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THE FINE ART OF FIRING

Shouting “You’re fired!” and sticking a finger in the face of your soon-to-be former employee is no way to conduct business. No business should ever imitate the style of a tight fisted, tantrum throwing tycoon who won’t even buy a decent toupee. Employment termination practices are getting harsher and employee lawsuits are showing no signs of retreat. This article discusses some of the finer points on how to terminate an employee, lessen the chance of litigation and promote a positive work environment.

When in doubt call your lawyer

Like the Geico® insurance commercial says: a 15 minute phone call could save you lots of money. It is amazing how quickly a lawyer can sort through the issues and documents when a potentially litigious employee needs to be terminated. Do not hesitate to contact your lawyer if you have any doubts as to the strengths or weaknesses of your position.

Check the Personnel File

Every personnel file should reflect some amount of due process before termination. This simply means notice and an opportunity to be heard prior to taking action against the employee. The personnel file should show that the employee was put on notice of poor or unacceptable performance. One way to establish due process is through progressive discipline.

Use Progressive Discipline

The traditional progressive discipline process is: (1) verbal warning; (2) written warning; (3) suspension or demotion; and finally, (4) termination. Every employee, and for that matter every juror, expects some measure of due process before termination. Documenting your steps through progressive discipline demonstrates due process. Keep in mind that progressive discipline is not needed for every situation. For example, threats of harm to other employees or company property or theft of company property warrant immediate termination. Whatever steps you take should be documented and include an additional warning stating: “If such conduct continues, you may be subject to further discipline, including immediate termination”.

Conduct “Short and Sweet” Exit Interviews

Employers should have two members of management present at all times during an exit interview. The termination should be conveyed in a brief, but friendly, manner. Employers should generalize the reasons for termination, for example: “[Name], unfortunately we have decided to let you go.” or “For various reasons your performance is not meeting our expectations.” If an employee asks for specific reasons for termination, the employer should either suggest that it would not be productive to get into specifics, or alternatively, qualify the reasons or deficiencies as not being all inclusive. Employers should never go through performance evaluations or the personnel file during an exit interview. The individual conducting the exit interview should not say anything to the employee that would even suggest the decision to terminate was influenced by race, sex, age, disability, or any other protected status. Finally, the interviewer must be careful not to sugar-coat comments to the employee or compliment the employee on past performance. A general doctrine in employment law practice is that “No good deed goes unpunished.”

Prepare a Resignation and Release for the Employee

In certain situations an employee may want to resign rather than be terminated. If this is the case, consult with your lawyer to prepare a resignation and a release of any claims arising out of the employment relationship. Caution needs to be taken in preparing these releases because many state and federal employment laws have time constraints allowing for the employee’s review and revocation of the release. Additionally, the practice of requiring a release or offering resignation in exchange may create a policy that your company could be bound by in future instances.

Consider Offering a Neutral Reference in Writing

Some employees may want more than just an opportunity to resign. In these cases, consider offering the departing employee a neutral reference in writing. Having a letter in hand from their past employer which simply states: “[Employee Name] worked for [Company Name] from [date] to [date].” may be sufficient consideration to get a release of claims. A neutral letter of reference can give the employee peace of mind knowing they can offer their prospective employer confirmation of past employment rather than being exposed to a potentially negative reference from their former employer.

Consider Agreeing Not to Contest Unemployment Compensation

In situations where you need to ratchet up the consideration in exchange for a release of claims, agreeing not to contest unemployment compensation can be an effective bargaining chip. Unemployment compensation is not guaranteed in every case. However, there can be more certainty to receiving benefits through agreement. Avoiding a dispute over unemployment compensation may give the departing employee enough incentive to sign the release of claims and forgo a trip to their lawyer’s office.

Consider Offering a Modest Cash Payment

Offering a departing employee one week of salary or wages (less withholdings) for every 1 or 2 years of service may seem overly generous in light of the employee’s unsatisfactory performance leading up to termination. However, if the employee refused any of the above

offers in exchange for a release of claims, then this may be a former employee with an axe to grind. If you suspect the employee is litigious, carefully weigh the costs and benefits of securing your own peace of mind without appearing to be an employer that is a soft touch or has deep pockets. Sometimes intangible lost opportunity costs associated with responding to a former employee's unemployment, civil rights or other similar claims, even if frivolous, warrant careful consideration of a modest, rationally based cash payment.

Confidentiality clauses in the release of claims are a must. Likewise, confidentiality should be the cornerstone of any negotiations and discussions related to termination. Quiet resolution goes a long way toward curbing grapevine gossip and promoting a more peaceful and productive employment atmosphere. Other "must haves" in a release of claims include, without limitation: the employee's waiver of re-employment; certain age discrimination provisions; and, the release of all agents, employees and affiliated entities of the former employer.

Using progressive discipline as described above will reduce the potential for litigation or an adverse outcome in the event of litigation. Negotiating a release of claims in exchange for non-monetary consideration, such as the opportunity to resign or a neutral reference in writing, costs you as an employer little more than paper and preparation time. Handled quickly and quietly, a termination does not need be the anxiety ridden event that most employers fear.

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