

'L' WORDS FACE INDUSTRY IN THE '90s

No one can escape today's onslaught of legislation and litigation in the green industry. But there are ways to sidestep many of the minefields that could land you in court.

by Will Perry, managing editor



Though George Bush was able to use an "L" word successfully in his bid for the presidency in 1988, two other "L" words could pose real problems for the green industry in the 1990s: litigation and legislation.

Americans are playing a "litigation lottery" today, according to attorney Richard Lehr, who represents the Professional Lawn Care Association of America (PLCAA). The skyrocketing number of cases dragged in to American courts can be traced to four developments, says Lehr.

Here comes the judge

First, the green industry is heavily regulated at the local, state, and federal level, as are most businesses where employees drive company vehicles. But the green industry faces additional challenges because its employees drive vehicles and use pesticides.

Second, more and more Americans

are looking to the courts for vindication. Lehr suggests this may be because there are too many lawyers out there spurring them on. "Our country has many more lawyers than we need," he says. There are more than 40,000 lawyers in Washington D.C., more than 100,000 in California, and more than 35,000 new attorneys churned out of law schools annually. In fact, says Lehr, there is one attorney for every 356 Americans.

Third, consumers and employees are more aware of the statutory and regulatory rights extended to them. "Whether employees know their rights or think they know their rights, they end up in the same place: raising issues before regulatory agencies, government, and the courts," says Lehr.

Lastly, management has a spotty track record of keeping up with current developments and, therefore, often fails to take action to prevent

problems from arising.

Landscape managers need to be aware of the changing work force in the 1990s and the effect these changes will have on their management practices (see related story).

There are steps one can take early in the hiring process to avoid age and sex discrimination cases later on, says Lehr.

Concerning age discrimination, Lehr suggests you ask direct, job-related questions of all applicants. "If you're concerned about an applicant's physical ability to do the job, consider giving them a 'piece-of-the-job' test," he says. Also, don't assume that a decline in performance is the result of age. More than half are medical related, such as drug or alcohol abuse or some other physical impairment.

The first step toward avoiding sex discrimination is to get rid of any stereotypes you may have that men work in the field and that women work in the office. "Using these generalizations will only lead to liability," warns Lehr. Also, simply because men prefer field work is not a permissible reason not to place a woman in the field.

Equal compensation

Employers must base compensation on factors unrelated to gender. "For example, if a woman is hired to work in the field, and she is married, do not pay her less because she is married," says Lehr. "Do not pay her less because you believe that the men working in the field are the primary breadwinners in their families and therefore should earn more money. Any distinctions in pay must be based on factors other than sex, such as quality of work, quantity of work, length of service, or any other non-sex-based factor."

Lehr says managers can reduce the sex discrimination minefield by avoiding generalizations about height, weight and strength during

the hiring process. Apply job-related factors consistently to both men and women.

If women performing the same job as men are earning less in your company, re-evaluate the situation or be prepared to state non-sex-based reasons for the difference. Also, train managers and supervisors to comply with the statutes and regulations forbidding sex discrimination and harassment.

Terminating employees

You can fire an employee whenever you want, unless your reasons for doing so violate federal law, public policy, or an employer-created contract, says Lehr.

Employer-created contracts include verbal representations or written communications to applicants or employees, such as handbooks or benefits packages. "Be sure that the employment application and/or employee handbook contain proper disclaimer language," says Lehr.

Consider requiring employees to sign written contracts, adds Lehr. "Such a contract should include a non-compete, confidentiality clause. Also, if you are in a state whose juries tend to be employee-oriented, such as Michigan, New York or California, consider a mandatory arbitration clause for breach-of-contract disputes," he says.

Customer litigation

Often you can tell when a customer is likely to become a future litigant. They're the ones who make repeated sales calls or complaints and/or fail to pay for services because they say they weren't properly performed.

To deal with problem customers, Lehr suggests you train workers to involve management in dealing with these matters as early as possible. If there is a disagreement regarding whether work was performed properly, consider involving a neutral party to analyze the situation and prepare a report. Inform your attorney and insurance agent of a potential claim, and consider the use of arbitration as a dispute resolution procedure before litigation, says Lehr.

Legal discipline

Discipline is an essential management resource, but discipline poorly administered can lead to litigation. Proper discipline involves five steps:

Step 1. Be sure the employee understands what is expected of them and that they are capable of performing as expected.

Step 2. If the employee does not perform as expected, ask the employee to

Understand tomorrow's workforce

America's workforce changed considerably over the past decade and will continue to do so in the 1990s. Managers in the green industry need to be aware of these changes in order to comprehend the direction and impact of impending legislation.

Perhaps the most significant change in the workforce is the growing number of women participants. More than 60 percent of all U.S. women work, compared to 54.3 percent in 1980 and 47.3 percent in 1975. Women comprise 45 percent of the entire U.S. workforce. Over the next 11 years women, minorities and first-generation immigrants will make up 80 percent of all new employees, according to industry consultant Richard Lehr.

Fewer workers, income

Another significant change is the age of the American worker. Employees are retiring earlier. Jobs paying \$20,000 a year or more have declined while the number of temporary and part-time jobs has increased (60 percent of which paid less than \$7,000 annually in the

1980s). The "baby bust" generation is now entering the workforce, limiting the number of available employees, says Lehr.

These changes will be reflected in the "L" words: litigation and legislation. For example, Lehr expects a rise in the number of cases involving age and sex discrimination, breach of employment contracts and consumer litigation.

Impending legislation

Concerning upcoming legislation, the agenda in 1990 will feature the Americans With Disabilities Act, parental leave legislation, minimum wage legislation, and mandated health insurance legislation.

Lehr suggests the green industry support its associations by making financial commitments for activities intended to influence the regulatory and legislative process. "Making contributions to certain candidates enhances your opportunity to influence the processes," says Lehr.

Also, practice problem prevention in your business and react aggressively to proposed hearings or legislation.

—Will Perry□

explain their actions and determine whether the problem was due to teaching or "won't do" or "can't do" by the employee, says Lehr. Explain what the employee needs to do, be sure they know how to do it, and follow up your actions with a memo to the employee which you review together.

Step 3. If the problem continues, repeat Step 2, emphasizing the importance of performing as expected and the implications for failing to do so.

Step 4. Again repeat Step 2, this time explaining that failure to alter behavior may result in termination.

Step 5. "De-hire," says Lehr. "The employee, through his or her behavior, has said that they do not want to work for your company."

Document your actions

Documentation insures there is no misunderstanding and that you acted fairly. The document should include the date of preparation, a summary of the incident and previous discipline, and action required. A supervisor should sign the document and a copy should be given to the employee. The employee should be offered an opportunity

to respond if they disagree, adds Lehr, but it should be written on a separate document.

During the "de-hiring," make sure you state your case, ask the employee if he believes he has been treated fairly, review the type of reference the company will provide, review confidentiality, and prepare a summary of the meeting immediately after.

Lehr adds that association support, financial commitment for activities intended to influence the legislative or regulatory process, and practicing problem prevention can help minimize the effect of the "L" words on the green industry in the 1990s.

"An aggressive reaction to hearings about proposed legislation or regulations will not hurt you," says Lehr. "A delayed reaction will not help you."

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