

Use “Golden Rules” to Avoid Employee Suits

BY BETSY BATES
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PORTLAND, ORE. — As if it weren't aggravating enough to worry about frivolous lawsuits filed by patients, physicians, like all employers, also need to consider their legal liability with regard to their employees.

Fortunately, most employment lawsuits are eminently avoidable, said employment attorney Kathy A. Peck at the annual meeting of the Pacific Northwest Dermatological Society.

Supervisors should follow the “golden rules” of discipline, said Ms. Peck, a partner in the law firm of Williams, Zografos, and Peck in Lake Oswego, Ore.

These include immediacy, consistency, impersonality (targeting the behavior, not the person), and positivism, always remembering that the goal is to rehabilitate employees whenever possible, rather than to punish or ostracize them.

Physicians and office managers also need to watch their language. Ms. Peck said many cases may turn on remarks, perhaps unintentional, that might be interpreted as being derogatory or stereotypical with regard to a protected class of workers, such as older employees, women, or members of a racial or ethnic group.

Work environment harassment claims are on the rise, so practices should respond promptly and definitively to complaints of sexual, racial, ethnic, religious, age, and disability-related harassment. Just as physicians should monitor their own remarks and behavior, they are responsible for their office environment and should take immediate corrective action if that atmosphere is tainted by “unwelcome conduct,” she said.

Require applicants to fill out an application form. Great interview skills do not necessarily reflect a solid employment history.

“You can hide things in a resume,” Ms. Peck said.

All employees (established and newly hired) should sign an employee handbook documenting policies and procedures. Include within the handbook an “at will” clause stating that the employee is free to resign at any time and that the practice is free to terminate the employee “at will.” The manual also should state that this policy remains in effect unless it is changed in writing by the physician or another designated individual at the office.

“There are huge exceptions” to when an employee can be discharged and why—because of pregnancy, for example—but the clause protects employers from being sued by those who assert they were hired until they retired, or some other vague point in time, said Ms. Peck.

Another issue that needs to be ad-

ressed is when an employee has a bad attitude. It's a huge mistake to put up with “posturing princesses” or passive-aggressive manipulators who stir up trouble. These employees can sour morale very quickly, leading to turnover problems, excessive time off, stress claims, and grievances, she said.

Offenders should be reminded of policies that require polite and cooperative behavior, and their behaviors should be documented.

When it comes to employee performance, it is important to not allow “soft” evaluations. It will be very difficult to justify in court the dismissal of an employee who received above-average evaluations for the past 6 years.

Many times a supervisor will say, “I thought if I gave her positive feedback it might cause her to change,” Ms. Peck explained.

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Although every evaluation should fairly point out positive performance examples, inflated praise generally does not compel an employee to work harder. Address shortcomings, establish goals for improvement, and then follow up, she advised.

Any decisions that are made regarding personnel must be documented. An employer who can present a

record of fair, reasonable, and consistent evaluations and decisions will fare much better if an employment discrimination case makes it to court.

If something does happen that requires action, always listen to the employee's side of the story. Not only is this fair, it might change your perception of an event, and it also helps to establish an accurate line of documentation right away, said Ms. Peck.

A dismissed employee later may come up with a multitude of supposed claims against you, but if someone listened to and documented his or her initial story, it establishes these facts on the record.

When an employee needs to be discharged, do not call it a layoff. Softening the blow to an employee by falsely implying that their dismissal was a result of a reduction in the workforce is a good way to get “into trouble with employment law,” she said.

An incompetent 55-year-old employee who is laid off and immediately replaced with a 36-year-old employee has the makings of a successful age-discrimination suit, she explained.

It is also important to provide a “clean” reason when an employee is discharged. If an employee was caught embezzling money, that's a firing offense and it's enough. Piling on other minor offenses is unnecessary and may clutter up any resulting employment claim against the practice, particularly if other employees had also committed minor infractions without losing their jobs, Ms. Peck said. ■

POLICY & PRACTICE

Rocket Fuel and Thyroid Deficiency

Environmental trace sources of perchlorate may be contributing to lower thyroid hormone levels in women, according to a study by the National Institute of Environmental Health Sciences. Perchlorate is used to make a variety of products including road flares, explosives, and rocket fuel. Researchers looked at urinary levels of perchlorate and serum levels of thyroid-stimulating hormone and total thyroxine in 2,200 males and females aged 12 years and older. They found that although perchlorate was not a significant predictor of T₄ or TSH levels in men, it was a significant predictor for levels of both in women. “These associations of perchlorate with T₄ and TSH are coherent in direction ... but are at perchlorate exposure levels unanticipated based on previous studies,” the authors wrote. The Environmental Working Group, a nonpartisan environmental research organization funded largely by foundations, called the report “alarming” and noted that its own analysis suggests that 44 million American women who are pregnant or thyroid deficient, or who have low iodine levels, are at heightened risk from exposure to the chemical.

Diabetic Nephropathy Genotype?

The Foundation for the National Institutes of Health has awarded the Joslin Diabetes Center one of its first six grants under the Genetic Association Information Network. GAIN is a public-private partnership among the foundation, Pfizer Inc., Affymetrix Inc., Harvard University, and several other companies and institutions aimed at finding the genetic causes of common diseases. Under the project, researchers will use biologic samples already collected from previous studies to evaluate the differences between the genomes of 1,000-2,000 patients with particular conditions and those of 1,000-2,000 healthy volunteers. In the Joslin study, Dr. James Heber Warram and colleagues will analyze the genomes of patients with type 1 diabetes and nephropathy. Pfizer is contributing \$5 million to cover the cost of overhead for GAIN, with part of those funds designated to establishing a GAIN database at the National Library of Medicine. Other studies funded in the first round of GAIN include those focussing on psoriasis, attention-deficit hyperactivity disorder, schizophrenia, bipolar disorder, and depression.

Nearly Free Humatrope, Forteo

The Health and Human Services Office of Inspector General has approved a request by Eli Lilly and Co. to provide three drugs—including the growth hormone Humatrope and the osteoporosis drug Forteo—free to beneficiaries enrolled in the Medicare Part D program who are experiencing gaps in their prescription coverage. The other drug covered by the program is Zyprexa, a drug to treat schizophrenia

and bipolar disorder. To be eligible for the program, beneficiaries must have an income below 200% of the federal poverty level. To cover some of the administrative costs, patients will be charged a \$25 fee for a 30-day supply of the medication, which will be shipped directly to the patient. The company said it expects to begin enrolling patients in the program as early as December. The program “meshes with Medicare Part D, allowing the drug benefit to be successful while still meeting the needs of low-income patients who require more sophisticated medications,” said Deirdre Connelly, Lilly's president of U.S. operations. Patients interested in the program can find information online at www.lilly-medicareanswers.com.

Low Adoption of EMRs

Only about one-fourth of office-based physicians are currently using electronic medical records in their offices, according to a study by researchers at Massachusetts General Hospital, Harvard University, and George Washington University. The study, which was funded by the Robert Wood Johnson Foundation and the federal National Coordinator for Health Information Technology, looked at dozens of studies and surveys done by information technology experts. “We are pitifully behind where we should be,” said study coauthor Dr. David Blumenthal of Massachusetts General Hospital. “We must find ways to get more physicians to embrace this technology if we are to make major strides in improving health care quality.” Barriers to EMR adoption include the high cost of systems, uncertainty regarding the return on investment, and the perceived legal burden of compliance with privacy regulations, according to the report.

CMS Curbs Improper Claims

Medicare's on track in 2006 to further reduce the number of fraudulent and inappropriate claims being submitted. CMS is reporting that 4% of claims were improper in 2006, down from 5% the previous year and from 14% in 1996, leading to \$11 billion less in improper payments over the last 2 years. To determine the error rate, CMS randomly sampled 160,000 claims submitted from April 2005 to March 2006. Since it has been able to more closely identify errors, CMS has been providing more accurate information to contractors, resulting in improved system edits and updated coverage policies, said the agency in a statement. In a statement, Sen. Chuck Grassley (R-Iowa), chairman of the committee charged with Medicare oversight, said, “I welcome the news that the government's increased attention to oversight of Medicare payments has paid off.” But he added that CMS has work to do, as it is “still paying for medically unnecessary services and undocumented services.”

—Joyce Frieden