

# PROBLEM EMPLOYEES HOW TO MANAGE HOW TO WIN

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## Nice to Meet You



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- **Practice Area:** Management-Side Employment & Labor Defense; Healthcare; Municipal Law; Wage and Hour; Litigation & Appeals
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## The Price is Wrong

- An empl benefits accident could no
- Apparen appear haven't : effort.
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LOCAL NEWS

### Ex-postal worker nabbed for fraud on 'Price is Right' gets probation

Posted September 11, 2013  
Updated September 12, 2013

[f](#) [t](#) [in](#) [e](#) [+](#)

**GREENVILLE, N.C.** — A former Fayetteville postal carrier who pleaded guilty to worker's compensation fraud after being spotted on "The Price is Right" game show was sentenced Wednesday to three years on probation.

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## Sometimes Employers Cause Their Own Nightmares

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## Halloween Costumes Gone Wrong

### Woman no longer employed at hospital after blackface pic

Jay Z & Beyoncé. 📷

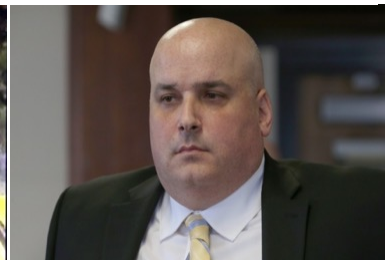


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## Halloween Costumes Gone Wrong . . . With a Twist

- MBTA trolley operator attacked by man dressed as Michael Myers on Halloween – claimed workers' comp. Only problem?

### MBTA Operator Allegedly Hired Man In Michael Myers Mask To Attack Him



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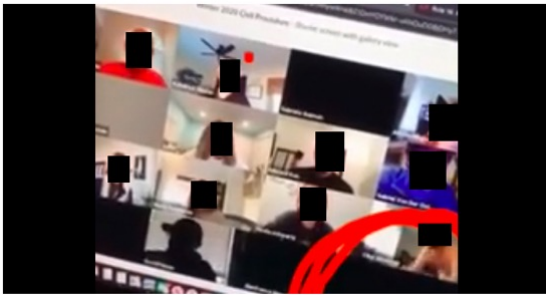
## More Recently . . . ZOOM

### Legal workers Zoom meeting interrupted by naked colleague

By **Aishah Hussain** on May 7 2020 3:30pm 12



They'd been chatting about civil procedure when 'Ben' appeared starkers on screen



**Christina Kerby**  
@ChristinaKerby



Pro-tip: if you and your husband are both working from home, check to see if he's on a four-way video call BEFORE running past the office naked to get a towel from the linen closet. #RealStory #COVID19 #WFH



**Tony Martin-Vegue** @tdmv

Day 2 of #COVID19 prompted WFH: Nailed down my routine by emulating my office schedule. 5:45am wake-up, hour workout, shower, dressed (no pajamas this time) and sat down to work when I would usually leave for work. +2 hours of extra productivity! Great day.

7:42 PM · Mar 12, 2020



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36 people are Tweeting about this



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## More Recently . . . COVID Litigation

- Muslim man suing employer for religious discrimination
- Mosque closed and he began performing Friday prayer at work. Terminated shortly after because productivity was low. (it was low everywhere the first 2 months of COVID).
- PFG sued in New Jersey for race discrimination related to RIF. African Americans disproportionately impacted by RIF.
- Furloughed employee of 28 years sued for age discrimination where younger employees were rehired, and he was offered a severance agreement.
  - *There are about 400 lawsuits of this variety currently pending.*
- Several more FFCRA cases on the horizon.



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## More Recently . . . BLM

She wore a BLM mask to work at Whataburger. After a customer complained, she lost her job.



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## More Recently . . . BLM

- **Side note:** diversity and inclusion has taken prominence in many HR departments. *This is a wonderful thing, but . . .*
- Several opportunities for missteps.
  - Reverse discrimination suits
  - Co-opting/appropriation by disgruntled employees
    - Some company statements after George Floyd protests, while good natured, could be damning if not artfully drafted.
  - Avoid open-ended surveys at all costs.



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## Final Dedication

- Remote employee is terminated for poor performance and my client asks me to send a demand letter after he refused to return \$10,000 worth of property.

I'll refer all future em  
terroristadegan. This  
to email you about.

Lol seriously - y'all are cute with your tersely worded emails and [REDACTED]. I can't believe people get intimidated by [REDACTED] lawyers like you. Oh well- I did file a grievance with the office of the committee on professional conduct with the Arkansas judiciary the other day. Fun times. I honestly can't believe they let people with names like Abtin mehblah lahtowelhead be lawyers. Sorry for spelling errors -silly autocorrect 😊

watch list. lol. Abtin  
med said was a-ok

ANYWAYS—



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## But Wait, There's More . . .

From: BFTV Forum <forum@email.boyfriendtv.com>  
Sent: Tuesday, July 30, 2019 2:48:20 AM  
To: Sales <sales@[REDACTED]>  
Subject: New Registration at BoyfriendTV



### Registration

Hi [REDACTED] sucksd [REDACTED],

Thank you for registering. We require that you validate your registration email to ensure that the email address you entered was correct. This protects against unwanted spam and malicious abuse.

Confirm email address



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## But Wait, There's More . . .

### "Employee Beware - Dont Work Here"

Former Employee - Account Executive in Vinton, VA

Doesn't Recommend

Negative Outlook

Disapproves of CEO



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## But Wait, There's More . . .

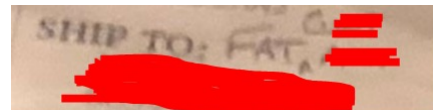
- He created a WordPress website and posted several defamatory posts about employees and the company, AND he uploaded a 2.5 GB folder (all for public access) with **incredibly sensitive** company data.
- Big problem for the Company because it was in the data security business.
- Very difficult to take things off the Internet; more so on an emergency basis.



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## Still More . . .

- We called the local PD and FBI for the cyber harassment.
- Filed an emergency lawsuit for breach of a confidentiality agreement in State 1
- He filed a debt action against our client in State 2
- He also filed for, and has appealed multiple times, unemployment (still ongoing)



What's up jerks.

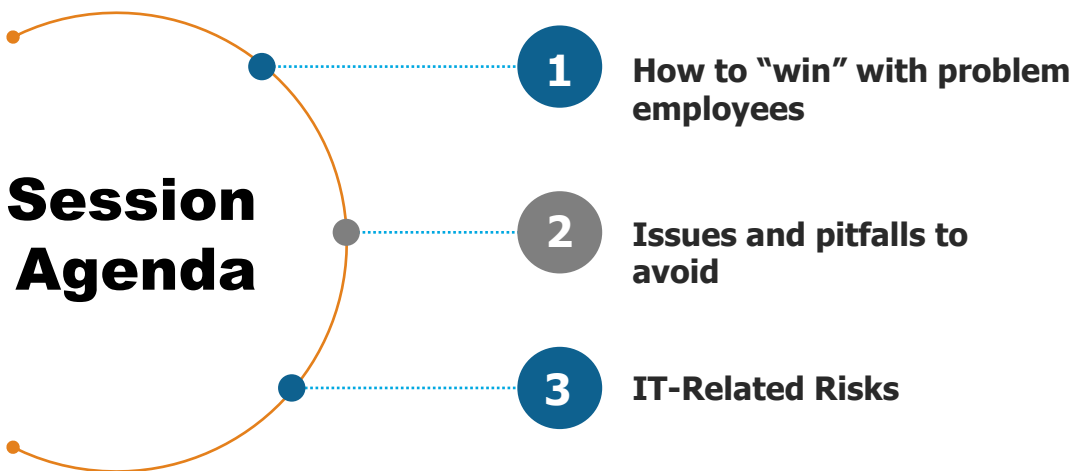
I assume you've approved my reimbursement by now and are getting my commission ready. Can't break laws now. Gotta pay what you owe. You're already making myself and my kids suffer by firing me for no reason| without warning. Real kind of you. Cocksuckers.

I hope your shit works well. I watched loads of porn on it -tell Tyler to clean it well and don't hold it up to a black light lol. ☹️☹️☹️☹️☹️☹️♥♥ I can't find the phone charger. I used a wireless charger and can't find the box the phone came in. I'm guessing it's in there. If I find it I'll send it to you. If not, sorry for the bad luck.

Anywavy v'all suck. You lied and treated me like shit. mom died the day they made this decision-that's fucking instant karma. You deserve it. Love the rest of your life knowing that it was your fault she died due to your bad actions and god was getting you back. Or the universe or karma or whatever you believe.<sup>1</sup>

Probably causes mom's cancer to return too. I hope the chemo fails. Bye bye baldy.<sup>2</sup>

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## Types of Problem Employees

**SHORT-TERM**  
employees  
who survived the  
probationary period.

**LONG-TERM**  
employees  
whose misbehavior has  
been tolerated for years.

Under each type, you will encounter employees *causing* problems and employees *with* problems.



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## When to Manage Risk

- At interviewing and hiring stage;
- At probation;
- Evaluation of performance;
- When things start to slip;
  - Get ahead of the issue before it becomes chronic
- When discipline is warranted.



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## Types of Negative Behavior

- General poor attitude
  - Criticizing
  - Complaining
  - Showing dislike for the supervisor/organization
- Making an art of doing minimal work
  - Socializing
  - Joking around
  - Avoiding work
- Regularly failing to follow rules
  - Forgetting to wear safety equipment
  - Signing out at lunch
- Failing to follow instruction
- Sarcastic, hostile, or passive behavior
- Substance abuse (symptoms/effects)



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## Consider the Employee's Perspective

### Use Self-Evaluations



## STEP 1

*What is the underlying cause of the behavior?  
If we can catch it, can we correct it?*

- Use of employee self-evaluations can be critical for success in resolving problems **or** for success in defending lawsuits.
- Is the employee unhappy in his or her current position or otherwise dealing with career development-type issues?
  - Seek to discover the employee's own desires
  - Have the employee self-assess his/her strengths



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## Why Do You (*still*) Have Problem Employees?



### STEP 2

*Determine your own culpability.*

- Problem with your policies?
- Problem with supervision?



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## Common Policy Problems | Probation

### Probationary period is too short




- **Observations**
  - 30 days is typical, but inadequate
  - Inaction results in retention
  - Need bodies to fill positions
- **Recommendations**
  - 6 months
  - 30/90/180 - day evaluations
  - Can start benefits at 30/60 days
  - Don't accept long-term problem as the solution to a short-term need.




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## Common Policy Problems | Attendance

### Attendance Issues



- **Observations**
  - No-fault points system, or
  - Standard progressive discipline
  - Both have forgiveness features
- **Recommendations**
  - Address chronic absenteeism
  - 6 disciplinary notices in any 24/36 - month period?
  - 3 suspensions will result in discharge?
  - Tie benefits to straight-time hours worked?




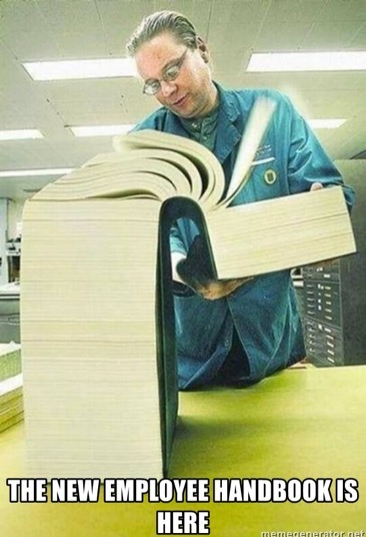
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## Common Policy Problems | Rule Detail

### Work rules are too detailed





ees can manipulate and pick es apart.  
 must have been written by be understood by working  
 d for anyone to remember all  
 rk rule for the specific  
 ipline only applies when the es the same specific work rule



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## Forget Path Dependency

# Path Dependence

**We Use This**

Q W E R T Y U I O P  
A S D F G H J K L  
Z X C V B N M

**QWERTY**

**This is Better**

Q W E R T Y U I O P  
A S D F G H J K L  
Z X C V B N M

**DVORAK**

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## Common Policy Problems | Rule Detail

**Work rules  
are too  
detailed**



### Recommendations

- Consider adopting a code of ethics or use simple work rules with examples of behaviors that violate the simple rules.
  - Be at work!
  - Be on time!
  - Be honest!
  - Be safe!
  - Be productive!
  - Be respectful!



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## Missed Opportunities | Policies v. Directives

- **Not everything needs to be a policy!**
- *Example:* before Halloween and holiday parties, a simple company-wide email setting expectations (attire, alcohol consumption limits, etc.) is more than sufficient.



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## Missed Opportunities | IT & Confidentiality

- **Remote work is here to stay.**
- Need for proactive IT resources to prevent online data dumps like my friend in the earlier slides.
- Easy to set enterprise-wide policies to wipe/lock equipment/email accounts – do so now so you don't get caught in a bind.
- Confidentiality agreements will become more prevalent and important.
  - In this way, confidentiality policies are not enough. Be thoughtful about who signs what (confidentiality, confidentiality & non-compete/non-solicitation, etc.)



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Why Do You  
(*still*) Have  
Problem  
Employees?

If there is not a policy problem,  
there is probably a **supervision**  
problem.



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Supervision Problem | **Little or No Training**

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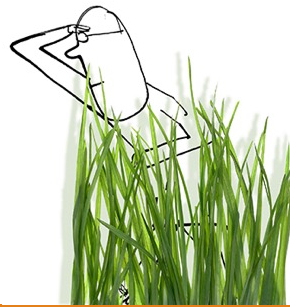
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## Handling Problem Employees & Avoiding Legal Liability

- Understanding “pretext” arguments
  - *McDonnell-Douglas v. Green*
- Must understand legal burdens of proof and persuasion.



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## Pretext | *McDonnell-Douglas Test*

### STEP 1

The **employee** must prove that they are a member of a protected class, that they met the employer’s legitimate job expectations, that they suffered an adverse employment action (firing, demotion, etc.), and that similarly-situated employees outside the protected class were treated differently.

### STEP 2

If the employee establishes the above, the **employer** must show that its decision was made for legitimate reasons and not based on any discriminatory motivation.

### STEP 3

Once the employer shows that it had a legitimate, non-discriminatory purpose, the **employee** must show that the stated reason is merely pretext for the real reason.



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## Pretext | How to Get Another Bite at the Apple

- Facts stated by employer are not true
  - Maintain proof of facts in personnel file!
- Inconsistency in application of policy
  - No good deed goes unpunished!
- Undocumented issues/discipline
  - If it's not documented, **it didn't happen**
- Otherwise not worthy of belief

### Typical case?

**Comparators**  
*(similarly-situated people  
outside the protected group)*  
**received more  
 favorable treatment**



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## Case Law Example | FMLA

### PLAINTIFF'S INITIAL PROOF

- Plaintiff took FMLA leave
- She was fired less than 2 days after returning to work
- No information given as to whether the employer hired another person for the job



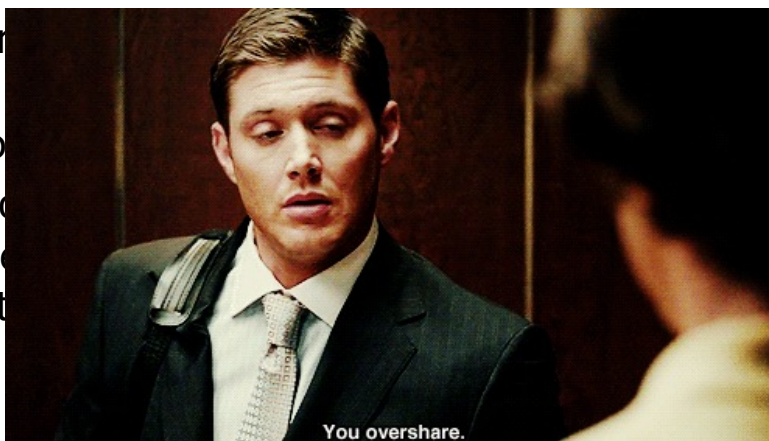
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## Case Law Example | FMLA Leave

### EMPLOYER'S NON-DISCRIMINATORY REASON

- Employer argued that the reason for the plaintiff's termination was the disclosure of images of patients, which is a legitimate business reason.
- The trial court found that the employer established a legitimate business reason for the plaintiff's termination.



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## Case Law Example | FMLA Pretext

### PROOF OF PRETEXT

**Plaintiff argued** that the reason articulated by the employer was pretextual for three reasons:

- There was a dispute regarding whether the plaintiff denied the allegations
- The identities of the complaining patients were not disclosed in accordance with Fed. R. Civ. P. 26 and therefore the testimony must be excluded
- The employer failed to apprise her of the situation until after the end of her leave.



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## Case Law Example | FMLA Pretext

### THE COURT?

- No pretext was shown by the Plaintiff.
- However, the court did state that the law prevents illegal rather than merely erroneous or ill-advised employment decisions.
  - Was this really an ill-advised decision on the employer's part?
  - Difficult to tell. The Plaintiff likely would have sued the employer if she had been fired earlier. This is a tough call.
- The court granted summary judgment for the employer. The court held that the Plaintiff failed to show that there was pretext, which left no genuine disputes of material fact in the suit, justifying summary judgment in the employer's favor.



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## Avoiding Pretext Arguments is Key

**Consistent and fair discipline** of an employee and of all employees for **violation of a work rule**, after a **full and fair investigation**, having heard all sides and **considered all mitigating and distinguishing factors**.

- **Theft:** Difference between stealing office supplies and stealing a computer?
- **Criminal Conduct:** Felony aggravated assault v. marijuana possession?
- **Absenteeism:** Called in consistently late and received written warning v. did not call in at all and terminated?



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## Work Rules

- Is there a written rule?
- How was the employee informed of the written rule?
  - Important to make sure handbook is available in central worksite location and an acknowledgement of receipt is signed by the new hire.
  - Can you prove receipt?
- If the rule was not written, how was the employee informed of the rule?
- Is the rule reasonable?



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## Violation of Work Rule

- Can you prove that the employee violated the rule?
  - Verbal warnings? Document the warning/interaction.
  - Written warnings? Allow the employee to make comments on the form and ask the employee to sign the document. If the employee does not dispute the policy violation on the warning form, this is good evidence that the employee is guilty.
- What if you believe, mistakenly, that the employee was guilty based upon your investigation?
  - Operating under a misunderstanding is still a legitimate, non-discriminatory reason for the adverse action.



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## Investigations

### Strive for a full and fair investigation.

- Did the company make a full and complete investigation before a decision was made?
- Did the employee have the opportunity to tell his/her side of the story?
- Did the company interview witnesses suggested by the employee before the decision was made?
- Did the company reasonably consider the employee's side of the story?



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## Consistency and Fairness

### Avoid pretext by comparator evidence.

- What was the discipline issued to other employees who violated this rule?
- Does the discipline in this case match the discipline in cases of other rule violations of similar severity?
- Did the company follow its progressive discipline policy?
  - If not, what was the valid reason for the exception?



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## How to Avoid Pretext | DOCUMENT!

- Be fair and consistent.
- Document exceptions and reasons why.
- Make Good Facts.
- Create a paper trail. If it is not documented, it didn't happen.
- You are writing a book for the jury/judge.
- Remember that while one employee may be suing, you may need to prove that someone is not similarly-situated. This will open employment records for other non-party employees.



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## Best Practices for Documentation

- Effective documentation is:
  - Contemporaneous
  - Focused on objective, observable measures of performance
  - Avoids subjective characterizations of human behavior
- At a minimum, your documentation should include the following details:
  - The date, time, and location of a particular incident or conversation
  - The details of any conversation with the employee
  - The employment policies and procedures violated
  - Any coaching or counseling provided to the employee
  - Any disciplinary action imposed



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## Termination Discussion | Planning

- Review documentation generated through progressive discipline
- Consult with legal counsel, if appropriate
- Arrange to have the meeting in person
- Select the time and place for the meeting
- Arrange to have a manager or HR professional present as a witness
- Arrange to have the employee's physical, electronic, and financial access terminated in advance
- Arrange to have security present if the termination will pose a safety risk
- Plan ahead who is going to speak and what that person will say



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## Termination Discussion | Facilitating

- Keep it short, no more than fifteen minutes
- Essential topics to cover
  - That a decision has been made to terminate employment
  - The reason(s) and key facts supporting the termination decision
  - The effective date of separation
  - A review of the employee's separation package, if any
  - A review of the employer's policy and procedures for handling employment references
  - A review of post-termination legal obligations (e.g. non-competition, confidentiality)
  - What will happen following the meeting (e.g. cleaning out workspace, return of company property, exit interview)
  - Whom to contact for post-termination issues



**Treat the employee with dignity and respect!**



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## Termination Discussion | Following

- Be prepared for post-termination interactions with
  - The terminated employee
  - The terminated employee's colleagues
  - Government agencies
- Requests for employment references must be handled with care to avoid **legal liability**
- Understand your obligations regarding access to employee personnel files



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## How To Survive The Horror | Summary

### BE PROACTIVE

Directives, policies, IT management, recruiting, hiring, and promotions with intent (hope for the best, prepare for the worst)

### BE DEFENSIVE

Leave management; behavioral management; documentation & investigations

### BE CONSISTENT

If you make concessions for one, be prepared to make them for all

### EXCEPTIONS

No one-size fits all in HR; deviations are okay if documented/reasonable/palatable



**When all else fails...call us for help!**



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# Thank you!

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## Upcoming Webinars

DATE		CE	WEBINAR TOPIC	SPEAKER
September 27	20 min		Customer Service in the ASC   Enhancing the Patient Experience	Laurie Brown
October 29	60 min	RN, CASC	Active Shooter	Tonya Wagner
November 29	20 min		Annual Survey Watch Report	Vanessa Sindell
December 17	60 min	RN, CASC	Credentialing Review	Crissy Benze

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