

Employment Law – Termination – HR

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Disclosures

- Am an attorney in private practice
- I have the following financial relationships to disclose:
 - Owner of Judith Jurin Semo, PLLC
 - Private law practice
 - Diversified portfolio that includes investment in health care companies (no active role)
 - Will not be discussing off-label uses of drugs/devices

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Objectives

- Identify the regulatory background underlying employment law that makes human resources ("HR") processes so important
- Review risk areas for ASC Medical Directors in addressing employment issues, including termination of personnel
- Identify the HR processes, documents, and policies needed to set expectations and assist a Medical Director to navigate employment and HR issues

** A note: Not legal advice

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Context

- ASC Medical Directors come from different backgrounds
 - Some are part of a private practice anesthesia group
 - Some may work for large national companies
 - Some may be employed by a health system that owns an ASC
 - Others may be part of an academic practice that staffs an ASC
 - Some may be direct employees of the ASC
- ASC Medical Directors also have different responsibilities
- Their interests in the HR topic may differ slightly, as there may be more or fewer repercussions for them as individuals

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Wide Scope of HR Laws



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HR Is Highly Regulated

- Human resources is a highly regulated area
 - Many different federal laws apply
 - Interpretations change
 - Change in administrations (federal level)
 - Court decisions
 - New laws
 - Federal
 - State
- Employees' awareness of their rights

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Wide Scope of “HR” Laws

- Anti-discrimination laws/anti-harassment laws (multiple laws)
- Equal pay for equal work (Equal Pay Act)
- Worker classification
 - Employee/independent contractor
- Workplace safety laws (OSHA-type laws)
- Federal labor relations laws (National Labor Relations Act)
 - Social media policies
 - *Note:* NLRA applies both to unionized & nonunionized settings
- Fair Labor Standards Act (“FLSA”)

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Wide Scope of “HR” Laws

- Federal laws (& many state laws) protect against discrimination in employment on multiple grounds:
 - Race
 - Color
 - Religion
 - National origin
 - Sex
 - Including sexual orientation, gender identity, & pregnancy
 - Older age (starting at 40)
 - Disability
 - Genetic information (including family medical history)

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Scope of Antidiscrimination Protection

Federal law forbids discrimination when it comes to any aspect of employment, including:

- | | |
|---|---|
| • Recruiting | • Layoff |
| • Hiring & firing | • Training |
| • Compensation (pay & retirement plans) | • Fringe benefits |
| • Job assignments | • Disability leave |
| • Promotions | • Any other term or condition of employment |

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Federal Laws Barring Discrimination in Employment

- **Title VII of the Civil Rights Act of 1964** (“Title VII”)
 - Prohibits discrimination in employment based on race, color, religion, sex, or national origin
 - Prohibits employers from treating employees differently, or less favorably, based on those factors
 - Prohibits employment decisions based on stereotypes (unfair or untrue beliefs) about abilities and traits associated with any of the illegal bases for discrimination

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Federal Laws Barring Discrimination in Employment

- **Equal Pay Act of 1963** (“EPA”)
 - Requires employers to give male & female employees equal pay for equal work
 - Employers must pay men & women equally for doing substantially the same work at the same workplace
 - Often difficult: What is equal work?
- **Age Discrimination in Employment Act of 1967** (“ADEA”)
 - Protects workers 40 & older from discrimination because of age

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Federal Laws Barring Discrimination in Employment

- **American with Disabilities Act of 1990** (“ADA”)
 - Illegal to discriminate against a qualified person w/a disability
 - Employers must reasonably accommodate the known physical or mental limitations of an otherwise qualified individual w/a disability who is an applicant or employee
 - Unless doing so would impose an undue hardship on operation of employer’s business
 - Importantly, prohibits discrimination based not only on a current or past disability, but also a perceived impairment

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Other Federal Laws



- **Genetic Information Nondiscrimination Act of 2008** (“GINA”)
 - Prohibits employment discrimination based on genetic info of an applicant, employee, or former employee
- **Civil Rights Act of 1991**
 - Provides monetary damages in cases of intentional employment discrimination

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Workplace Harassment



- Harassment is a form of employment discrimination that violates Title VII, ADEA, & ADA
- Harassment is unwelcome conduct that is based on any of the prohibited grounds for discrimination
 - Race, color, religion, sex, national origin, older age, disability or genetic information
- Harassment becomes unlawful where:
 - Enduring the offensive conduct becomes a condition of continued employment, or
 - The conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive

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Workplace Harassment



- Discriminatory harassment based on multiple grounds can create a hostile work environment
 - Race, age, sex, religion, national origin, disability, genetics
- Retaliation for complaining about discrimination based on protected characteristics also can create a hostile work environment
- If a supervisor's harassment results in a hostile work environment, the employer must prove the following to avoid liability:
 - It reasonably tried to prevent & promptly correct the harassing behavior &
 - The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer

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Harassment/Hostile Work Environment



- Unwelcome conduct can be by supervisors or others
 - Co-workers
 - Customers
 - Contractors
 - Patients
 - Patients' families
 - Anyone w/whom victim interacts on the job
- The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct
- Unlawful harassment may occur without economic injury to the victim, or discharge

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Liability Based on Agreeing to Patient Requests



- Acceding to patient requests can constitute discrimination if the patient's demand is based on a ground on which the employer may not discriminate
- Example: A nurse who was reassigned based on patient's racial preference filed suit for discrimination on the basis of race
 - Court agreed (2019 decision denying motion to dismiss): *Williams v. Beaumont Health System* (ED Mich. 2019)
 - 2010 case: Certified nursing assistant at LTC facility prevailed in a similar case: *Chaney v. Plainfield Healthcare Center* (7th Cir. 2010)

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Sex-Based Discrimination



- Sex discrimination: treating someone unfavorably based on that person's sex – includes:
 - Conduct that is sexual in nature – e.g.,
 - Sexual jokes, photos, touching, or requests for sexual favors
 - Non-sexual conduct that is based on gender – e.g.,
 - Comments that men or women do not belong in certain jobs
 - Comments questioning men's or women's skills or abilities
- Includes discrimination based on:
 - Sexual orientation
 - Gender identity/transgender status
 - Pregnancy
- A harasser can be same sex as harassed employee or a different sex

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Other “HR” Laws



- Leaves of absence
 - Family Medical Leave Act (≥ 50 EEs)
 - Pregnancy Discrimination Act
 - Uniformed Services and Reemployment Rights Act
- Protections for whistleblowers
- Wage and hour laws
 - Laws dictating wages & hours of employees (DOL)
 - Fair Labor Standards Act

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Other “HR” Laws



- Employee benefits laws
 - Employees’ access to benefits
 - Affordable Care Act (healthcare coverage & insurance)
 - COBRA (Consolidated Omnibus Budget Reconciliation Act)
 - Provide eligible employees access to continued health coverage post-termination
 - ERISA (Employee Retirement Income Security Act)
 - Requirements relating to pension plans (if employer offers)
- Workplace safety laws
 - OSHA (Occupational Safety and Health Act): Safe working conditions
 - State worker compensation laws

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Other HR-Related Areas



- Employee rights under the National Labor Relations Act (NLRA)
 - Rights of employees to engage in “concerted activity”
 - Two or more employees may take action for their mutual protection regarding terms & conditions of employment
 - Even if not unionized
 - Examples:
 - Address employer about improving pay
 - Discuss work-related issues – e.g., safety concerns
- Consider NLRA rights in trying to implement social media policies

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Don’t Forget About State HR Laws!



- States actively regulate HR
 - State law often is more expansive than federal law
 - E.g., lower thresholds (numbers of employees) for certain anti-discrimination laws to apply
 - ~13 states/jurisdictions: No employee minimum to file a claim under state law
 - > 20 states: Lower threshold than federal law to file state law discrimination claim
 - E.g., AK (2 employees for state law to apply)

Specific info on employee thresholds at <https://www.workplacefairness.org/minimum>

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State HR Laws Continue to Change

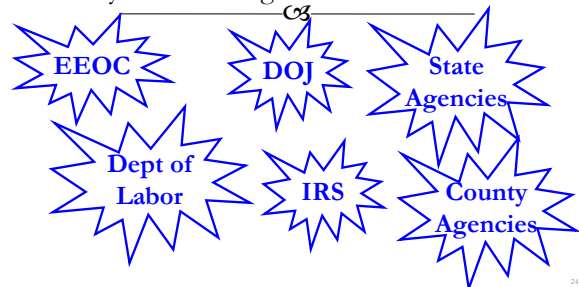


- Recent/new state laws:
 - Mandated sick leave
 - Family leave
 - Anti-discrimination:
 - Natural hairstyles as a protected characteristic
 - Gender identity/expression/sexual identity as a protected class
 - Off-duty conduct (marijuana use) as protected conduct
 - Limiting length/enforceability of noncompetes
 - Nondisparagement agreements & NDAs
 - Mandating religious exemptions to vaccine mandates
 - Creating a wage theft crime (covers independent contractors, as well)
 - Lactation breaks

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Many Different Agencies Enforce HR Laws



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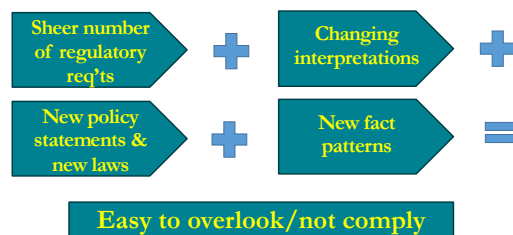
Attorneys' Fees & Fee Shifting

- All federal anti-discrimination, anti-harassment, & anti-retaliation laws provide that the prevailing party may recover reasonable attorneys' fees
 - Plaintiffs also can recover damages – e.g., back pay, lost benefits
- The ability to recover attorneys' fees makes these cases attractive for plaintiffs' counsel

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Why HR Compliance Is So Important



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Why HR Processes are Important

- For both an anesthesia group ("Group") & an ASC, failing to implement/enforce HR policies:
 - Exposes ASC/Group to legal claims, expense
 - Legal fallout (agency enforcement, penalties, lawsuits)
 - Or "bad press" that harms ASC/Group
 - For Group, can result in adverse facility reactions
 - Due to Group's failure to monitor behavior
 - Can result in loss of Group's contract(s)
 - Drains ASC's/Group's attention from more important issues
 - Drain on ASC/Group resources – Investigation costs, legal fees, PR costs

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Steps to Setting HR Policies & Processes

- Critically important to have the resources & processes in place & available before they are needed
 - Set ASC policy
 - Without specific individuals coloring the decision on policy
 - Set ASC expectations
 - Applicable to all ASC personnel
 - NOTE: Must enforce policy consistently
 - Set ASC processes
 - Identify in advance who has what authority
 - Who makes key decisions – hiring, discipline, termination

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Steps to Setting HR Policies & Processes

- When drafting policies, especially on prohibited conduct, important to include
 - Clear expectations
 - Details on consequences for the prohibited conduct
 - Need to consider state law
- After develop policies:
 - Must train ASC personnel on the policies & expectations

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Who in ASC is Responsible for HR?

- For a Medical Director, want clarity on who in the ASC is responsible for HR issues, both day-to-day & when issues arise
 - What responsibility (if any) does the Medical Director have?
 - What does the Medical Director agreement say about HR responsibility?
 - Is role a supporting role, to participate with ASC in its oversight of personnel?
 - Or is the Medical Director directly responsible to hire/fire ASC personnel?

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What ASC Medical Directors Need to Know About Employment Law – Termination – HR



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What is the Role of the ASC Medical Director vis-à-vis Employment Issues?

- What an ASC Medical Director needs to know about employment depends on the ASC Medical Director's role
 - Is the Medical Director responsible just for clinical issues, or for overseeing ASC personnel?
 - Who is responsible for overseeing ASC personnel?
 - Is there different oversight over ASC clinical personnel vs. administrative personnel?
 - Who employs the ASC personnel?
- Difficult to generalize

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What is the Role of the ASC Medical Director vis-à-vis Employment Issues?

- First task: An ASC Medical Director must understand the duties of the position and:
 - Who at the ASC is responsible for addressing personnel issues involving independent Medical Staff members
 - Who at the ASC is responsible for addressing personnel issues involving ASC personnel
 - If the Medical Director is employed by an entity other than the ASC (e.g., a private anesthesia group), the extent of that entity's obligations
 - Who serves as legal counsel for employment issues for the ASC?
 - Who has authority to contact legal counsel on HR issues?

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What is the Role of the ASC Medical Director vis-à-vis Employment Issues?

- Whether a Medical Director needs to know about HR processes/termination/employment laws really depends on the Medical Director's duties
 - Who has responsibility for:
 - Interviewing & hiring ASC personnel?
 - Evaluating ASC personnel on an ongoing basis?
 - Disciplining ASC personnel?
 - Terminating ASC personnel?

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What is the Role of the ASC Medical Director vis-à-vis Employment Issues?

- In general, do not anticipate that an ASC Medical Director will have front-line authority on overseeing ASC employees
 - ASC Administrator, other ASC staff typically have that responsibility
 - Some ASC Medical Director duties may overlap
 - Understand/delineate roles to minimize
 - Confusion over responsibilities
 - Potential liability

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What is the Role of the ASC Medical Director vis-à-vis Employment Issues?

- A Medical Director likely has certain responsibilities relating to oversight of ASC Medical Staff members
 - Is the Medical Director responsible for overseeing all Medical Staff members, including surgeons & proceduralists?
 - Politically a tough position
 - Is the Medical Director responsible only for overseeing/evaluating only anesthesia personnel?
- Key difference in overseeing ASC personnel vs. Medical Staff members
 - Medical Staff members typically are not employees of the ASC
 - (Often are owners)

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What is the Role of the ASC Medical Director vis-à-vis Employment Issues?

- Evaluation and discipline of Medical Staff members, and decisions relating to credentialing, often will not occur in the employment context
 - Employment laws will not apply

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NPDB Considerations

- Discipline & credentialing of Medical Staff members involves possible reporting to the National Practitioner Data Bank ("NPDB")
- A permanent "black mark" on a physician's record



Resources at: <https://www.npdbhrsa.gov/helpCenter/policy.asp>
& <https://www.npdbhrsa.gov/resources/aboutGuidebooks.jsp>

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NPDB Considerations

- Clinical matters may be the subject of peer review
 - Immunity under the Health Care Quality Improvement Act ("HCQIA") for peer review that satisfies the conditions of the statute
 - But: Immunity does not mean that unhappy Medical Staff members will not file suit to challenge decisions & test immunity
- Behavioral/conduct issues do not necessarily undergo peer review
 - No immunity
 - Standard ability to challenge

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Protection for Medical Director Duties vis-à-vis Employment & Other Issues

- The ASC should provide liability protection (insurance, indemnification) for the Medical Director's administrative duties
 - Not necessarily covered by professional liability insurance
- A key risk area: Evaluating ASC personnel
 - Claims by ASC personnel based on negative evaluations by the Med. Dir. likely are not covered under a professional liability policy
- Key risk area #2: Disciplining/Evaluating Medical Staff members
- Pointer: Any commitment by the ASC must survive termination

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Specifics: What HR Documents & Processes?

SAMBA
SOCIETY FOR
ANALYTICAL
MEDICINE
AND
BIOTECHNOLOGY
ASTHESIA

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Setting Expectations

Policies

Handbook

Code of
Conduct

SAMBA
SOCIETY FOR
ANALYTICAL
MEDICINE
AND
BIOTECHNOLOGY
ASTHESIA

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Setting Expectations

- Critically important to set expectations
- Often reflected in a Code of Conduct
 - Integrity in personal & professional conduct
 - Civility
 - Confidentiality
 - Avoid conduct that could cast negative light on ASC
 - Comply with law & ASC policies

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Policies: Consequences for Failure to Comply

- Important to have policies** to deal with ASC personnel & Medical Staff members who fail to follow rules
 - In advance
 - Before problem behavior begins
- Identify who in ASC will act
 - Is that the Medical Director?

** If ASC adopts policies, the ASC must follow them!

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Employee Handbook

- ASC may want to develop (if it has not already) an employee handbook
 - Key policies
 - Operational issues
 - Compliance with state law
- Handbook: Employees are intended audience
- Caution: Changing NLRB decisions/guidance on handbooks & what employer rules are permissible
 - Focus of concern: Impact on NLRA rights

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Operational Policies

- Policies/procedures typically intended
 - To assist in managing operations
 - Provide for consistency in addressing situations
 - May be some overlap with handbook
- Examples of policies:
 - Hiring & termination
 - Who has authority
 - Legal considerations
 - Position descriptions & competencies (beyond clinical)
 - Leave

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Other Policies

- Among other policies the ASC will want to have, which may facilitate the Medical Director's ability to carry out the role
 - Disruptive conduct policy – detail disciplinary steps/consequences
 - Employee scheduling – who makes the schedule, exceptions
 - Goal: Promote fairness
 - Leave/vacation – accrual, restrictions, personal holidays
 - Job-sharing

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Operational Tip

- Make sure the ASC provides training on its policies and on substantive areas – *e.g.*:
 - Harassment/hostile work environment
 - HIPAA & confidentiality
 - Employment discrimination – including concrete examples of behavior that may lead to claims & liability (not obvious actions)
 - Workplace etiquette and the Code of Conduct

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But What Does
All This Mean to
an ASC Medical
Director?

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HR Risk Areas for ASC Medical Directors

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HR Risk Areas

- To highlight risks of noncompliance with HR laws, will review several “Myths” relating to HR/legal compliance
 - Misconceptions about how policies apply to physicians, ASCs, and ASC personnel

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HR Risk Areas

Myth 1:

**THERE IS NO
RISK IF IT'S
NOT IN
WRITING**

- Too often, physicians think that they can avoid legal exposure if communication is oral, not written
- **FACT:** Liability can stem from actions, not just documents

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HR Risk Areas

Myth 2:

**IF I ACT IN GOOD
FAITH, MY CONDUCT
CANNOT BE DEEMED
TO BE HARASSMENT
OR DISCRIMINATORY**

- **FACT:** Perception is more important than intent
- Intent alone does not drive findings of discrimination
- Critical to have training to develop common understandings of conduct and/or statements that can be deemed offensive
- The “but I hug everyone” or “I was just joking” will not preclude liability

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HR Risk Areas

- Liability can stem from an ASC employee's/Group member's actions outside the ASC/Group – *e.g.*,
 - Harassment of ASC personnel
 - Discussion of confidential ASC (or Group) info w/spouses, surgeons, others
 - Posting inappropriate items on social media

Myth 3:

**ASC/GROUP'S HR
& OTHER
POLICIES DO
NOT APPLY TO
ACTIONS
OUTSIDE ASC/
GROUP**

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HR Risk Areas

Myth 4:
THESE POLICIES DO NOT HAVE ANY REAL ABILITY TO PROTECT THE ASC/GROUP

- **FACT:** Policies & training can protect ASC/Group
- Actively taking steps to comply can lead to lower penalties (e.g., HIPAA)
- Effective compliance programs can result in reduced penalties (e.g., False Claims Act)

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HR Risk Areas

- **FACT:** Policies & compliance plans alone do not protect the ASC or Group
- Ongoing training and ongoing implementation are critical

Myth 5:
OUR ASC/GROUP IS PROTECTED BECAUSE WE HAVE POLICIES/ COMPLIANCE PLAN

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Termination & Documentation

- Risks associated with terminating ASC personnel:
 - Claims of wrongful termination
 - Claims of illegal discrimination
- If there are performance issues with an employee:
 - **Document, document, document**
 - Need a record of what has occurred
 - Important to defend claims of illegal discrimination or wrongful termination

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Termination & Documentation

- Documentation important on several levels
- Need to document notice to employee of ASC's concerns
 - Expectation of fairness & due process
 - Even if employment agreement does not mandate
 - Juries will still expect notice & opportunity to cure
- Dispute likely, so must document ASC's view of what occurred
 - Juries expect employers to keep records of employee issues
 - Absence of records leads to conclusion that claimed event is pretextual; will impede ASC's ability to defend

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Discipline & Termination: Get Help Early On



- When a problem arises: Consult experienced counsel (employment law) early on to:
 - Plan strategy
 - Identify options
 - Identify risks
- Best investment: understand land mines ahead

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Conclusion

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Conclusion



- There's a lot to know
- Don't expect to know it all
- Understand the scope of your duties as a Medical Director
- If you have any responsibility for HR matters, identify the ASC staff who will work with you on HR matters
- Document concerns and be fair in implementation of policies
- Get legal help early on