

MARCH 2019 NEWSLETTER

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HOW TO TERMINATE AN EMPLOYEE AND MINIMIZE LITIGATION

FIRM ANNOUNCEMENTS

A. UPCOMING SEMINAR

Joseph R. Pozzuolo, Esquire will be presenting a seminar to the graduating medical professionals at the Sidney Kimmel Thomas Jefferson University Medical School on Monday, April 11, 2019 at noon titled “Practical and Legal consideration of Planning Your Professional Future”.

B. AWARDS

Pozzuolo Rodden, P.C. is pleased to announce that Joseph R. Pozzuolo was awarded The America’s Most Honored Professional 2018-Top 1% by the American Registry. The American Registry was selected to be the official and authorized recognition partner for some of America’s most trusted professional organizations at identifying business excellence. These organizations rigorously gather up peer review ratings, client reviews, industry analysis to ultimately uncover the best of the best professionals in the business. For 2018 the American Registry proudly announced that Joseph R. Pozzuolo is one of America’s Most Honored.

C. BLOGS

1. The following are a few of the business, tax, employment, estate planning and business litigation

blogs posted on our main website www.pozzuolo.com during the past month:

- a. Power Of Attorney Not Surcharged Where Documents Permitted Authority To Make Gifts;
- b. Appellate Court Invalidates Non-Hire Provision Between Trucking Companies; and,
- c. Judge Rules Company May Be Sued Over Harassment By Non-Employee.

Please visit our website www.pozzuolo.com for more information on these and other relevant business, tax, estates, business litigation and employment topics.

2. The following are a few of the family law blogs posted on our family law website www.pozzuolofamilylaw.com during the past month:

- a. Gag Order Issued In Child Custody Case;
- b. Although Child Relocation Is In Minor Child's Best Interest, It Is Not Necessary To Move Immediately; and,
- c. Support And Alimony Contempt Actions.

Please visit our website www.pozzuolofamilylaw.com for more information on these and other relevant family law topics.

HOW TO TERMINATE AN EMPLOYEE AND MINIMIZE LITIGATION

Employee Termination/Litigation

The termination of an employee may not only be tough on the individual, but can have serious consequences for the employer when an employee files a wrongful termination suit. The repercussions of a wrongful termination may include a required forced rehiring, back pay, and even punitive damages. The first step for an employer to avoid the cost and expense of a wrongful termination suit is to have an understanding of a lawful versus a wrongful termination and to focus on prevention rather than containment of a problem after it exists. Thus, it is necessary to clearly define the employment relationship from the beginning by having clearly written employment policies that are consistently applied. Examples of such policies include a two-way communication on an employee's performance, documentation of all communications and write-ups, and allowing the employee to leave with dignity.

Bases for Wrongful Termination Suits

In Pennsylvania and New Jersey, employees are "at-will" employees by default. Generally, an at-will employee may be terminated at any time for any reason as long it does not violate a well-defined public policy. There are five major public policy limitations on terminating an employee. This means that you cannot terminate an employee for: 1) refusing

to commit an illegal or wrongful act; 2) performing a public obligation (i.e. jury duty/military service); 3) exercising a legal right or privilege (i.e. filing a workers' compensation or Title VII claim); 4) reporting to a public authority the criminal activity of the employer; or, 5) any reason in contravention to federal or state anti-discrimination statutes. If an employer willfully or recklessly violates any one of these public policies, it is possible that liability in the form of compensatory and/or punitive damages may follow. However, in many instances even when an employer terminates an employee for a lawful reason, the employee may, wrongfully, assert that the reason was a pretext for discrimination or another type of unlawful discharge.

An exception to "at-will" employment is an employee hired "for-cause" or "for term." These type of employees have a right to continue working unless there is a reasonable business purpose for terminating the employee or the agreed upon employment term has run. These types of employment relationships are usually created through a written contract or union agreement which requires "cause" for termination or the expiration of a minimum employment period. However, an employee may have an implied relationship, without a written contract or agreement, if the employer makes representations that implicitly state a term of employment or a for-cause relationship in supplemental material or company policies.

Many times, terminations against public policy and implied for-cause and/or for term employment result in unforeseen wrongful termination suits. These types of wrongful termination disputes can potentially be avoided by following some of the practices outlined below.

Prevention Steps from Hiring

It is important to take steps to minimize wrongful termination suits by having strong policies and procedures in place, beginning from the hiring stage. The first step is to have materials, notice forms, written employment policies and/or an employee handbook that clearly define the employment relationship. Many employees mistakenly believe they cannot be fired at any time for any legal reason and may resent a sudden and surprising termination. The purpose of these materials is to clearly define that an employee is an "at-will" employee and what that means in practice. Existing handbooks and materials should be reviewed and amended in places that may imply more than an "at-will" relationship or leave any doubt that the employment is at-will. As an example, where the handbook lists specific reasons for termination, it should include a catch all clause for any and all other "at-will" reasons. This gives the employees notice at time of hiring, as well as the courts in any potential litigation, a clear and unequivocal message that there is and was no implied "for cause" relationship.

Second, the employer can lessen its risks of an unfavorable high award, employee litigation by requiring its employees to sign an employment arbitration agreement. This means that if the employee has a complaint it will not be heard as a full blown case before a court or jury but will be heard by an arbitrator who is generally a retired judge or attorney. Arbitration proceedings generally move more quickly, are cheaper, are more informal, the awards for employees are less in that a jury will not get the opportunity to feel sorry for a

defenseless, unprotected, unemployed employee, employers win more often in arbitration than in litigation and the proceeding provides greater confidentiality for the employer to avoid any unnecessary and unjustified harmful publicity.

Third, all written employment policies should clearly spell out the employer's policies and procedures that are applied consistently to all employees. These written policies and procedures should also include procedures for performance reviews, disciplinary warnings, write ups, and any disciplinary actions etc. The written material should also set forth the company's anti-discrimination and anti-sexual harassment policies to deter employees from creating a racially charged or sexually intimidating atmosphere, thereby lowering the risk of a public policy based wrongful termination action.

The fourth step is to have two way communications with the employee about the employee's performance and deficiencies. Let the employee know, in writing, where the employee needs to improve, especially if there are performance or disciplinary issues. This puts the employee on notice of any deficiencies and allows the employee to find ways to correct his or her mistakes and faults. More importantly, this shows a defined pattern of behavior and/or deficiencies by the employee and the remedial measures taken by the employer to more definitively prove a reasonable business purpose for the termination of the employee in the event that an employee files a wrongful termination action.

Fifth, the employer should take steps to record performance communications and specific events during the employee's employment. The employee should review and sign warnings and write ups and any corrective action plans to document the employee's deficiencies and the acknowledgment of the employee. These records will show a reasonable business purpose for the termination of an employee by showing a pattern of events and behavior that would reasonably lead to a termination. This may also prevent a terminated employee from even initiating a wrongful termination action if a potential attorney for the employee sees a well-documented history of write ups and grievances against the terminated employee.

Lastly, minutes should be taken when an employer's management or board discusses massive layoffs. For example, if the company closes a predominantly minority division, minutes help prove a business reason not motivated by race, sex, or other unlawful reasons. These precautions are necessary to create a written record to protect and defend the employer if litigation ensues.

Precautions Just Before Termination:

When an employer decides to terminate an employee, the employer should evaluate its risks for being perceived as violating public policy or expressed/explicit/implied employment terms, and take steps to allow the employee to leave with dignity.

At the time when an employer decides to terminate an employee, the employer should first determine whether the employee has a contract individually or through a union, or whether he is an "at-will" employee. If a contract exists, the terms should be reviewed and it

should be evaluated whether there exists a valid business reason for the employee's dismissal within the terms of the employment agreement/contract. If no contract exists and the employee is at-will, the employer should examine whether the employee falls within a protected class under both the federal and state anti-discrimination statutes or is protected through any other public policies noted above. Title VII protects against discrimination on race, color, religion, sex, and national origin. Further, the federal system protects for age, disability, and veteran status through the ADEA, ADA, and VEVRAA and allows for a leave to help family members or for pregnancy. Pennsylvania adds protection for ancestry, the use of guide or support animals, or support animal trainers in addition to the federal statutory protection. New Jersey further adds protection for discrimination based on marital status, sexual orientation, genetic information, gender identity or expression, armed forces services, and genetic testing. New Jersey also requires proper notice for mass terminations. Thus, it is mandatory to determine whether the termination could be seen as violating any of these federal or state laws. If so, extra documentation may be necessary to negate a discriminatory motive.

Second, it is important to allow the employee to leave with dignity, if possible. There is nothing worse than a spiteful employee who just lost his livelihood and demands revenge. The process of ongoing, documented communication should take out the element of surprise. Further, an employee should neither be fired nor embarrassed in front of coworkers nor should an employer verbally chide or attack the employee. Let the employee know calmly, in private, that they are being terminated. Avoid blurting out about their incompetence or lack of work ethic. If reasonable, allow for a severance or continued salary payments for a finite period of time and tie these payments to a written general liability release. This should hopefully reduce resentment and potentially make the employee more reluctant to bring a claim against the employer. Further, avoid a constructive discharge, namely forcing the employee out by creating a hostile work environment for the employee so that the employee resigns. It is better to outright explicitly terminate the employee rather than let it fester into a deeply antagonistic environment.

Third, an employer can also give the employee the option to resign. This helps alleviate tensions as it allows the employee to believe it was his or her own choice to leave, often reducing resentment. It can also help the employee to obtain a new job because he or she can say that he or she resigned rather than was terminated. If the employee gets a new job, then damages will be mitigated and a law suit may not be worth pursuing. Also, more importantly, if the employee resigns, it was his or her decision and not a termination. The employee ended the relationship.

Before terminating an employee, the main goal is to assess any possible legal issue that may arise and reduce the employee's resentment. If the employee knew the terms of employment through a handbook and there was an open dialogue, the termination will not be much of a surprise and hopefully proceed smoothly. Do not create and manufacture resentment. Last, if there is the possibility of wrongful termination charges, it may be best to have an attorney examine specific legal precedent to determine the employer's liability exposure and the proper course of action to minimize damages.

If a Law Suit is Eminent

If a suit is commenced and there is proper documentation as outline above, the complaint may be dismissed on the pleadings at the administrative level before the discovery or trial stage of a court proceeding. However, if it proceeds beyond the pleading stage, it may be best to consider a settlement if the evidence is unable to prove a lawful termination for documented reasons. A suit could bring unnecessary and needless publicity to the employer's business that could harm the continuation of business. Further, if the trial is a jury trial, the jury could identify with the poor, helpless worker that lost his or her job rather than side with the employer, leading to a potentially high award for the employee. Last, even if the claim is small, it may not be worth the expense to litigate to a jury decision. However, if the employer settles too easily, employees will bring frivolous claims knowing the employer will settle. A settlement will allow the employer to continue what it does best: business. It avoids being bogged down by side litigation as a distraction. Further, it will avoid a potentially devastating wrongful termination award. It is best to speak with your attorney to evaluate any claims as they arise.

Conclusion

Avoiding wrongful termination and discrimination suits requires more thought than just merely a quick decision at the time of termination. It requires a process of ensuring the employees know the terms of employment, receive constant feedback on their performance, and a written record system to provide evidence that justifies the termination. Upon termination, it is important that the employee is given dignity and that the employer does not hinder the employee from finding the next job. If the employee feels that he or she was treated fairly, only the more scrupulous will file a claim; if they do, the employer has to have a clear, written record that gives justification to the termination.

If you have any questions or inquiries concerning your business and this subject matter, please do not hesitate to contact us to speak with one of our experienced attorneys.

PUBLICATIONS

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

Corporate/Tax Articles

- Bankruptcy - How To Prevent It And How To Cope With It Should It Happen To Your Business
- Deferred Compensation Rewards And Retains Key Employees
- Design Buy-Sell Agreements For Maximum Utility
- How An S Corporation Avoids The Double Taxation Incurred When Excessive Compensation Is Treated As A Dividend
- How Mortgage Lenders Should Draft Broker Agreements To Avoid RESPA Violations

- How To Look, Act And Sound Like A Professional Corporation
- How to Structure a Suitable Buy-Sell Agreement
- How To Use Non-Qualified Deferred Compensation Arrangements As A Business, Retirement And Tax Planning Tool
- Money Purchase Pension Plan Falls Out Of Favor
- Protecting A Client's Business From Unfair Competition Using Restrictive Covenants
- Structuring Loans From Qualified Plans - How To Handle The Strict Tax Rules
- What Type of Qualified Corporate Retirement Plan Best Serves Your Business, Tax And Retirement Needs
- Why An Employment Contract Is Mandatory

Estate Planning Articles

- Adapt Estate Planning Strategies to Fit the Needs of Same-Sex Couples
- College Funding Tool Offers Estate Planning Advantage
- Diversify Strategies For An Effective Estate Plan
- Divorce and Estate Planning
- Divorce Raises The Need For Performing An Estate Planning Review
- Drafting The Durable Power Of Attorney For Wealth Protection Purposes
- Estate Planning For Pet Owners
- Remarriage Situations Can Raise Special Estate Planning Considerations
- Six Proven Estate Planning Techniques
- Special Needs Trust - An Estate Planning Tool For The Disabled
- The Limited Liability Company -A Sophisticated Tool For Estate Planning
- Using Trusts To Maximize Family Protection And Minimize Estate Tax
- Why Living Wills- Advance Directives Are An Essential Part Of Estate Planning

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.

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