

Legal Update

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EMPLOYMENT TERMINATION: TRICKIER THAN YOU MIGHT THINK

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INTRODUCTION

In most states, employees are “employees at-will” and can be discharged at any time with or without cause or notice. While this may sound simple, today it isn’t. The employment at-will doctrine has been substantially eroded in recent years by federal and state statutes and court decisions. Even when an employer is justified in terminating an employee’s employment, challenges to the termination often occur. Before terminating an employee’s employment - whether for disciplinary reasons, due to poor performance, or in connection with a downsizing - employers should make sure not only that the termination does not violate applicable law, but also that the discharged employee cannot successfully claim that it does. Employers would be especially wise to document their decisions.

Following are checklists of the kinds of questions employers should consider before discharging employees to avoid litigation or, if litigation ensues, improve their chances of prevailing. While the questions are not exhaustive, they can provide a useful framework for employers. Of course, it is always advisable to consult with legal counsel before terminating an employee’s employment.

DISCUSSION

A. CONTRACTUAL ISSUES

If the answer to any of the questions below is “yes,” then think twice before proceeding with a termination:

1. Does the employee have a contract limiting the circumstances under which his or her employment can be terminated?
2. Is there an applicable contract requiring “good cause” before an employee can be discharged?
3. Is there an applicable employee handbook that provides that employees will be discharged only if certain procedures or progressive discipline steps are followed or which provides that employees will be discharged only for cause?
4. Were oral promises or assurances concerning job security made to the employee at or after the time he or she was hired? For example, was the employee told, “As long as you do good work, you’ll have a job here”?
5. Is the employee employed in a state where there is an “implied covenant of good faith and fair dealing” in the employment context?

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B. DISCRIMINATION ISSUES

Might any of the following criteria have played any role in the decision to discharge the employee?
If so, then reconsider the decision:

1. Race
2. Color
3. National Origin
4. Birthplace
5. Ancestry
6. Original name
7. English proficiency (unless job-related)
8. Religion (including religious affiliation or holidays observed, or a request for religious accommodation)
9. Age (especially 40 or older)
10. Sex / Gender
11. Physical or mental disabilities of the employee (whether real or regarded as disabled), or because of the employee's family, business, social, or other relationship or association with an individual with a disability
12. Pregnancy / childbirth / whether the employee has children
13. Employee has taken or sought an FMLA leave or state law leave equivalent
14. Employee has taken nursing breaks at work or has been denied a request to take nursing breaks
15. Employee has been the victim of domestic violence, dating violence, sexual assault, stalking, or the like
16. Marital status
17. Sexual orientation
18. Veteran's status / Type of military discharge
19. Union affiliation, union activity, or other "protected concerted activity" (*i.e.*, activities in concert with other employees directed to wages, benefits, and other terms and conditions of employment)
20. Record of arrests (whether or not an arrest resulted in a criminal charge or conviction)
21. Economic status (*e.g.*, earnings being subject to garnishment for indebtedness; credit rating; child support payments; bankruptcy history; whether employee owes a debt)
22. Education level (unless job-related)
23. Lawful use of products off-the-job (*e.g.*, smoking off the job)
24. Refusal to take a polygraph test

Even if none of the above-referenced factors has been taken into account, will there be an "adverse impact" on a group of protected employees? For example, if you are thinking about laying off several

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employees, might women, employees over 40, or Latinos be disproportionately affected as compared to men, employees under 40, or Caucasians?

C. RETALIATORY DISCHARGE/PUBLIC POLICY

Might the decision to discharge the employee have been made to retaliate against the employee because the employee exercised a legal right? If so, be very cautious before proceeding with the discharge. For example, has the employee recently:

1. Complained about safety conditions or other work conditions (such as pay, benefits, or breaks)?
2. Reported unsafe conditions to an administrative agency?
3. Complained about sexual or other unlawful harassment?
4. Filed a workers' compensation claim?
5. Filed a discrimination claim, a claim for overtime pay under federal or state law, a claim for wages, commissions or other compensation, an unfair labor practice charge, or other charge or complaint against the employer?
6. Accepted jury duty?
7. Been required by subpoena to testify in a criminal proceeding?
8. Refused to testify on behalf of the employer or otherwise participate in a discrimination case?
9. Refused to commit an illegal or unethical act, such as engaging in price fixing?
10. Left work to vote at a special or general election?
11. "Blown the whistle" on the employer for violation of the law?

D. ERISA RIGHTS

Is the employee being discharged because he or she is about to become eligible for pension or other benefits for some reason other than completion of a probationary employment period or because he or she has given information or testified in any inquiry or proceeding relating to the Employee Retirement Income Security Act (ERISA)? If so, think twice about the timing of the termination.

E. FAIRNESS, "DUE PROCESS," AND PREPARATION

Before an employer discharges an employee, the employer should make sure that it is acting fairly, providing the employee with "due process," and that the employer has well prepared for the termination. The following questions can help in this assessment:

1. Does or should the employee know the acceptable standard of conduct or performance for which he or she is being discharged? How will the employer be able to prove it? Is it well documented? For example, is there a provision or rule in the employer's employee handbook that sets forth the standard? And does the employer have a signed acknowledgment on file that the employee received and read the handbook? Has the employer revised the handbook since obtaining the employee's signed acknowledgement?
2. Is the employer following the policies of its employee handbook or deviating from them?

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3. Has the employee been warned of the consequences of the unacceptable conduct or inadequate performance? If so, what kind of documentation exists? Oral or written? Did the employee sign any of the documentation? Or, is the infraction so severe, serious, and clear (*e.g.*, the employee has been caught stealing on videotape) that a warning is not necessary?
4. Has a fair, impartial, and thorough investigation been conducted into the unacceptable conduct? For example, did someone get the employee's side of the story? Are there any witnesses who were not interviewed who should have been? Have there been unbiased performance reviews? Does the employer have all of the facts and understand their context?
5. What about the timing of the proposed termination? Did the employee commit the infraction a long time ago? Is the termination of employment going to occur shortly after the employee exercised a legal right that may give rise to a retaliation claim?
6. How strong is the evidence of the employee's unacceptable conduct or performance? Does the employer have sufficient documentation or credible and unbiased eyewitnesses who can substantiate the unacceptable conduct or performance?
7. How well are the reasons documented? Is the documentation specific and detailed, or it is vague and filled with conclusions? For example, compare the following examples of documentation:

Vague Documentation	Detailed Documentation
Pat's work was sloppy.	On November 30, 2011, Pat typed three letters that contained a total of ten typographical errors – three in each of the first two, and four in the third. In the third letter, Pat misspelled the name of our customer as Mr. "Where" rather than Mr. "Wehr." (See attached letters.) Pat has received oral and written warnings regarding the company's expectation that Pat's work performance must improve significantly and on an immediate and sustained basis. Pat's failure to make such improvement will result in more severe discipline up to and including the termination of Pat's employment.

8. Is the employer ignoring the need for documentation by counting on its perceived ability to "buy" a release from the employee?
9. Have other employees committed the same or similar infractions but not had their employment terminated? If so, think twice before discharging the employee, or at least make sure that there are excellent reasons for the difference in treatment.
10. Does the proposed termination fit the "crime," or is it disproportionate?

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11. Will the Director of Human Resources or other appropriate manager review the facts and the employee's entire personnel file before a final decision is made about whether to separate from the employee? Does the personnel file support the decision to terminate the employee's employment? For example, if the reason to discharge the employee is poor performance, has the employee received several raises and bonuses which could undermine that the termination is really for poor performance? Does that person have the power to reject the recommendation to discharge the employee?

CONCLUSION

Despite the employment-at-will doctrine, employers need to act with care before terminating the employment of their employees. Not only are there important legal and employee morale reasons for doing so, but also in today's legal environment terminations have increased potential to result in a lawsuit. In addition, because employment termination is the functional equivalent of "capital punishment," fairness ought to play a role in the decision making process. Finally, it is advisable to consult with legal counsel before terminating an employee's employment.

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