

HOT TOPICS IN EMPLOYMENT LAW

- I. TERMINATING AN “AT- WILL” EMPLOYEE
- II. REASONABLE ACCOMMODATIONS UNDER THE AMERICANS WITH DISABILITY ACT
- III. ILLEGAL DRUG USE AND PROTECTION UNDER THE AMERICANS WITH DISABILITY ACT

POZZUOLO RODDEN, P.C.
COUNSELORS AT LAW
2033 WALNUT STREET, PHILADELPHIA, PA 19103
215-977-8200/FAX 215-977-9663
FIRM WEBSITE: www.pozzuolo.com



MARCH 2011 NEWSLETTER

REPORT FROM COUNSEL

AVOIDING COSTLY LITIGATION

I. Terminating An “At-Will” Employee

In Pennsylvania, absent contractual provisions to the contrary, employees are considered “at-will,” which means either party can terminate the employment relationship at any time for any reason

or no reason. The trick is to avoid pitfalls creating situations where the “at will” employment status is relinquished. There are certain statutes and case law that impose various restrictions on an employer’s free reign to terminate an “at-will” employee. Employers can make themselves vulnerable to wrongful termination suits for firing an “at-will” employee for the following reasons:

1. Statutory Restrictions

Both federal and state legislation have limited the “at-will” employment doctrine by placing restrictions on an employer’s ability to terminate an employee under certain circumstances. One of the most well known limitations on an employer’s right to terminate an “at will” employee is Title VII of the Civil Rights Act of 1964, which makes it illegal to discriminate against an employee (or job applicant) in the terms and conditions of employment, including termination of employment, because of the employee’s race, color, religion, sex, national origin and veterans status. Other federal statutes limiting the employer’s ability to terminate an “at will” employee include, but are not limited to, the following: Age Discrimination in Employment Act, Americans with Disabilities Act, and the Family and Medical Leave Act. Additionally, Pennsylvania state statutes, such as the Pennsylvania Human Relations Act, limit an employer’s ability to terminate employees.

2. Implied Contract

An implied contract may be found where an employee shows that his/her employment was intended to last for a definite period of time, to be terminated only for cause or if he/she performed obligations beyond the scope of employment he/she was hired for, known as special consideration. Situations involving special consideration may arise when a person leaves a secure job or relocates for promise of new employment. Additionally, while employee handbooks and probationary periods do not automatically change the “at-will” employment status, it should be clearly expressed to the

employee, in writing and in plain and simple language, that his/her employment is “at-will” to avoid the possibility of creating an implied contract. To avoid misunderstandings, it is imperative that each employee sign an acknowledgement of his/her “at will” employment status, with a copy of this signed acknowledgement made a permanent part of the employee’s personnel file.

3. Public Policy

Public policy exceptions to the “at-will” employment doctrine are very rarely found by Pennsylvania Courts. Recently in Weaver v. Harpster, 601 Pa. 488 (Pa. 2009), the Pennsylvania Supreme Court held “an employer may terminate an at-will employee for any reason unless that reason violates a clear mandate of public policy emanating from either the Pennsylvania Constitution or statutory pronouncements.” This public policy exception is extremely narrow and creates a difficult, but not impossible, burden for the employee to overcome. For instance, Pennsylvania Courts have found wrongful termination of “at will” employee based on a public policy exception when an employee was terminated in retaliation for filing a Worker’s Compensation claim.

II. Reasonable Accommodations Under the Americans With Disability Act

The American with Disabilities Act (“ADA”) prohibits employers from discriminating against qualified individuals with disabilities. Disabilities may be physical or mental impairments that may not be obvious to the employer and require a case by case analysis. The ADA covers employers with 15 or more employees and protects those employees that are qualified for the job but need a “reasonable accommodation” to perform the essential functions of the job. A “reasonable accommodation” is some type of change or modification in the normal work environment that will enable an individual with a disability to enjoy the same benefits of employment as an individual with no disability. An employer is required to make reasonable accommodations for a qualified applicant or employee as

long as providing the accommodation does not cause undue hardship to the employer.

An undue hardship is a reasonable accommodation which is impracticable and will cause significant difficulty or expense to the employer. Undue hardship is a defense available to an employer in a claim under the ADA. The United States Equal Employment Opportunity Commission (“EEOC”) suggest an employer take the following factors into account when determining if a reasonable accommodation will cause an undue hardship: (1) the nature and cost of the accommodation needed; (2) the overall financial resources of the business; (3) the number of employees; (4) the effect on expenses and resources; and (5) the impact of the accommodation on the business. Additionally, if the cost of the accommodation results in undue hardship to the employer, the EEOC instructs employers to determine whether funding is available from alternative sources, such as state rehabilitation agencies. The EEOC has found that an undue hardship cannot be claimed based on fear, prejudice or concern for employee morale but may be claimed if the reasonable accommodation will be “unduly disruptive to other employees’ ability to work.”

If a disabled employee requests his/her employer for an accommodation for a disability, then the employer must promptly respond to the request. If there are various ways to provide reasonable accommodations, then the employer may choose the less expensive or easier option as long as it is effective and is not obligated to provide the exact accommodation that the employee requested. Reasonable accommodations can include a variety of forms, including, but not limited to, the following:

1. Providing Unpaid Leave- An employer may grant an employee unpaid leave. However, an employer does not have to treat an employee requesting a reasonable accommodation different than other employees by providing a greater period of paid leave. Additionally, even if an employee has a

“no-fault” leave policy that requires automatic termination after a certain period of leave, the employer may allow the employee requesting an accommodation an additional leave period on a case by case basis. However, if other accommodations are available (for example a temporary transfer, modified schedule, working from home) or if the leave would cause an undue hardship, the employer is not required to grant additional periods of unpaid leave in excess of its policy.

2. Restructuring Job Responsibilities. An employer may restructure or alter minor job tasks to allow a disabled employee to work. For example, allowing short breaks throughout the day for an insulin-dependent diabetic to check his/her blood sugar, providing a desk chair with additional lumbar support for an employee with a bad back, providing a computer monitor which displays large type font for an employee with a visual impairment, and modifying an employee’s normal working hours to accommodate a disability.

3. Reassigning the Disabled to a Vacant Position. An employer may reassign a disabled employee to another available position assuming the following conditions are met: (1) the employee is qualified for the position; and (2) the position is equal (or as close as possible) in pay and status. However, an employer is not required to “bump” or terminate an otherwise qualified employee or create a new position in order to accommodate a disabled employee.

There are certain requests for a reasonable accommodation that are not required by the ADA such as: eliminating primary job responsibilities, providing prosthetic limbs or other personal use items, or excusing violations of uniformly applied conduct rules (e.g. threats of violence, theft, etc.).

One problem that may arise when providing reasonable accommodations is other employees may question the special treatment of the disabled individual. It is impermissible for an employer to disclose the disability of the employee receiving the reasonable accommodation because of a disability. This violates privacy policies under the ADA which generally prohibits disclosures of

medical information to co-workers and could subject the employer to a lawsuit for this unauthorized medical disclosure. The EEOC instead recommends an employer “point out that many of the workplace issues encountered by employees are personal, and that, in these circumstances, it is the employer’s policy to respect employee privacy.”

III. Illegal Drug Use and Protection Under the Americans with Disabilities Act

The ADA’s definition of “disabled” does not include an employee who is currently engaged in the use of illegal drugs or a job applicant who is not hired if a drug test required of all job applicants shows current illegal drug use. In this regard, it is permissible for an employer to terminate an employee engaging in current illegal drug use and reject a job applicant in the same case. However, if drug tests are required as a condition of an offer of employment, the need to verify the applicant’s drug use must be consistent with business necessity. For example, the employee driving a company vehicle, the school bus driver, the hospital worker dispensing medication etc.

However, former illegal drug user can fall under the protections of the ADA if the employee or job applicant completed drug rehabilitation or is no longer using illegal drugs. Individuals who are addicted, or have a history of addiction, may be regarded as having an impairment and qualify for protection under the ADA. This is because one is “disabled” under the ADA if his/her disability causes a substantial impairment in one or more major life activity. Thus, one area of concern for an employer is whether a policy excluding a former employee for re-hire who was discharged for workplace misconduct may be interpreted as discriminatory towards a past drug user with a history of addiction under the ADA.

For instance, in Raytheon v. Hernandez, 540 U.S. 44 (U.S. 2003), the United States Supreme Court considered whether “the ADA confers preferential rehire rights on disabled employees lawfully

terminated for violating workplace conduct rules.” In Raytheon, a former employee who was terminated for using illegal drugs, completed a rehabilitation program and reapplied for employment and was denied re-hire based on the company’s policy against rehiring employees who had previously been terminated due to workplace misconduct. The former employee argued the policy was discriminatory because he was denied employment based on his history of drug use. Alcoholism and drug addiction both qualify as diseases under the ADA. The company argued that its decision not to re-hire the former employee was based on his misconduct under a company policy forbidding illegal drug use. The Supreme Court found that to determine whether a company policy is discriminatory, a court must consider whether the company had a legitimate and nondiscriminatory reason for denying re-employment and that the denial was not based on the individual’s disability where the company had a strict no re-hire policy for all employees terminated for employee misconduct. In the Raytheon case, the Supreme Court ruled unanimously that an employer is lawfully entitled to refuse to rehire employees previously terminated for violating its work rules, even where the ex-employee later claims the violation was disability- related.

Additionally, the United States Department of Justice examined the ADA in the context of government units hiring police officers and advised the government employers that “policies that screen out applicants because of a history of addiction or treatment for addiction must be carefully scrutinized to ensure that the policies are job-related and consistent with business necessity.” The United States Department of Justice further advised that policies disqualifying job applicants based on felony convictions, which may exclude former addicts with felony convictions, are allowable under the ADA as long as the policy is job-related and consistent with business necessity.

We hope this information is helpful. If you would like more details about these areas or any other aspect of employment law, please do not hesitate to contact us.

UPCOMING SEMINARS

JOSEPH R. POZZUOLO, ESQUIRE AND JEFFREY H. SMITH, ESQUIRE WILL BE PRESENTING: ***“THE NUTS AND BOLTS OF ACQUISITION, EMPLOYMENT AND COMMERCIAL LOAN BUSINESS DOCUMENTS FOR THE SUBURBAN GENERAL PRACTITIONER AND CPA INCLUDING ETHICS”*** A CONTINUING LEGAL EDUCATION/CONTINUING PROFESSIONAL EDUCATION (CLE/CPA) SEMINAR FOR ATTORNEYS AND CERTIFIED PUBLIC ACCOUNTANTS ON FRIDAY, MAY 6, 2011 AT NEUMANN UNIVERSITY.

JUDITH P. RODDEN, ESQUIRE AND LESLEY M. IBANEZ, ESQUIRE WILL BE PRESENTING: ***“EMPLOYMENT LAW IN THE NEW TECHNOLOGICAL AGE”*** A CONTINUING LEGAL EDUCATION/CONTINUING PROFESSIONAL EDUCATION (CLE/CPA) SEMINAR FOR ATTORNEYS AND CERTIFIED PUBLIC ACCOUNTANTS ON FRIDAY, MAY 20, 2011 AT NEUMANN UNIVERSITY.

JOSEPH R. POZZUOLO, ESQUIRE AND JEFFREY S. POZZUOLO, ESQUIRE WILL BE PRESENTING: ***“THE CLOSELY HELD BUSINESS BOOTCAMP FOR THE GENERAL PRACTITIONER AND CPA INCLUDING ETHICS”*** A CONTINUING LEGAL EDUCATION/CONTINUING PROFESSIONAL EDUCATION (CLE/CPA) SEMINAR FOR ATTORNEYS AND CERTIFIED PUBLIC ACCOUNTANTS ON FRIDAY, JUNE 3, 2011 AT NEUMANN UNIVERSITY.

Publications

All of the following professional publications and past newsletters written by attorneys of this office are available by clicking here: <http://pozzuolo.com/PubsArticles.shtml>

Corporate/Tax

Design Buy-Sell Agreements For Maximum Utility

Deferred Compensation Rewards And Retains Key Employees

How To Use Non-Qualified Deferred Compensation Arrangements As A Business, Retirement And Tax Planning Tool

Protecting A Client's Business From Unfair Competition Using Restrictive Covenants

Money Purchase Pension Plan Falls Out Of Favor

Why An Employment Contract Is Mandatory

What Type of Qualified Corporate Retirement Plan Best Serves Your Business, Tax And Retirement Needs

Structuring Loans From Qualified Plans - How To Handle The Strict Tax Rules

How An S Corporation Avoids The Double Taxation Incurred When Excessive Compensation Is Treated As A Dividend

Bankruptcy - How To Prevent It And How To Cope With It Should It Happen To Your Business

How To Look, Act And Sound Like A Professional Corporation

How Mortgage Lenders Should Draft Broker Agreements To Avoid RESPA Violations

How to Structure a Suitable Buy-Sell Agreement

Estate Planning

The Limited Liability Company -A Sophisticated Tool For Estate Planning

Diversify Strategies For An Effective Estate Plan

Use Wills To Maximize Family Protection And Minimize Tax

Six Proven Estate Planning Techniques

Divorce Raises The Need For Performing An Estate Planning Review

Divorce and Estate Planning

Remarriage Situations Can Raise Special Estate Planning Considerations

College Funding Tool Offers Estate Planning Advantage

Drafting The Durable Power Of Attorney For Wealth Protection Purposes

Why Living Wills Advance Directives Are An Essential Part Of Estate Planning

Special Needs Trust - An Estate Planning Tool For The Disabled

Adapt Estate Planning Strategies to Fit the Needs of Same-Sex Couples

Estate Planning For Pet Owners- (A pre-publication draft can be obtained by emailing to: joe@pozzuolo.com.)

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects. It is to provide insight into legal developments and issues. You should always consult with legal counsel before taking any action on matters covered in our updates.

This newsletter is courtesy of Pozzuolo Rodden, P.C.

To subscribe, unsubscribe, or for any questions, please contact us at INFO@POZZUOLO.COM.