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HOT TOPICS IN EMPLOYMENT LAW

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. <u>Providing Unpaid Leave</u>

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. <u>Restructuring Job Responsibilities</u>

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. <u>Reassigning the Disabled to a Vacant Position</u>

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.

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.
