



## The HR Pros Checklist: Do You Have All Your “Ducks in a Row”?

by Liz Tascio  
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A handful of M&Ms, some misguided career advice, a lifelong habit of looking down during a conversation. These sound innocuous, but they’ve all been issues in harassment claims by employees.

Human Resources professionals bear a major role in preventing their companies from being held liable for claims of harassment and discrimination. Even a whisper of complaint requires attention. Richard H. Block, an employment law attorney with Drier LLP, presented a few practical measures HR can use to help keep a complaint from snowballing into a costly jury verdict for employers:

1. Train managers to receive and report complaints properly
2. Require arbitration agreements from new hires
3. Negotiate for signed releases when an employee quits or is fired
4. Give substantive references to increase your chances of getting them
5. Respond effectively to charges, armed with documented facts

### **What managers need to know**

In today’s legal environment, getting a discrimination lawsuit decided in court can cost a company millions of dollars in damages. Today’s adults grew up under Title 7, which prohibits workplace discrimination, which means jurors tend to side with employees, Block said.

“We’ve interviewed them after cases, when we’ve won the cases,” Block said. “They still say, ‘We tried to do everything we could for the employee.’”

Bearing that in mind, companies should set policies that prevent complaints from becoming jury cases, Block says. “The biggest, by far, jury verdicts happen when complaints are ignored,” Block said. “Probably the biggest law firm in the country, Baker and McKenzie, had a case years ago (in which) a secretary complained about a partner. They ignored it. ... One day, he threw M&Ms in the breast pocket of her shirt and reached in for the M&Ms.”

In court testimony, it came out that other women had complained about the partner and been ignored, too. A San Francisco court awarded the woman more than \$7 million.

Block recommends a policy that not only allows employees who feel harassed to report to any manager with whom they're comfortable, but trains managers how to receive complaints and act on them properly; dispensing friendly advice won't cut it.

"We have a case right now where an employee went to a manager who said, 'Oh, don't go to HR, they won't take it seriously,'" Block said. "'It will ruin your career.' That's what she was told."

When investigating a complaint internally, a few appropriate questions can sometimes put the matter to rest. Several female employees at one company said that a male manager always looked at their breasts during conversations with them, so Block interviewed the man. He noticed the man looked down at a 45-degree angle the entire time. After a little conversation, Block told him what the women in his group were saying.

"He was mortified; it was unconscious," Block said.

After that, the man made an effort to look people in the eyes. The women reported months later everything was fine.

"Keep in mind, if you start your interviews saying, 'Sally says you harassed her,' you're just going to get, 'I didn't,'" Block said. "So you have to start with broad questions."

### **Documenting complaints and responses**

Even a rumor of an allegation requires attention from Human Resources, said Alexis Porter, an attorney with Drier LLP.

"Courts make no distinction between written or verbal complaints, formal or informal," Porter said. "If you hear or have any inkling that there's some sort of complaint, you need to ask those questions and figure out what's going on."

Toronda Miller, director of Human Resources at NYC & Company, asked whether she had handled a recent complaint the way she should.

"Somebody comes to me and they say they overheard the accountant manager call the assistant 'sweetie,' and they knew that she felt very uncomfortable because it wasn't part of her culture," Miller said. Miller asked the assistant if she should talk to the manager for her, but the assistant declined. "I let it rest at that. Is that the appropriate step to take? Should I have had documentation saying that I had this conversation with her?"

"What you have to say is, 'I do want to address it; we'll do it discreetly, professionally,'" Block said. "If I don't, they'll do it to somebody else."

The conversation with the assistant should have been documented, Block said, as should subsequent talks with the manager.

Documents can be your best friend or your worst enemy, Block said. Documentation that reflects honest evaluations, reasons for hiring and firing, reasons for promotion, etc., will boost your chances of getting a charge dismissed. Keep all documents in a central place, accessible to the employee.

“I can’t tell you the nonsense that managers have about employees and their files,” Block said. “We’ve been midway through a case, and even though we put out the alert to everyone involved, the manager says, ‘Oh, by the way, I do keep my own secret place, my off-the-record file.’ And we all know there’s no such thing as off the record.”

HR professionals should habitually spot-check documents that pertain to evaluations, hirings, firings, demotions, and promotions, Block said. This puts pressure on managers to provide thorough, honest records. If a manager gives only positive evaluations because her peers do, for example, it’s harder for her to justify firing someone later for poor performance.

A helpful way to keep managers themselves from harassing employees is to indemnify them, Block said, so monetary damages will come out of a manager’s pocket. “Incidents of harassment by managers go way, way down.”

### **Negotiating arbitration agreements and releases**

Even if all training and policies fail, and an employee surfaces with a complaint you can’t deal with internally, an arbitration agreement can keep you out of court, Block said.

“You get them in there for orientation when an employee’s excited to come on, and they’re signing 30,000 documents, they’re signing health forms and I-9s and everything else, and you slip one in there, ‘I agree that I will take all discrimination claims to an arbitrator,’” Block said. “It’s great! They’re enforceable in every court in the nation.”

If your company doesn’t want to force current employees to sign one, the company can make it a condition of employment for new hires, and eventually most of the workforce will be covered, Block said.

“All new employees will sign it,” Block said. “They want the job. They’re not going to be labeled as a complainer.”

Getting a signed release at the end of employment can keep a company from even having to go to arbitration, Block said. The agreement can include anything from a non-compete clause to a promise not to sue. Offer something in return, such as severance, a few months of health care costs, or a good reference.

“They have to be voluntary and easily understood,” Porter cautioned. If necessary, get the release translated into an employee’s first language.

Negotiate a release whether an employee is fired or resigns; this way, the release doesn’t raise a red flag. Be aware that some employees won’t be open about why they’re quitting.

“So many times, employers say, ‘I had no idea so-and-so would sue, it was an amicable separation, or she left voluntarily,’” Block said. “Well, maybe she couldn’t take the work environment anymore.”

### **Helpful hiring policies**

HR professionals shy away from giving thorough references to other employers, fearing defamation lawsuits. But no one who does hiring likes getting the “safe” reference: name, rank, and serial number.

Block says the best way to get a helpful reference is to give them, even simply stating whether you would rehire an employee.

“Where’s the defamation you’re worried about?” Block said. “You don’t need tons of detail. Just a negative or positive reference.”

In fact, not giving an honest reference can mean trouble. There is a growing body of case law around habitually violent employees whose previous bosses didn’t report their behavior during a reference check, Porter said.

Don’t mention whether an employee has filed a discrimination suit against the company, Block said; it looks like retaliation.

When hiring, educate everyone involved in the interview process, including receptionists and assistants.

Block cited a case in which a receptionist escorted a white candidate to an interview, leaving an African-American candidate, who had arrived first, waiting outside. When the white candidate was hired, the African-American candidate sued, saying the company had been discriminatory from the beginning.

“When the assistant picks somebody up from reception and brings them to your office, who knows what question your assistant might ask? She could say, ‘Oh, do you have kids?’” Block said. “I’m raising practical (issues).”

Thorough training and carefully crafted policies can prevent a lot of legal headaches, but Block pointed to one common policy that doesn’t actually do much good for employers: a non-fraternization policy.

“It just sends employees underground, and when you find out about it, you’re faced with enforcing it,” Block said. That could mean firing two productive employees who have a consensual relationship. “Don’t bother.”

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