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Bye Bye Baby Boomers!

REPLACING SUPERVISOR SKILLS

By: Mark A. Lies, II

As the American society ages, the economy (and employers) must prepare for the imminent departure of approximately 78 million workers in the "Baby Boom" generation. Currently, these employees are retiring at the rate of over 8,000 per day or more than 300 per hour. Since many of these individuals are senior employees and members of management, the departure of their knowledge, experience and work ethics will have a significant impact on the workplace. This article will discuss what employers should consider to respond to this phenomenon in order to continue to comply with federal and state safety and health and employment laws, particularly as it regards the loss of supervisors.

LEGAL STATUS OF SUPERVISOR

In the workplace, the supervisor occupies a unique role. Since the employer is typically a corporation, it must act through its employees. Those employees who are designated as supervisors (typically employees who have the authority to hire, fire, enforce discipline or enter into contractual relationships) are considered under the law to be "agents" of the employer with authority to create legal liability against the employer for their actions, including their negligent or intentional acts which may constitute violations of employment or other laws.

Unfortunately, many supervisors do not realize that they occupy this status or the extent to which their actions (either their affirmative actions or their failure to take actions when necessary) can create legal liability. More importantly, many supervisors are totally unaware of their own exposure to personal liability (for monetary judgments against them and their financial assets, or worse, personal criminal liability).

DUTY TO TRAIN SUPERVISOR

Obviously, if the workplace is not being directed by skilled supervisors, chaos is a likely outcome. Thus, just as it is necessary to train the supervisor to supervise the production of the actual work, it is necessary to provide training regarding the operation of several laws which will be intimately involved with the supervisor's day to day interaction with employees, including:

- Worker's Compensation
- Occupational Safety and Health Act (OSHA)
- Civil or Tort Liability
- Employment Discrimination Laws
(Title VII, ADA, FMLA, employee privacy rights)
- Whistleblower Laws

WORKER'S COMPENSATION

Supervisors must be trained to have a basic knowledge of an employee's right to receive benefits for injuries and illnesses that may occur at work and that it is a violation of the law to refuse to hire or to fire an employee who has exercised their rights under the worker's compensation laws, including filing a claim or receiving benefits.

This training must include basic awareness of how to report a worker's compensation claim, how to investigate it and what documentation may be required to be filed with the appropriate state Industrial Commission. Conversely, supervisors must also be aware of the potential for a fraudulent claim being made and how to participate in defending such a claim while maintaining confidentiality.

OCCUPATIONAL SAFETY AND HEALTH LAW

From the outset, the supervisor must be made aware of their role as the primary enforcer of the employer's safety and health policies, through walkarounds to identify hazards and violations and written or verbal discipline to employees who have violated the policies. Obviously, in order to perform this function the supervisor must have also received prior in-depth training to identify hazards and the OSHA regulations or employer policies which are applicable. It is crucial that the employer document this training in order to establish that it has a competent supervisor fulfilling this role.

The training obligation imposed on the supervisor is further complicated by the fact that the supervisor may not have the ability to communicate with his/her employees because of a language barrier. If this barrier is not bridged, the supervisor cannot train his subordinates as to the required safety or health matters (e.g., hazard communication, LOTO, fall protection, etc.) nor can he effectively

communicate disciplinary action either verbally or in writing. It is strongly recommended that bilingual face-to-face training and written materials be utilized to meet this obligation.

In addition, supervisors must be clearly made aware that their failure to identify hazards and to enforce the safety and health policies can lead to the issuance of civil citations by OSHA with, in some cases, significant monetary penalties against the employer. More importantly, the supervisor's training must include potential employer and supervisor criminal liability under federal law for fatalities due to the supervisor's action in causing violations of regulations because of conduct which is intentional or indifferent in nature. Under state law, there may be additional criminal liability facing a supervisor which far exceeds those under federal law.

Another area of concern is the supervisor's role in responding to an OSHA inspection. The supervisor is most likely totally unaware of the rights of the employees, the employer and OSHA during an investigation and how to assert the rights of employees and the employer. Moreover, he must be aware of criminal liability for obstructing the inspections and the duty to provide truthful responses to the agency.

CIVIL OR TORT LIABILITY

Whenever an accident occurs at the workplace, in addition to a worker's compensation claim, there is a potential for a third party action by the injured employee against a manufacturer of the equipment or service provider who may be responsible for the accident, in whole or in part. In this event, the supervisor must be trained in when and how to preserve accident evidence (including physical artifacts, documents or site conditions) against "spoliation" and, if this is not done, that the employee may have a potential claim directly against the employer because of the loss of the employee's claim against the third party due to the loss or destruction of the evidence.

If the employer decides, as it should, to conduct a "root cause" analysis of the incident, the supervisor must also receive training in how to participate in a meaningful fashion without generating documents which may create liability against the employer because the documents contain unsupported factual conclusions about employer liability, constituting "admissions" that can be utilized to establish liability in a subsequent court or regulatory proceeding.

EMPLOYMENT DISCRIMINATION LAWS

As most employers are well aware, federal and state employment discrimination laws pose significant liability. Many supervisors have no meaningful knowledge of the wide scope of these laws. There is no necessity that supervisors develop in-depth experience in these laws as long as they have received competent, continuing awareness training of the following:

- the various protected employee categories under such laws (e.g., age, race, sex, national origin, ethnic background, religion)
- the various protected employees' rights under such laws (e.g., disability, (ADA) serious health conditions (FMLA))
- The duty to protect employees against violation of these rights and communicate promptly with Human Resources when an employee complaint of discrimination occurs
- The duty to participate in a timely, confidential investigation of employee complaints to determine whether there has been a violation, and if so, to take prompt, effective remedial action

Another related area of liability is that of employee retaliation claims, that is, the supervisor must be made aware of the potential for an employee to claim retaliation for any adverse employment action (e.g., termination, demotion, loss of overtime) taken by the supervisor that may occur sometime after an employee has previously made a complaint or filed a discrimination claim. The supervisor must be trained to document the rationale for the subsequent adverse employment action and the reason(s) why it is not related to the prior employee discrimination complaint or claim.

WHISTLEBLOWER LAWS

Finally, supervisors may have no awareness of whistleblower laws which protect employees against adverse employment action when they complain about certain protected activity. A key example involves the right of an employee to contact a federal or state agency to complain about matters such as workplace safety and health, workplace violence, environmental violations and the like. Again, the supervisor must be made aware that any such complaints made to the supervisor must not be used as a basis for negative action against the employee, despite the supervisor's belief that such complaints are factually incorrect or are being made to embarrass, or worse, to cause the supervisor to be subject to negative job action by the employer.

CONCLUSION

As can be seen from the foregoing, the newly minted supervisors will face many challenges as they assume the obligations of the departing Baby Boomer supervisors. If the employer develops a credible program to train the incoming supervisors in the foregoing salient areas under these laws, the employer can greatly reduce its potential liability.