

When Should Managers Call HR?



By Jonathan A. Segal | July 21, 2020 | SHRM

Employers expect supervisors to resolve some issues on their own and to report other things to human resources—or possibly to in-house counsel—rather than to resolve them independently.

But do you know which is which? For example, you probably know that you should report to HR all complaints of

unlawful discrimination, harassment or retaliation, even if:

- The employee requests that the complaint be kept confidential.
- The employee implores the supervisor not to consult with HR.
- The complaint appears to lack merit.

But in other instances, the line is less clear. For example, if an employee is frequently late, it's your job to resolve the issue by confronting the employee about his lateness and handling it according to established company policies. But what happens if the chronically tardy employee responds by saying that he has been late because of chemotherapy appointments? That's the kind of information you need to report to HR so a determination can be made about whether a work accommodation is appropriate.

Here are some other clarifications of when to report in suspect categories:

WAGE COMPLAINTS

An employee complaint about not being paid as much as he deserves usually is an employee relations issue, not a legal issue. But when an employee complains that the employer has failed to pay him for time worked or has made improper deductions from his pay, savvy supervisors will see legal red flags. For nonexempt employees, improper deductions may include things like not paying for short breaks. For exempt employees, improper deductions may include deductions inconsistent with the salary basis requirement of the overtime regulations of the Fair Labor Standards Act (FLSA), such as not paying an exempt employee for a holiday when the employer is closed.

By immediately reporting a wage complaint to HR, you let the organization determine whether the complaint has merit. If no money is owed or no improper deductions made, HR can correct—or at least try to correct—the employee's misunderstanding. On the other hand, if there was a mistake, HR can correct it before the employee files a complaint with an administrative agency or court. This should go a long way toward minimizing the employer's exposure to liquidated damages for willful

violations of the FLSA, and it also may mitigate an employer's liability under state wage and hour laws, whose requirements and penalties are often more stringent than federal law.

Remember, you must report even minor wage claims. A single employee's small wage loss may signal a systemic problem affecting other employees—in other words, a class action waiting to be born.

ALLEGATIONS OF WRONGDOING BY OTHERS

More and more employees are "blowing the whistle" on alleged wrongs that may not directly affect their terms and conditions of employment—alleged corporate fraud, for example. Managers should report immediately complaints of criminal or fraudulent activity, or violations of statutes such as the Sarbanes-Oxley Act. You also should report alleged violations of core employer policies that may have material legal and business consequences, such as conflict of interest policies, business ethics standards or codes of conduct.

DISCLOSURE OF MEDICAL INFORMATION

Any disclosure of a serious health condition or a physical or mental impairment by a job applicant or employee should be reported to HR—even if the applicant or employee doesn't specifically seek an accommodation. During interviews, you may ask applicants whether they can perform the essential functions of the job for which they have applied—but you may not pursue any medical inquiries before making a conditional offer of employment. Likewise, where a current employee's performance or behavior is below standard, managers need to focus on the deficiencies—and not inquire or speculate as to any suspected medical reason that may underlie them.

But what if an applicant says that he cannot perform a particular function because of clinical depression, or an employee acknowledges her performance deficiencies but says that lethargy resulting from her heart condition has caused them? In these cases, even though there was no direct request, the disclosure puts the employer on notice that the applicant or employee may need an accommodation. Accordingly, the employer—that is, HR and *not* you—may need to begin the interactive process to determine whether a reasonable accommodation is needed.

ACCOMMODATION OR LEAVE REQUESTS

An applicant or employee need not use the legal words "Americans with Disabilities Act (ADA) accommodation" or "Family and Medical Leave Act (FMLA)" to trigger statutory rights. The key is whether a reasonable supervisor would recognize the individual's communication as a request for an accommodation or a leave of absence. With regard to accommodations, for example, you should report requests for help, support, job changes, etc. if the employee—contemporaneously or previously—has disclosed the existence of a serious health condition or impairment.

As for leave, report requests for "time off" for medical or other potential FMLA situations, even if the employee does not utter "FMLA." Even if the employee clearly is not eligible for FMLA leave, you need to report a request for time off because a leave could be a reasonable accommodation under the ADA regardless of FMLA eligibility.

EVIDENCE OF UNION ACTIVITY

If 30 percent of eligible employees in an appropriate bargaining unit sign union authorization cards, the union can petition the National Labor Relations Board for an election. Even if an employer wins the election, the victory can be very costly. The key to avoiding elections is early detection of and rapid response to union activity. But employers often begin their counteroffensive *only after* the union has obtained the 30 percent showing of interest. Sometimes, this is because supervisors fail to report to HR what they may see as "isolated" signs of union support. A bundle of isolated, minor occurrences may amount to evidence of a serious union campaign.

Direct signs of union activity would include an employee handing out a union flier in the parking lot or wearing a pro-union T-shirt. Indirect warning signs would include unusual off-site gatherings of employees—at barbecues, bowling alleys and bars. You also need to be aware of the restrictions on your behavior under the National Labor Relations Act. Supervisors cannot:

- Spy on employees to see who may be engaging in union activity.
- Promise employees benefits for refraining from union activity.
- Interrogate employees as to whether they or others are engaging in union activity.
- Threaten or take adverse action against employees for engaging in union activity.

While you cannot spy, you can report what you see in plain view. And while you cannot interrogate employees about their union sympathies, you can report what is volunteered or what you inadvertently overhear.

GOVERNMENT COMMUNICATIONS

Inform HR immediately if you receive any communication from a government agency, official or entity, including everything ranging from a charge of discrimination filed with the EEOC or other agency to an on-site visit from a U.S. Department of Labor investigator asking to review certain files in connection with alleged overtime pay violations of the FLSA. It's not your duty to decide whether and to what degree to cooperate. Sometimes, government officials ask for more than they are entitled to have. And even where they have a legal right to the requested information, the *manner* in which the employer communicates can determine the legal outcome and damages that may flow from it. If an official contacts you by phone, be polite and say, "Our organization/company will cooperate with your request; however, I do not have the authority to respond. Let me give you the name and telephone number of the HR professional with whom you should speak. I also am going to contact HR right now."

LAWYER COMMUNICATIONS

Report immediately—and don't respond—to any subpoenas or letters from lawyers who do not represent the employer. In case of "friendly calls" from lawyers who are "just curious" about a few things, don't provide any information. There is no duty to cooperate with an attorney on a fishing expedition. Instead, say something like this: "I do not have authority to talk with you. Please give me your name and number and I will forward them to HR."

SIGNS OF WORKPLACE VIOLENCE

Not all workplace violence is preventable. But sometimes there are warning signs that supervisors need to report to HR and/or security immediately, including:

- Discussions of or particular fascination with perpetrators or victims of violence.
- Talk of weapons that seems abnormal in frequency or content.
- Statements about hearing voices or receiving signals.
- Threats of suicide.