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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 allowing the employee to leave with dignity. This newsletter will discuss steps that will minimize the risk of wrongful termination suits.

Basis 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. The five major public policy limitations are terminating 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 claims); 4) reporting to public authority criminal activity of the employer; or 5) a reason in contravention to federal or state anti-discrimination statutes.

If an employer willfully or recklessly violates any one of these public policies, then liability in the form of compensatory and punitive damages may follow. However, many times, even when an employer terminates an employee for a lawful reason, the employee may assert that the reason was a pretext for a true discriminatory or unlawful discharge. Also, an employee hired "for-cause" or "for term" has a right to continue working unless there is a reasonable business purpose for terminating him or the employment term has run. These relationships are usually created through a written contract or union agreement that requires cause for termination or a minimum employment period. However, an employee may have an implied relationship if the employer makes manifestations that implicitly state a term or for-cause relationship in supplemental material or company policies. Many times, implied for-cause employment and terminations against public policy result in unforeseen wrongful termination suits. These types of wrongful termination disputes can be avoided.

Prevention Steps from Hiring:

It is important to take steps to minimize wrongful termination suits 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 believe they cannot be fired at any time for any 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. Existing handbooks and materials should be reviewed and amended in places that may imply more than an "at-will" relationship. One example is if the handbook lists specific reasons for termination, it should include a catch all clause for all other "at-will" reasons. This gives the employees notice at time of hiring and the courts in litigation a clear message that there is and was no implied "for cause" relationship.

Second, written employment policies should clearly spell out policies and procedures to be applied consistently to all employees in similar situations and should include performance reviews, disciplinary warnings, etc. This material can also set forth company anti-discrimination and anti-sexual harassment policies to deter employees from creating a racially charged or sexually intimidating atmosphere to avoid a public policy based wrongful termination.

The third step is to have a two way communication with the employee about the employee's performance and deficiencies. Let the employee know in writing where he needs to improve. This puts the employee on notice and allows the employee to find ways to correct his mistakes and faults. The employee may leave himself out of guilt if he fails to improve and it may also relieve steam to avoid an angry employee that is more likely to bring a suit. More importantly, this shows a defined pattern of behavior and remedial measures to more easily prove a reason able business purpose for termination to prevail in a wrongful termination suit.

Fourth, the employer should take steps to record performance communications and specific events. The employee should review and sign warnings and necessary corrective action plans to document the employee's deficiencies and acknowledgment. This facilitates demonstrating a reasonable business purpose for a termination by showing a pattern of events and behavior leading to the termination. This may also stave off the initial suit if counsel for the employee sees a well-documented history of faults and grievances against the 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 take away the sting of surprise to the employee and create a paper trail to defend the employer if litigation ensues.

Precautions Just Before Termination:

When an employer has decided 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.

When terminating an employee, the employer should first classify 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 dismissal within the terms of the employment agreement. If no contract exists, 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 other public policies. 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 misperceived 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 communication should take out the surprise, and an employee should neither be fired nor embarrassed in front of coworkers nor should an employer directly verbally chide and 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 until the end of the month, and tie these payments to a written general liability release. This hopefully will reduce resentment and possibly the employee will be more reluctant to bring a claim. Further, avoid a constructive discharge. It is better to terminate the employee rather than let it fester into a deeply antagonistic relationship.

Third, give the employee the option to resign. This helps as it allows the employee to believe it was his own choice to leave which may reduce resentment. It also will help the employee to obtain a new job as he can say he resigned rather than was terminated. If the employee gets a new job, then damages will be mitigated and the suit may not be worth pursuing. Also, more importantly, if the employee resigns, it was his 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 Suit is Eminent:

If a suit is commenced and there is proper documentation, 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 publicity to the business similar to the Texaco racism incident in 1994 that could harm the continuation of business. Further, if the trial is a jury trial, the jury could identify with the poor, helpless worker rather than side for the employer leading to potentially high award. 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.

Conclusion:

Avoiding wrongful discrimination suits requires more thought than just merely a quick decision before termination. It requires a process of ensuring the employees know the terms of employment, receive constant feedback on their performance, and a record system to provide evidence to justify the termination.

Last, 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 was treated fairly, only the more scrupulous will file a claim; if they do, the employer has to have a clear record to justify the termination.

If anyone has any questions or inquiries concerning this subject matter, do not hesitate to contact us. Feel free to email us your questions or comments concerning this newsletter.

ANNOUNCEMENT

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