chaSEMINARS.com
2514 Stenson Dr | Cedar Park TX 78613 | 512-336-1005 | Fax 512-336-1008 | missy@CHAseminars.com

HUMAN RESOURCES GENERAL OVERVIEW
MODULE IV

LESSON 1 ~ LEGAL GUIDELINES FOR INTERVIEWING

Host: Welcome to Legal Guidelines for Interviewing. Asking candidates fair and challenging questions can make or break the interview process. Not only can improper questions make you miss out on talented candidates, but they can also be illegal. Now during this program, you'll learn the three principles to keeping interviews within legal boundaries. You'll also learn what to avoid during the interview process, and protected characteristics that describe what can and cannot be asked when interviewing. In addition, you'll learn other legal issues regarding the interview process. Watch now as we take you through the legal do's and don'ts of the interview process.

Brad: There are three guiding principles that will keep your interviews within legal boundaries. Don't forget that! Brad speaking. Hey Gina. Yeah, I decided to come in a little early this morning to review the candidates we're interviewing today. You're doing the same? Okay, I'll come by your office in a sec. Yeah, see you. The first of the three principles is ask.

Gina: Ask work-related questions that will assist you in determining whether a candidate is qualified for the position.

Nori: Hey Gina, here are those files you wanted.

Gina: Thanks, Nori. The next principle is hire.

Brad: Hire the most qualified candidate based on legitimate job criteria and third...

Gina: Stay away from impermissible subjects of inquiry, such as race, religion or marital status. Even if you don't ask improper questions during an interview, you should be aware that an applicant could sue claiming he or she was discriminated against. At this point a manager's only defense is to show that the candidate that was hired is the "best qualified" for the position.

Brad: In order to keep the interview process as fair and challenge-free as possible, do the following: Write out all questions you plan to ask candidates. Have your questions reviewed by in-house experts or other experienced managers, if possible. Ask all candidates the same questions. Take notes during the interview. Studies show that interviewers forget 75% of what a candidate says. Write down only job-related information in your interview notes. For example, if someone mentions they're married, don't write it down and don't follow up on it. Remember that interviews include all interactions with prospective candidates, to include phone conversations, meetings or meals. And always, treat candidates respectfully.

Nori: Hey Brad, wow! It looks like you and Gina have a big day of interviewing coming up.

Brad: Yeah, we sure do. You know, I want to get these interviews on track early and really set a professional tone.

Nori: That's good. You're much better off staying focused and not getting sidetracked.

Applicant: I was promoted to a manager just before I married my wife. It was a good year.

Nori: And how many people were you managing?

Applicant: I had nine people on my team. My wife was concerned that it was too much to handle with the big life transition and everything.

Nori: How long have you been a manager?

Applicant: About three years.

Nori: Just remember to stay focused, even if the candidate offers information that's not job-related, and you'll be all right.

Brad: In order to avoid even the appearance of impropriety and to set a professional tone in a job interview, all inquiries should be job- and work-related. The only legitimate business purpose you have for meeting a candidate, is to determine who is the best qualified person for the job. Don't ask questions of one gender, and not the other. Don't ask personal questions. Don't tell jokes. Don't belittle candidates or use sarcasm. Don't ask third-party questions about a candidate that you aren't allowed to

ask the candidate directly. For example, questions concerning their medical history or marital status. Don't ask any questions about protected characteristics like race, gender or marital status.
Nori: But isn't there a caveat where it's okay to ask questions about protected characteristics?
Brad: Yes, but only under very limited circumstances. The law may allow for an employer to use protected characteristics as part of a hiring decision, where such a requirement is a "bona fide occupational requirement."
Nori: BFOQ, go on.
Brad: Well say, for example, you have a play or a movie, and the gender of either an actor or an actress is a BFOQ. You may need to hire a man or a woman for a specific role. The law will allow for us to use a protected characteristic if it is part of a BFOQ, but you need to either check with either Gina or your human resources manager before you ask.
Nori: Oh man, with all that information and a full day of interviews coming up, it sounds like you could use a cup of coffee. Do you want to go get one?
Brad: You know it!
Gina: Hi guys.
Brad: Hi Gina.
Nori: It looks like you could use a fill up.
Gina: Oh, yeah.
Brad: You know Gina, I plan on being real selective with our interview candidates today.
Gina: That's great. Just make sure you don't exclude any candidates illegally.
Brad: Right, you mean like race, color, sex...stuff like that.
Gina: It's not just stuff like that. It's illegal to exclude candidates on the basis of characteristics protected under federal law, which include the topics you raised as well as age 40 and over, religion, veteran or military status, pregnancy, family and medical leave, citizenship and other characteristics protected under state and local laws, which include sexual orientation and marital status.
Brad: You know I'm sorry. I hope it doesn't seem like I'm making light of the subject.
Gina: Oh, no, no, no. I know exactly where you're coming from. It's just really important that we understand why we can ask some questions and not others. For example, age. It is not generally permissible to ask about age, other than to determine if an applicant meets minimum age standards set by state or federal law. Unacceptable questions would be: How old are you? When were you born? What are the dates you completed high school? - or any question which tends to identify applicants over the age of 40.
Nori: And what about race and color? It's illegal to ask questions as to an applicant's race or color or about an applicant's complexion or color of skin, eyes, hair. There are no acceptable questions, period. Certain state or federal laws, including those covering affirmative action, may require employers to track the race, gender and other protected characteristics of their applicant pool. Where this is the case, follow your employer's procedures for completing such forms, and separate these forms from the employment application. Generally such forms ask applicants to voluntarily self-identify their race, sex, etc. If they choose not to fill out the form, do not follow up with them.
Brad: With the exception of certain jobs, for example, federal jobs and jobs requiring Department of Defense clearance. It is not legal to ask about an applicant's citizenship status. This is because certain noncitizens, such as permanent work residents or work-authorized aliens, have the legal right to work in the United States. So the permissible question is, "Are you legally entitled to work in the United States?" Under certain circumstances, employers may be able to inquire about an applicant's visa status, as employers are not required to sponsor people on certain types of visas. Because immigration is a specialized area of the law and many employers handle this process differently, check with your local in-house experts to determine how and at what stage your employer screens for visa status. Don't ask about visa status unless instructed to do so by your employer. An acceptable question is, "Are you legally entitled to work in the United States?" An unacceptable question would be, "What is the birthplace of the applicant, the applicant's parents, applicant's spouse or other relatives?" "Is the applicant a U.S. citizen or citizenship of the applicant's parents, applicant's spouse or other relatives?"

It is also unacceptable to require the applicant to produce naturalization or alien card prior to employment.

Gina: It's illegal to discriminate on the basis of someone's national origin, which includes their birthplace, ancestry, culture or linguistic characteristics common to a specific ethnic group. In a job interview, this subject is most frequently brought up in the context of an applicant's speaking skills, accent and/or their language skills. An applicant should be asked about what languages they read, speak or write, only where it is relevant to the job they are applying for. Requirements of English fluency or no accents must be clearly related to the position for which the employee is applying. Although it may be a job requirement for a telephone receptionist to be highly fluent and easy to understand, a similar requirement would not exist for a machine operator. It is acceptable to ask what languages the applicant reads, speaks or writes, if use of a language other than English is relevant to the job for which the applicant is applying. Now this position requires someone to be fluent in Spanish. Is this a problem?

Applicant: No problem at all.

Gina: Would you feel comfortable reading and writing it as well?

Applicant: Absolutely. I'm fluent in all areas in Spanish.

Gina: It is unacceptable to ask questions as to nationality, lineage, ancestry, national origin, descent or parentage of applicant, applicant's parents or spouse. What is your mother tongue or language commonly used by applicant? How applicant acquired ability to read, write or speak a foreign language. Height/weight requirements, fluency in English requirements, training or education requirements which deny employment due to an individual's foreign training, may exclude individuals on basis of national origin, resulting in illegal discrimination. Always make sure your organization has a BFOQ for the requirement.

Nori: It's not permissible to ask any questions about someone's marital status. However, an employment application may ask if someone has ever used another name. But this information must be used only for checking past work experience or for other nondiscriminatory purposes.

Brad: Unless sex is a bona fide occupational qualification for a job, for example, you are hiring women or men to fill a gender-specific role - men and women must be treated equally when hiring them. You cannot make generalizations about physical ability or sex. For example, you may not refuse to hire a woman for a particular job solely because you believe that women are too weak for the job, or that men are less capable of assembling intricate equipment, or that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of characteristics generally attributed to the group. Similarly, you may not discriminate against a particular gender because of customer preference. For example, it is unlawful for you to have a policy of hiring only women because your customers don't like being served by men. Unacceptable things to ask are: Number and or age of children or dependents; provisions for child care; questions regarding pregnancy, child-bearing or birth control.

Gina: It's not permissible to ask about an employee's religious beliefs or practices. However, where weekend or overtime work is required, it is permissible to ask someone if they can meet those requirements. But if the person says that they cannot work at a certain time due to religious beliefs, then the employer must make a reasonable accommodation. This is an exempt management position so it sometimes requires a little more than the nine to five. Many of our managers work about 50 hours a week to accomplish their jobs. Is this something you can do?

Applicant: Oh yeah, I've been working an average of about 55 hours a week in my last company. There is one thing, however. I need to pray several times a day for about 15 minutes. Now, I've always been able to get my job done and that's never been a problem before.

Gina: Not a problem. We try to accommodate other religious practices as well. If you believe that accommodating someone's religious practices would create an undue hardship on the business, check with human resources prior to refusing to hire someone on that basis. Of course, if someone is not the most qualified candidate for a position, then they don't have to be hired. That's why you don't want to focus on religious accommodation or practice in the pre-hire process. What is unacceptable? Any questions regarding applicant's religion.

Nori: When interviewing a candidate, focus on their abilities, not their actual or perceived disabilities. Focus on work history and accomplishments, just like you would with any other candidate. Although you can ask candidates about their ability to perform essential job functions, do not move beyond this. While it is legal to ask applicants with an obvious or revealed disability to demonstrate how they would perform an essential job function, many employers restrict who should ask these questions. Disability-related inquiries and medical examinations may be permissible in the post-offer stage, but check with your in-house experts prior to making such inquiries. An acceptable question to ask is, Now that I've explained the job, are you able to perform the essential job functions?
Applicant: Sure, no problem.
Nori: When you may reasonably believe that an applicant would not be able to perform a job function because of a known disability, you can ask the applicant to describe or demonstrate how they would perform a given job function. An applicant's disability would be a known disability, either because it's obvious, for example, the applicant uses a wheelchair or because the applicant has voluntarily disclosed that she or he has a hidden disability. What are unacceptable questions to ask? Well, it is unacceptable at the application stage to make a disability-related inquiry, which is a question or series of questions that is likely to elicit information about a disability. Such questions include, but are not limited to, the following: How did you become disabled? How long have you been disabled? Do you need a reasonable accommodation for the job? Have you ever filed for workers' compensation? What impairments do you have? Also, asking an employee to provide medical documentation regarding his or her disability. Finally, asking about an employee's current or former use of prescription drugs or medications.
Brad: It is not permissible to ask what type of discharge an applicant received from military service. You may ask whether or not the applicant served in the U.S. military, the period of service, rank at the time of discharge and work experience received while in the service. Gina, I was wondering, is it okay to ask someone about their criminal history?
Gina: Good question, Brad. In general, you can ask about convictions for felonies, although you can't automatically exclude someone because they've committed a felony. However, these rules vary from state to state and there are some exceptions that allow for limited inquiry into arrests, depending on the nature of the job and depending on your local state law. I'm glad you asked, because in the future you will need to clear questions about criminal history with me or any other HR manager prior to asking them. Brian: All right. Now, correct me if I'm wrong. Is it still illegal to ask someone to attach a photograph with their resume, whether they want to or not?
Gina: That's right. However, we can tell them that a photograph may be required after they've been hired.
Brad: Cool.
Nori: Hey Gina, did you want me to make more copies of that work history release form?
Gina: Yes, please do.
Brad: So, it's okay to ask for professional references.
Gina: You bet! In fact there's nothing illegal about asking for professional references at all. The most conservative approach would be to have an applicant sign one of our waivers.
Brad: And now what exactly is that?
Gina: It's a form releasing the company, its managers and its agents from any liability connected with any investigation into the applicant's work history, background and any facts that are revealed during the hiring process. Oh, and be sure you never ask a reference any question you couldn't directly ask a candidate. Background checks are legal, but there are restrictions on what types of information may be obtained. Always get a signed release prior to conducting background checks. If you are conducting them yourself, make sure you have clear guidance about the permissible parameters. If you are hiring an outside third party, make sure they're aware of relevant rules. Certain disclosures to applicants are required when an employer is obtaining, for example, a consumer report obtained from a consumer reporting agency.
Brad: There is no explicit prohibition against obtaining or using credit information, although the manner in which the information is obtained is regulated. And you can be sued for sex or race discrimination if

the practice has a disproportionate impact on women or minority applicants. For this reason, be cautious when relying on credit information, unless it can be justified by the nature of the position.
Nori: There are many requirements that must be met before using credit information, including notification to the applicant. Check with experts for compliance with state and federal credit reporting laws prior to using them in the hiring process.
Brad: I'm starting to get a little nervous.
Gina: Don't worry about it, Brad. You'll do fine. Just ask the questions we've discussed, avoid the ones that we've called out and it'll be a great day.
Nori: Your first appointment's here.
Gina: Oh, thanks. Bring him in.
Host: Remember, asking the right questions in an interview is not only good business sense, but also the law. Ask work-related questions that help you determine qualified candidates. Hire the most qualified candidate and stay away from impermissible subjects.

LESSON 2 ~ WRONGFUL TERMINATION I

Host: Welcome to Wrongful Termination. With every discipline or termination decision, you're at risk of a lawsuit. As managers, you need to know the legal parameters when disciplining or terminating an employee. In this program, you'll learn about employment at will and the restrictions and exceptions for termination. You'll also learn what is meant by progressive discipline and due process. Let's watch now as attorneys at the Ivy Palm law firm work with a recently terminated employee.
Mary: What now? I'm on a deadline, you know. A lot of people are counting on me.
Tony: Mary, I have to let you go.
Mary: So he fired me, right then and there!
Andre: No way! He fired you on the spot, just like that?
Mary: Just like that!
Melanee: No written warning? No formal suspension? Just immediate termination?
Mary: No written warning, no suspension. You are disgusting.
Betty: Me? What about you? You're worse.
Mary: Oh, that's rich, like you never padded your numbers?
Betty: Me?
Tony: Okay, that's enough. You two, knock this off. The next time you two argue, I'm going to suspend you both, on the spot. Do I make myself clear?
Andre: So, duh, he warned you and you argued again?
Melanee: Mary, did you have any kind of employment agreement with Springfield?
Mary: No, of course not. Nobody at Springfield does.
Melanee: Okay then, I'll discuss your situation with my senior partner.
Mary: Well, be sure to discuss that Springfield Software was absolutely wrong to fire me like that, and they're going to pay. You...! Who the...do you think you are, anyway?
George: What the...are you complaining about this time?
Mary: Don't give me that... You know...damn well what I'm talking about.
Andre: She's certainly no Miss Congeniality.
Ivy: Mary was an at-will employee. She didn't have any contract in place committing Springfield to employ her for any particular period of time or offering her any other rights to continued employment.
Andre: If there's no contract, what's wrong with firing somebody?
Ivy: Andre, you don't know much about wrongful termination, do you?
Andre: I have a feeling I'm about to learn.
Melanee: Regardless of the employer/employee contractual relationship, an employer's reason for terminating an employee has to be legal and can't violate public policy.
Andre: She's so negative. Why can't management just fire somebody because she's bad for everybody's morale?
Melanee: Don't give us any ideas, Mr. Junior Associate for a grand total of a week and a half, and already he thinks he knows everything.

Ivy: Andre, there are three categories of exceptions regarding an employer's rights to terminate an at-will employee.
Melanee: Public policy, federal whistle-blower and statutory restrictions.
Andre: Statutory restrictions? Like the federal anti-discrimination statutes? I remember stuff like that. Discriminating on the basis of race, sex, religion, disability status, national origin, age and return from family, medical and/or military leave is against the law.
Ivy: And in addition to those statutes, some states have even more specific discrimination statutes. For example, in some states it's unlawful to discriminate on the basis of marital status or even appearance.
Andre: Maybe Mary should move to one of those states. Melanee, you mentioned something about Mary filling a complaint with OSHA about fumes?
Mary: I'm out of here. There's a horrible smell all around my cubicle. It's like a really awful chemical leak or something. I'll come back when you call me and tell me it's been fixed. Oh, I almost forgot. Don't bother calling me any time next week, I'm on jury duty.
Ivy: So, did Mary need to take a medical leave because of the fumes?
Melanee: Mary said she left early that day because of the fumes. But, she didn't need to take a medical leave.
Andre: Turns out, some woman was just doing her nails in the cubicle close to Mary's. Is that lame or what?
Melanee: However, prior to her leaving that day because of the fumes, Mary did file her complaint with OSHA.
Andre: Which she said she forgot to mention to her boss.
Melanee: She said she was complaining on behalf of her co-workers. I can't help but wonder if she was actually planning ahead, hoping for the protection under the federal whistle-blower exception.
Andre: She's a real gem.
Ivy: Now, when did Springfield learn that Mary had filed the complaint with OSHA?
Melanee: That's what I'm trying to find out.
Ivy: Anti-retaliation rules protect employees from unfair treatment in the workplace. Statutes forbid employers from retaliating against workers who report violations of federal law, who exercise their rights under anti-discrimination statutes or who protest wages, hours or working conditions.
Andre: So since Mary reported a violation, are you saying Tony retaliated? He fired Mary to get even with her because she blew the whistle?
Melanee: We'll explore that possibility.
Andre: So I'm protected when I complain about the facilities here.
Ivy: If you were complaining to authorities, you are protected, regardless of your good faith or reasonableness. If you're registering an internal complaint, you are not protected if your complaint is unreasonable or malicious.
Melanee: I've told you, your request that we install exercise equipment in the extra office is totally unreasonable.
Andre: So tell me more about these statutes.
Melanee: Statutes also create a separate vehicle for a fired employee to initiate legal action, either in the form of an administrative complaint or a civil lawsuit, regardless of the so-called at-will relationship.
Ivy: Melanee, what about the jury duty? Springfield might have violated public policy when they fired Mary. She missed work when she was on jury duty just prior to her termination. Now, most states recognize a cause of action for wrongful termination if you can point to public policy exception to the at-will employment doctrine.
Andre: Public policy exception?
Ivy: We've seen claims won by employees who have been treated poorly or fired after they filed workers' comp claims, who have refused to participate in illegal activities, refused to forego the exercise of a job-related legal right or privilege or refused to forsake the performance of an important public duty.
Andre: Oh, like jury duty.
Ivy: Like jury duty. Now, Melanee, you're going to need more corroborative evidence from her, evidence that confirms she was doing great work up until she was terminated.

Melanee: We'll get complete copies of her personnel file, review her performance evaluations.
Ivy: And see what corporate-level documentation you can collect. What does Springfield publish, post or distribute about their standards, rules and consequences? Now, remember, communication is everything.
Melanee: I'll ask her to bring that stuff in before lunch, if she can.
Andre: So I'm canceling my lunchtime workout again?
Melanee: Poor baby.
Ivy: Well, try to sort through everything, then reconvene here this afternoon. Aim for 3:00 or 4:00?
Melanee: The race is on.
Mary: These performance evaluations are such a waste of time.
Tony: I'm with you, but you know we got to do them, Mary, to keep management happy. Let's just grin and bear it, sign them and move on.
Mary: Grin and bear it, Tony? That's one thing, but what is this...? Now you want me to smile? I brought everything I could find. I hope we nail the....
Melanee: Please sit down. Exactly what reason did Tony give you for firing you?
Mary: Oh, he mumbled something about my - my judgment and my people skills dragging down my job skills, whatever that's supposed to mean. Oh, I have that handbook you asked me to dig up.
Melanee: Is there a section in this on company standards, rules and consequences?
Mary: Who knows and who cares?
Melanee: Well, when judging an employer's actions, a jury usually applies a fairness test. Employers are required to communicate company rules and the consequences for failing to follow them, to all employees. Once everyone knows the rules, the rules must then be consistently applied.
Mary: Rules, consistently applied?
Melanee: You were arguing with Betty, though, right? Using a lot of four-letter words? Are there rules against that?
Mary: Everyone at Springfield uses four-letter words whether they're arguing or not. I was a peacekeeper, for crying out loud. I don't want to cause trouble, but I think you should know that George has been harassing me, Tony.
Tony: I'm sorry to hear that. Can you be a little bit more specific, Mary? I'll make a note of it in his file and I'll talk with him about it.
Mary: No, it's no big deal. Don't do anything like that. I just thought you ought to know. I just want to keep the peace. This has to stay between you and me.
Tony: Okay, if you insist.
Andre: I hope I didn't miss anything important.
Melanee: Keeping things off the record is not always the best idea, Mary. Speaking of which, on the record, did any of your performance evaluations indicate that you needed to improve your judgment or that your temper or people skills might be interfering with your job performance?
Mary: Absolutely not. Here, look for yourself. Pile of.... Spotless record. Check them out.
Andre: So why didn't they name you employee of the year?
Melanee: Mary, I can't tell much from looking at these evaluations.
Andre: So what are we looking for, anyways?
Melanee: Something quantitative. Mary, where's your job description? What skills, knowledge, experience, behavioral traits did you need to perform your job? What were your performance standards?
Mary: Performance standards. Whenever they said jump, I was required to ask, how high?
Andre: Such an athlete.
Melanee: If your performance objectives weren't specific, objective and measurable, Springfield will have a problem showing you didn't meet their standards. Employers need to evaluate performance, formally and informally, against job criteria. Evaluations should accurately reflect your performance, specifically documenting your strengths and areas for improvement.
Mary: Well, performance evaluations are just a big joke at Springfield. Everybody just laughs them off.

Melanee: I don't think anyone's going to be laughing anymore, especially when we use these evaluations in court.
Andre: This one says you should smile more often. What does smiling have to do with your job?
Melanee: A lot of these commentaries aren't factual or job-related, they're judgment-based.
Andre: Your new hairstyle is nice? These are legitimate performance evaluations?
Melanee: Performance evaluations should be straightforward and accurate. Did your boss review these with anyone at a higher level of management or even discuss them with you prior to any of your formal evaluations?
Mary: He always seemed to just do whatever he needed to do to get them out of the way as fast as possible.
Andre: Garbage in, garbage out.
Melanee: At least they did have a current evaluation in your file prior to your termination.
Mary: Aren't they special?
Frank: Tony, have you got time for me right now?
Tony: I always have time for you, Frank.
Frank: My doc's suggesting my health problems might come from stress here. The fighting and the profanity really get to me. You know, like that thing with Mary and Betty last week.
Tony: You mean that thing that happened a couple of weeks ago? Don't worry. I talked with them right after you left. I warned them, it better not happen any more.
Frank: Well, I don't know if it's happening any more, but it's - it's not happening any less either.
Tony: I'm really sorry, Frank. Let me see what I can do. Man, first OSHA, now this.
Melanee: Mary thinks Tony was getting even with her for reporting him to OSHA.
Andre: I think she set him up.
Ivy: Well, when employees know they are in danger of being fired, sometimes they try to connect their protected activity with an employer's discipline or a termination decision. Now, to avoid liability, Springfield has to show it would have terminated her anyway. Did you find any evidence of that in any of Mary's performance evaluations?
Melanee: None. We can't find one word suggesting Mary had ever been warned about her poor performance.
Andre: According to his deposition, Tony maintains an open-door policy. He claims he takes all complaints, including safety concerns, seriously, and is committed to thoroughly investigating an employee's concerns, including Mary's "chemical leak." He insists he was protecting Mary's future at Springfield, so he continually addressed Mary's pattern of personality conflicts off the record. After talking with his HR and legal departments, however, he realizes by failing to document his discussions and warnings with Mary, that he failed to comply with laws and regulations. No good deed goes unpunished. So Springfield's claiming just cause.
Ivy: Springfield knows that when terminating an employee, the best way to prove they didn't breach a contract or act in an unlawful manner is to show they acted with just cause.
Melanee: I don't think they can prove that.
Andre: But Tony warned her not to fight any more.
Ivy: Well, the rule prohibiting fighting is definitely a reasonable rule designed to protect Springfield's legitimate business interests. It's directly related to the orderly, efficient and safe operation of their business.
Andre: I mean, she even confessed that she violated the rule. She disobeyed her manager, so he dumped her. What's wrong with that?
Melanee: His investigation wasn't fair and objective. In fact, he didn't even ask Mary for her side of the story before he fired her.
Andre: So she's protected even though she failed to comply with Tony's directives?
Melanee: Yes, because Tony didn't fire Betty. As far as I can tell, Mary wasn't treated in a manner consistent with the way other similar employees were treated. So the degree of action taken was not justified under the circumstances.
Ivy: I think you're onto something. And no evidence of progressive discipline?

Andre: But wait a minute. Are all forms of misconduct subject to progressive discipline? I mean, what if she embezzled or something?
Ivy: Progressive discipline is directed at correcting behavior. Now, some behaviors, like stealing, may be so unacceptable that a chance for correction is not appropriate. I suspect, however, that correction of Mary's tendency to argue would have been appropriate.
Andre: I don't get it. Tony did communicate his expectations. So what were those women thinking?
Melanee: But he didn't fire Betty, nor did he provide Mary with enough opportunity to correct her behavior.
Andre: So we defend the four-letter-word slinging whistle-blower because Springfield didn't play fair?
Melanee: To pass a fairness test, Springfield should ensure consistently equal treatment to all employees.
Ivy: Andre, neither consistency nor due process is required by law in the private sector, but they are good ideas. And failure to follow a progressive discipline system can provide evidence of unlawful motives.
Andre: So even if Tony wasn't looking for an excuse to fire Mary, based on her evaluations, Mary can make it look that way.
Melanee: Springfield's case would have been stronger if Mary's file had contained factual and specific disciplinary write-ups focused on job-related behavior, not personality.
Ivy: I think the court will find that, at most, Mary should have been placed on suspension pending a prompt and complete investigation. Tony should have asked the five W's: who, what, where, when and why. He should have interviewed witnesses and he should have allowed Mary to provide her version of the facts before he made his final decision.
Andre: So even though Mary was wrong, Springfield was more wrong?
Melanee: Something like that. Tony moved too fast.
Andre: He messed up.
Melanee: Okay, this closing has to convince the judge and the jury that two wrongs don't make a right. Members of the jury, Springfield Software made a bad termination decision. They wrongfully terminated Mary Lyons.
Andre: They didn't play fair.
Melanee: They didn't treat Mary the way they treated other employees.
Andre: They warned her she'd be suspended - not terminated - the next time she was caught fighting.
Melanee: Although, in general, Springfield's policy and procedure appears to be consistent with the law, I suggest to you that Springfield Software retaliated against Mary Lyons by terminating her. Mary left work suddenly one day because she suspected a chemical leak. Prior to leaving, she filed a complaint with OSHA.
Andre: And then she missed a few days because of jury duty.
Melanee: Allegedly, Mary argued with fellow employees. There is nothing about her arguing in her personnel file, nor is there any written indication that her arguing affected anyone's job performance, including her own.
Andre: It's a frame-up.
Melanee: I suspect this allegation is a pretext to hide the real reason for Mary's termination.
Andre: They were just looking for an excuse to dump her.
Melanee: Apparently, acting out of anger and frustration, Mary's boss terminated her wrongfully.
Andre: Everyone interviewed agrees, Tony treated Mary inconsistently.
Melanee: Inconsistent with the way he treated other employees, and inconsistent with his prior employee communication to her. Mary may very well have been wrong in her behavior on the job, but Springfield Software wrongfully terminated her and I trust you'll agree, two wrongs don't make a right. Protect Mary's rights. Find Springfield Software guilty of wrongful termination.
Ivy: I'm not surprised she won.
Andre: So, have you given any more thought about getting that exercise equipment?
Melanee: So sorry I'm late, but you're never going to believe this. Springfield's CEO just called. He wanted me to run an on-site seminar for his managers to help them improve their management system

and processes. He wants this to be the first and last case of wrongful termination at Springfield Software, ever. I referred them elsewhere. I'm just glad to see they're getting their act together.
Andre: Maybe two wrongs can make something right, after all.
Host: Welcome back. Remember, the manner in which you handle a termination decision can determine whether a lawsuit is filed against your company. Therefore, in order to prevent involvement in a lawsuit, you need to know the legal parameters when you decide to terminate an employee. By understanding these legal parameters, you'll be better prepared to deal with the consequences of disciplining or terminating an employee.

LESSON 3 ~ WRONGFUL TERMINATION II

Host: Welcome to Wrongful Termination. With every discipline or termination decision, you're at risk of a lawsuit. As managers, you need to know the legal parameters when disciplining or terminating an employee. During this program, you'll learn about employment "at will" and the restrictions and exceptions for termination. You'll also learn what is meant by "progressive discipline" and "due process." Let's watch now as employment law attorney, Paul Gutierrez, explains how to handle the termination decision that preserves an employee's dignity and reduces legal exposure to your company.
Paul: Hi, I'm Paul Gutierrez. Wrongful termination is a term that generally refers to a person being fired when they shouldn't have been. It can be a very misleading phrase. Many terminations people think of as "wrongful" aren't illegal. In many states, employment is "at will." This means the employer can fire the employee for no reason or any reason. Both employer and employee are free to sever their relationship at any time for any reason; it is not illegal. At one time, employers enjoyed the relative freedom to deal with their workers as they saw fit because they were "at will" employees. However, in recent years, many exceptions to the "at will" employment rule have been created and the courts are continually limiting the parameters in which an employee can be legally terminated "without cause." There are three restrictions or exceptions regarding terminating employees and they are: statutory restriction, federal exemptions, public policy restrictions. Let's look at the statutory restriction on the ability to terminate. Employers cannot discriminate against employees on the basis of protected characteristics, such as age, race, sex, national origin, disability, religion, family and medical leave, pregnancy, citizenship and military status. Each state has specific discrimination statutes that are in addition to federal law. Including, for example, state statutes making it unlawful to discriminate on the basis of marital status and appearance. In some states, for example, California's Fair Employment and Housing Act (FEHA) prevents termination of employee based on sexual orientation. Now let's look at the federal exceptions. "Whistle-blowing" is when an employee tells on an employer who's breaking the law. The law protects employees who blow the whistle on their employers. Examples of wrongdoing include: claims of unlawful discrimination in violation of employment statutes, failure to comply with health, safety or environmental regulations or allegations that an employer is attempting to defraud the federal government. To actually whistle-blow, the employee must tell of the illegal act to someone outside the company. It must be a government or law enforcement agency. If the employee just complains to someone inside the company, that is not whistle-blowing. And the whistle-blower laws do not protect the employee. However, the employee may be protected under other laws. For example, it is illegal to fire someone for complaining of sexual harassment or discrimination. It is not necessary that the employer actually breaks the law. The employee could be whistle-blowing on something that isn't illegal in the first place. The employee is still protected from retaliation or termination. However, the employee must believe he or she is reporting a violation of the law, and the employee's belief must be reasonable. If the employee has reported the alleged illegal activity to a government or law enforcement agency, he or she is protected. The employer cannot retaliate against the employee. The employer cannot fire the employee for whistle-blowing. The employer cannot mistreat the employee for whistle-blowing. This doesn't mean that after whistle-blowing, the employee cannot be fired for any reason. The employer can continue to treat the employee like any other employee. But the employer cannot treat the employee differently because of the whistle-blowing. There are also public policy restrictions on the ability to terminate. An employer cannot discriminate against an employee for engaging in other protected activities. The courts have created a number of exceptions to the

employment "at will" relationship that impose legal liability on the employer in a situation where discrimination did not exist. One of these exceptions is the public policy exception to the employment "at will." The majority of states now recognize a cause of action for wrongful termination pursuant to the public policy exception to the "at will" employment doctrine. The essence of the exception is that an employee will have a claim for wrongful discharge if the discharge is contrary to a clear mandate of public policy. It should be noted that, as with any other claim for wrongful termination, these types of cases are dependent upon the particular facts of each case. The general types of cases where a claim is allowed under the public policy theory, include the following: A refusal to participate in illegal activity; the employee's refusal to forsake the performance of an important public duty or obligation; the employee's refusal to forego the exercise of a job-related legal right or privilege; the employee's performance of an act that public policy would encourage under circumstances where retaliatory termination is supported by evidence of employer's bad faith, malice or retaliation; wrongful termination claim predicated on employee's jury duty; wrongful termination claim based on employee's filing of workers' compensation claim. What can a manager do to avoid liability? First, consider very carefully the reasons for the decision to terminate and communicate those reasons and only those reasons accurately to the employee. An employer should resist any temptation to avoid confrontation or save the employee's feelings by, for example, blaming business conditions when the real reason is performance or misconduct. Just as importantly, there should be no exaggeration of the employee's failings and no inclusion of factors that were not the basis for the decision. Second, consider whether there is sufficient believable evidence to support the reasons to be offered for the termination. If an employer is unable to come forward with evidence that the reasons for the termination were not what the employer said they were, the decision becomes extremely vulnerable. The employer should consider taking notes or preparing memoranda of meetings leading up to the termination decision, and all critical documents should be retained as evidence. These steps may be helpful or even necessary to substantiate the employer's statement of its reason for the termination. Third, where the termination is for poor performance or misconduct, determine whether similar performance or misconduct by other employees has led to termination. If there are material inconsistencies in treatment, questions may be raised as to whether the employee's performance or misconduct was the real reason for the termination. There are usually two reasons why an employee may initiate a whistle-blowing claim. First, the employee knows he or she is in danger of being fired and tries to connect his or her protected activity with the employer's discipline or termination decision. In that situation, the employer must be in a position to show it would have taken the same action anyway. Second, the employee has a legitimate concern and no other way in which to address that concern. What should a manager do? Well there are a couple of things. Maintain an open door policy in which you take all complaints seriously and commit to thoroughly investigate employee concerns. Take all safety concerns seriously. Address personality conflicts that become a pattern. Take steps to assure compliance with laws and regulations and contact your Human Resources department for more detailed information. And what about terminating an employee with "just cause?" Well, when terminating an employee, the best way to prove you didn't breach a contract or act in an unlawful manner, is to show that you acted with just cause. Just cause is the universally accepted standard by which the appropriateness of actions is judged. While determinations of whether or not just cause exists vary from jury to jury, the following guidelines are useful in determining whether or not that standard has been met. Where an employee's conduct or performance is unacceptable, consider whether or not the employee was adequately warned of the consequences of such conduct or performance. To what extent have you or other supervisors made an effort to inform the employee about the rules and regulations, the reason you find his or her behavior inappropriate or unacceptable and the consequences of not correcting the inappropriate or unacceptable behavior? While an employee is presumed to have adequate warning of the consequences for violating the rules and regulations, did management take the extra step to ensure that the employee was aware of the rules? Were adequate warnings for inefficiency, simple negligence or other behavior that is unacceptable, given in the appropriate form? That is, in formal employee counseling, oral or written instructions. Investigate the situation before proceeding with the disciplinary process unless immediate action is necessary. Obtain all available facts before taking any action.

Investigate responsibly. Avoid overreaction. Consider, seek out and listen to all sides of the story. Where at all possible, obtain statements from employees or other persons who were a witness to an incident. If verbal or written statements are obtained from witnesses, ensure these persons swear or affirm what they have said or written is true and accurate to the best of their knowledge. The definition of just cause doesn't matter to a jury. The jury applies the "fairness test." Consider if the employee was treated fairly. Here are some questions to ask yourself to determine fairness: Was the employee notified of the rule or expected standards of performance? Was the rule or the company's expectation or order legitimate? Was it reasonably related to the orderly, efficient and safe operation of the company's business? Did you find out whether the employee violated the rule or disobeyed management before making the final decision to take an action against the employee? Was the investigation fair and objective? At the investigation, did you find substantial evidence or proof the employee did violate the rule or fail to comply with the directive? Has the employee been treated in a manner consistent with the way other similar employees were treated? Was the degree of action taken by you justified under the circumstances? Did the employee know of company standards, rules and consequences? Communication is everything. You must determine and communicate with your employees as to what the company's rules are and the consequences for failing to follow them. For example, employees are automatically on notice, for instance, stealing or fighting. Once you and your employees know the rules, they must be consistently applied. Failure to require other employees to follow them communicates a message to all employees that the rule need not be followed. However, some disciplinary procedures can be applied to an individual's problem performance, such as tardiness. A manager can deal with the behavior needing correction by having the employee report in, keep track of time, etc., without requiring all employees to do likewise. In order to disqualify an employee from receiving unemployment benefits, one must establish the employee was terminated for "misconduct." This includes the fact that the employee knew what the rule was and violated it. Performance evaluations are a critical management tool. Here are some guidelines: Determine the criteria upon which you will evaluate your employees. Most organizations have a performance management and process in place for this purpose. What do you expect the employee to do and what are the standards to be used to evaluate how they are performing these duties? For which tasks will the employee be held accountable? What are the skills, knowledge, experience and behavioral traits required to perform these tasks? What are your performance standards (accuracy, speed, quality)? What are the results that must be accomplished and by when must they be accomplished? Two, write performance objectives that are specific, objective and measurable. Three, be sure to continuously evaluate performance against the job criteria. Evaluate formally and informally. Document the employee's strengths and the areas for improvement. Be specific. Four, don't write anything you wouldn't want a jury to see. Desk files can be used in court. Five, avoid judgment-based commentaries. Stick to the facts and keep them job-related. Six, don't wait until the termination decision has been made and then create a file. Seven, be straightforward. Don't say it unless it's accurate. Eight, formal evaluations should never be a surprise. News should have been discussed on one or more occasions in the past. Nine, ensure performance evaluation is reviewed by a higher level of management before being shared with the employee. Ten, ensure performance evaluation is monitored for legal compliance. Assure no disparate impact on females, minorities or older employees. Assure no wording that would indicate unlawful considerations. Progressive discipline is a process for dealing with job-related behavior that does not meet expected or communicated performance standards. The primary purpose for progressive discipline is to assist the employee, to understand that a performance problem or opportunity for improvement exists. The process features increasingly formal efforts to provide feedback to the employee so he or she can correct the problem. The goal of progressive discipline is to improve employee performance. Before conducting progressive discipline, be sure you: one, communicate your expectations and what happens if the employee doesn't satisfy the expectations. Two, establish a system to ensure consistent or equal treatment to all employees. Three, provide the employee with opportunities to correct behavior. Not all forms of misconduct should be subject to progressive discipline. Progressive discipline is directed at correcting behavior. Some behaviors, such as stealing, may be so unacceptable that a chance for correction is not appropriate. On a few rare

occasions, factors may indicate no amount of progressive discipline will modify the employee's behavior. For example, when it's clear the employee doesn't have and will not, in the reasonable future, obtain the skills to perform the job. However, as a manager, exercise caution. There have been cases in which an employee was terminated for a significant act, such as drug abuse, theft, and later stated they should have been subjected to the progressive discipline program first. All that being said, unless one can point to objective reasons for failing to do so, in cases where an employer has adopted a progressive system, it should be followed. Failure to follow can provide evidence of unlawful motives. The disciplinary write-up must be factual and specific, focused on job-related behavior and not personality, focused on what rule or numbers of rules were violated, clear about future expectations, reviewed by upper management to ensure consistency. Also, review the employee's disciplinary record before determining the level of discipline to be conducted. Now, let's take a look at due process. Due Process refers to how and why laws are enforced. When thinking of terminating an employee, consider the following: Placing an employee on suspension pending investigation is preferable to immediate termination and the corresponding common practice of reinstating the employee after all the facts have been established. Investigation should occur promptly and completely. Get the five W's: who, what, where, when, why. Interview witnesses. Participation in investigations is an element of their job. Not wanting to get involved is not acceptable. Allow the accused employee to provide his or her version of the facts before the final decision is made. When making the termination decision, here are some questions to ask yourself: Did I follow the company's rules and procedures? How have other employees who have done similar misdeeds been treated? Are there legitimate reasons to make a different decision in this case? Is the contemplated action consistent with what the employee was told the last time he or she engaged in this type of behavior? Are there legal issues that impact on the disciplinary decision? Are our company policies and procedures consistent with the law? Am I turning a bad complaint into a good retaliation case? Here are some guidelines as to what to avoid: Firing an employee in a humiliating context; insisting an employee voluntarily quit; acting out of anger or frustration; telling the employee his or her job is eliminated when it's not; giving inconsistent treatment and communication. Terminating an employee is never pleasant or easy. However, if you set clear expectations with your employees and effectively manage their performance, you'll be in a better position to avoid any legal challenges. Be sure to be aware of your organization's termination policy and follow it. Contact your Human Resources department with any questions when dealing with such an occurrence.

Host: Welcome back. Remember, the manner in which you handle a termination decision can determine whether a lawsuit is filed against your company. Therefore, in order to prevent a lawsuit, you need to know the legal parameters when you decide to terminate an employee. By understanding these legal parameters, you'll be better prepared to deal with the consequences of disciplining or terminating an employee.

LESSON 4 ~ PREVENTING LAWSUITS

Bob Rosner: When it comes to preventing lawsuits at work, I always think of Tim Ekelman. He was hospitalized after doing his own imitation of a circus sword swallower. Oh the 40-inch blade went down just fine. It was taking it out when the problems started to happen. He sliced his throat, he damaged his voice box, he even had a collapsed lung. A local news reporter interviewed a sword swallowing professional to find out what Tim did wrong. "Easy," he said, "he forgot to dull the blade before he swallowed it." And that's my advice to any company that wants to reduce the threat of lawsuit. If you don't want to die by the sword or a lawsuit, don't pull a Tim. You have to smooth those sharp edges in your organization. Here are some tips on how you can do that. Sloppy memos. As the Microsoft trial has taught us all, there is no such thing as a deleted e-mail. When you sit down to write an e-mail or a memo, always imagine twelve jurors reading it before you hit Send. Off-target estimates. Most bad estimates don't come from miscalculations, they come from misinformation. Protect yourself and your company by having every employee fill out a checklist before an estimate is ever offered to a customer. Lawyer want-to-be's. Most employees aren't attorneys, yet they offer legal opinions like they passed the bar. Avoid legal speculation or your well-meaning comments may bring real attorneys running. The enemy within. Recently I got an e-mail from someone who saw the new temp employee they just hired

on America's Most Wanted. Do homework on every employee, vendor and even your customers. Check their references, do a background check on anyone you work with. Lack of respect. Pride and anger, they're like raw meat to a hungry lawyer. Profanity, sexual references, over-the-top criticisms of competitors, have all led to successful lawsuits. Always show respect to the people you work with and against. Ignoring problems. Hey, I'm into denial as much as any guy from New Jersey, but denial in the workplace can get you in big trouble. Behind any successful lawsuit is usually a problem that could have been solved but was ignored. Not following the contracts. How many times have we all heard in our career, "Hey, I know that's what the contract said but that's not how we do it around here." It's also how you'll send your attorneys to Tahiti. Misuse of power. A little power can go a long way toward a lawsuit if it's used incorrectly. Make sure you're not withholding information, violating patents or copyrights, or stealing secrets from your competitors or you're apt to be sliced and diced by their lawyers. If you're reluctant to follow this advice, realize that your corporation may be sued or you may be personally libel. Now to this very day, our sword swallowing friend, Tim, may be a cutup, but he now realizes that it's smart to be dull, and the same goes for you in terms of corporate lawsuits.

LESSON 5 ~ TEN TOP WAYS FOR A MANAGER TO STAY OUT OF JAIL

Host: Welcome to the Top Ten Ways for a Manager to Stay Out of Jail. The workplace is becoming increasingly complex, with many federal and state laws protecting the rights of your employees. These laws are expansive, covering everything from offer and termination letters, to privacy and discrimination. As a manager, you need to be aware of these laws in order to effectively and legally manage your employees. During this program, you'll learn the top ten issues to keep in mind during employee interactions. You'll also learn tips on how to effectively deal with these issues and stay on the right side of the law. Watch now as Bob Rosner, author of "The Boss's Complete Survival Guide," explains the top ten ways for a manager to keep on the "straight and narrow," and stay out of jail!

Bob: When you first got that management position, chances are pretty good that you thought a lot of perks would be coming your way. A corner office, a parking slot right next to the building, a staff of people ready to meet your every whim. Jail? You never thought about jail! But increasingly the workplace is so complex, the laws, the court cases, the regulations, that it's entirely possible to parlay your management job into a lengthy jail term, and that's why we're here. We're going to share with you the top ten ways to stay out of jail. There are literally thousands of federal, state and local laws that regulate workplace interactions in some way. Keeping informed of these laws can be a challenge. It's almost a job unto itself. However, as a manager, it's up to you to be sure that you're aware of these issues. Whenever in doubt with what to do, partner with your human resources department for guidance. Let's look at ten ways in which you can stay out of trouble. Number 10! (Offer Letter)

Speaker: "I didn't know that I had to put everything in the offer letter. I often used to offer benefits verbally, that were never written down."

Bob: Make sure your offer to a potential new employee lays out the ground rules from the start. Be sure to put the offer letter in writing. Make it specific with what you're offering, such as job responsibilities, salaries, benefits, etc. Be consistent in presenting offers. Although the terms may vary from job to job, the format should be consistent. Don't guess at any questions you may be asked. If you don't know the answer to a question from a potential new employee, go and find it out. Don't make any promises outside of the offer letter. Comments such as, "We pay more than our competitors," and "There will be stock options," have led to lawsuits. Number 9! (FMLA and ADA)

Speaker: "My son is sick! He's very sick, but my manager won't let me take my 12 weeks off. That's guaranteed under the FMLA."

Bob: Provide employees the time and support that they're entitled to when they face a medical issue or a disability. The Family and Medical Leave Act, FMLA and Americans With Disabilities Act, ADA, require employers to provide reasonable support to employees in balancing their personal and family lives with the demands of the workplace. Make sure that you understand and comply with the requirements of both laws. FMLA: Don't make decisions about promotions, work assignments, termination or other work activities based on actual or perceived illnesses, injury or other medical conditions. Be aware of the conditions upon which a leave can be granted, such as the birth or adoption of a child, or family or employee health problems. Don't decide yourself when an employee's condition

merits a leave. Always get a doctor's opinion when dealing with an employee illness or injury. Follow the guidelines for arranging a leave. How an FMLA leave affects the employee's health coverage, and the rights of both employers and employees for returning to work after a leave. ADA: When interviewing potential new employees, don't ask any questions that are likely to reveal information about a disability. This rule prohibits direct questions about a particular disability. If you're not sure whether an employee's situation is covered by the ADA, don't guess. Consult with your human resources department to learn more about ADA and reasonable accommodation. The ADA requires businesses to provide reasonable accommodations. Focus on the accommodation, not the disability. Number 8! (Exempt Employees)

Speaker: "I'm working 12-hour days, not getting any overtime, I can't, I can't live like this."

Bob: Make certain your exempt workers are really exempt. Federal law and the laws of most states base overtime requirements on individual workweeks. So it's quite simple. Non-exempt employees must be paid overtime if they work more than 40 hours in a single week. Period! Many employees are wrongly classified as exempt, and therefore are not paid for their overtime contributions. Be sure your employees are properly classified and adequately compensated. There are four main exempt worker classifications. Supervisory/Managerial Exemption; is your primary duty to manage? Do you customarily and regularly direct the work of at least two employees? Administrative Exemption; is your job directly related to management policies or general business operations? Do you customarily and regularly exercise discretion and independent judgment? Examples include operations director or marketing director. Professional Exemption; does your job require a specialized study or a degree? Does your work require the consistent exercise of discretion and judgment? Outside Salesperson Exemption; primary responsibility of the person is sales of goods or services away from the place of business. Number 7! (Privacy)

Speaker: "I suspected that Morris was using drugs! I had his office searched, his personal belongings. Now I wonder if I did the right thing? Did I?"

Bob: Respect employee privacy. The workplace is not a prison and you're not the warden. There are laws that protect certain aspects of employee privacy. There are many jurisdictions that govern privacy law. Be sure you know and understand the law that applies to you. Consult with your human resources department. One misstep can result in a lawsuit involving emotional distress damages, punitive damage, as well as bad public relations. Follow and communicate your company's policy regarding e-mail, Internet and other employer-provided resources. Focus on the business reasons for any investigation, inquiry or search. Be very careful about searching anything that is not company property, such as purses, briefcases, or even pockets. Don't overreact when becoming aware of inappropriate behavior. Drugs in the workplace, pornography and illegal gambling are serious offenses and you can't ignore them. But the fact that there may be, or is a problem, doesn't mean that the employee's rights may be ignored. Be sure your employees understand your company's employee handbook guidelines and other key documents that clarify expectations of privacy. Number 6! (Training)

Speaker: "If only I had trained my employees about discrimination in the workplace, or hiring practices, then I wouldn't be liable."

Bob: Provide your employees the training they need. The workplace is growing more complex each day. Help your employees remain current and effective, by providing them with ongoing training. Identify the training needs and existing skills and knowledge of your employees, especially on issues such as safety, ergonomics, preventing sexual harassment, discrimination, diversity, etc. Don't offer training only to those employees you like. Be careful not to single out gender, racial or other demographic groups either to receive training or not to receive it. Understand that you can be held liable for negligent supervision if you don't offer employees the training they need to do their job safely. An employee could even file a claim if he or she was injured because a co-worker hadn't been trained to properly use equipment. Document the training that your employees receive and keep completion records of their training in the appropriate personnel files. 5! (Sexual Harassment)

Speaker: "I don't know. I kept putting off a full-scale investigation. I thought these things would just work themselves out."

Bob: Do everything you can to prevent sexual harassment. If you become aware of any harassment an employee is experiencing, take action immediately. Save yourself the pain and protect the dignity of all

your employees by being vigilant against all forms of harassment. Know your company's harassment policy and ensure your employees have a copy of it. Understand the legal aspects of harassment. Sexual harassment can take many forms and can happen at work or off-site, it can involve employees, customers or vendors. Provide your employees training on the prevention of harassment. One of the best ways to prevent harassment is to educate your employees about the specific prohibited behavior and tell them they will be held accountable for that behavior. Be sure promotions and demotion decisions are handled appropriately and consistently, and that no decisions are made outside of the system. If an employee tells you he or she is uncomfortable about a situation, you then have notice of a potential discriminatory environment. Because as a legal matter, what the manager knows, the company knows. Conduct a prompt, confidential and thorough investigation, and be sure to partner with your human resources department. Foster a climate of respect and look for any warning signs that may violate that environment of respect. Number 4! (Discrimination)

Speaker: "They were just jokes, e-mails! I didn't find them too offensive. But now, I don't know."

Bob: Make employee decisions based on work-related factors. Ignore irrelevancies such as age, race and gender. Let's face it. We all have our own biases. But when you let your own personal biases influence your decision-making at work, you are on the road to trouble. Don't make assumptions about people. Be aware of your own biases, prejudices and stereotypes. Don't bring them into the workplace, and make sure that they don't influence your decisions. Don't make any hiring, promotion or work assignment decisions based on age, race, religion, national origin, marital status, citizenship, military status, disability or pregnancy. Don't joke or make any negative comments about people's age, race or religion, or any other protected characteristic. One person's joke, is another person's offense. Better to be safe than sorry. Be consistent in how you treat employees. Treat like cases alike. Consistent documentation proves consistent treatment. Number 3! (Termination Letters)

Speaker: "That was a mess." If only I'd involved someone from HR! If only I had written a more effective termination letter!"

Bob: Write effective termination letters. As that great philosopher, Neil Sedaka, crooned, "Breaking Up Is Hard To Do." And that's why it's so important that you cross all your t's, and dot all your i's in a termination letter. Always have terminations in writing and explain why the employee is being terminated. Include legitimate business reasons and be consistent with prior communications. Don't include any personal reasons in the letter, such as the person is not well-liked. Focus on the unacceptable outcome and the person's behavior and performance. If applicable, make it clear that an employee's employment is "at will," that he or she was given prior discipline, or you had a promise the behavior would not continue. Involve your human resources department or company attorney before terminating any employee. Have either review the termination and your supporting evidence, before you act. Don't talk about the termination with other employees. They don't need to know why someone was let go. Number 2! (Documentation)

Speaker: "I'm looking through Ed's file, but there's so many holes here. I can't remember."

Bob: Carefully document all performance problems. Would we all drive the speed limit if the police didn't give out tickets? Would we all pay our taxes on time and in full, if there were no threat of being caught by the IRS? Maybe, but at work all performance problems need to be documented. And there should be clear consequences for a poor or inappropriate performance. Never put anything in writing you would feel uncomfortable having read to a jury. Be specific and stick to the facts. Draft it, read it and read it again before you give it to the employee. Limit yourself to legitimate business-related issues. Don't say anything that could be construed as discriminatory or reflecting a stereotype. Document the big stuff, such as counseling and other conversations related to performance, performance problems and discipline, such as warnings, suspensions and demotions. Be prompt to document the performance problem, document the employee's performance while it's still clear in your mind. Make sure any disciplinary warning is factual, specific, focuses on job-related behavior, indicates what company rules or policies were violated, and is clear about future expectations. Keep your documentation objective and job related. You might have your boss review it to ensure consistency. Number 1! (Formal Performance Reviews)

Speaker: "It was clear to everyone that Keith was not performing. He was a distraction, prone to violent outbursts. I just didn't think to document it all!"

Bob: And the top way to stay out of jail; conduct formal performance reviews. Without objective, consistent reviews, a lot of your decisions about raises, promotions, and so on, may be arbitrary and unfair. Unrealistic reviews, are unfair to the employee who's robbed of a chance to improve, and unfair to you if you want to take disciplinary action against them somewhere down the road. Make performance reviews a priority and take them seriously. Conduct a formal review with all your employees on an annual or even semi-annual basis. Make sure to follow your company's procedures accordingly. Focus on job performance by being specific and sticking to the facts. Reviews must be fair and objective, so your personal feelings about an employee are irrelevant. Include objective data and don't rely on hearsay or gossip. Formal evaluations should never be a surprise. Reviews should summarize and validate; they should not shock. Continuously evaluate performance against job criteria, and promptly address any serious performance issues. Be honest, consistent and thorough. If the employee is excelling, say so. If there is a problem, be candid. Document the problem and outline the steps you expect the employee to take. Don't write anything that you wouldn't want a jury to see. Ensure the evaluation is monitored for legal compliance. The workplace is full of legal land mines. But if you follow these top ten ways to stay out of jail, you will emerge unscathed. But there will also be an even bigger benefit. You'll increase your chances of having a more productive and satisfied work force.

Host: As you've just seen, knowing the many workplace-related legal land mines can be a challenging and daunting prospect. However, being aware can not only keep you out of jail, but also make you an effective manager.