- *Use even-handed procedures for selecting surveillance targets*

# Contractual obligations

- *Employment manuals*
- *Collective bargaining agreements*

# Investigations

- *Union representation – Weingarten rights*
- *Criminal vs. employee discipline*

# Discipline

- *Grievance and arbitration*
- *Due process rights under state law*

# Arbitration

- *Both sides have right to legal representation and to present evidence*
- *Employer may not interfere with right of employees to testify at arbitration hearing*
- *Arbitrator is not required to follow finding of misconduct in another forum, even a criminal court*

# Proactive Steps in Union Context

- *Run training sessions, which include clear statement of disciplinary rules*
- *Give union policy statement on disciplinary procedures for staff sexual misconduct*
- *Review collective bargaining agreement for inconsistent terms; request modifications if necessary*

# Termination and Resignation

- *Employee References*
- *Defamation*
- *Allegations of Discrimination*

# Law suits

- *Defamation*
- *Discrimination*

# Defamation

- *“Qualified privilege” protects representatives of employers who give out allegedly defamatory information for legitimate business purpose*
- *Applies to former employee reference checks, provided that employer can show*
  - Lack of malice
  - Good faith
  - Belief in truth of statement made

# Proactive steps

- *Establish and adhere to policy limiting dissemination of information about employee discipline*
- *Limit dissemination to “Need to Know” basis*
- *Implement policies protecting employee personnel files*
- *Implement consistent policy on reference checks*

# Discrimination

- *Requires showing employee was treated differently than others similarly situated*
- *Pretext: is the employer's reason the REAL reason?*

# Consistency makes good policy

- *Training supervisors*
- *Minimizing managerial discretion*
- *Treat like cases alike*
- *Consistently enforce disciplinary rules*
- *Maintain up-to-date personnel files*
- *Keep contemporaneous documentation of all infractions, even minor ones*
- *Protect employment information from general discussion*

# Miscellaneous Topics

- *Psychological Testing*
- *Polygraph Testing*

# Psychological Testing

- *No legal bar to using under federal law, EXCEPT as it may indicate discrimination*
  - e.g., asking about religious views
  - Check with your legal counsel about state law bars
  - In public sector, privacy concerns re: intrusive questions may also be issue

# Employee Polygraph Protection Act

- *Many states have rules limiting or prohibiting polygraph testing; check with your legal counsel*
- *Federal law prohibits most polygraph testing in private sector but exempts public employees*