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60-Second Memo

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What About Bob? The Risks of Termination

By: Karin R. Zeigler, Esq.

Bob is a "good enough guy", but . . . he is a mediocre employee. He does his job - but not with excitement. He comes to work everyday - in body at least. He sits at his desk - but is not a go-getter. He is not pleasant, but not offensive. He sucks out any hint of company morale from nearby employees. You want to get rid of him. Can you do it?

In today's climate where every termination is a nail biter, is employment really "at-will" anymore? In the majority of states, employees not working under an employment contract are deemed to be "at-will" and may be terminated for any reason, so long as it is not illegal. Employees who work under an employment contract, on the other hand, can only be terminated for reasons specified in the contract.

There are numerous illegal reasons for termination. Typically such reasons fall into one of two large categories: illegal discrimination or illegal termination in violation of public policy.

Before making a termination decision, the employer should

always:

- Determine whether the employee falls within a protected category.
- Review the timing of the termination.
- Review the employee's entire personnel file.
- Review all the events surrounding the termination.
- If the termination is a disciplinary consequence, verify the employee was adequately forewarned of his or her conduct. Make certain the rule/offense is reasonably related to business need. Review the investigative findings to ensure the investigation was fair and complete. Review the evidence of the employee's guilt to determine if "substantial evidence" exists to support the decision.
- Make sure the applicable rule, policy or criteria are being applied consistently. Verify that the punishment fits the offense.
- Consider any protected status, anticipate potential claims and proceed in a manner which minimizes the risk. If the employee falls into any of the protected categories above, consult an employment law attorney prior to termination to minimize any associated risks.
- If the termination occurs close in time to the employee's participation in a "protected activity," be wary of a claim of retaliation.

It is paramount that the company create a paper trail documenting the circumstances leading to the decision to terminate an individual, even if it is simply a matter of the relationship not being "beneficial" to the company (non-performance reasons). Personnel file records and performance reviews often should be part of the documentation. If the termination is a matter of economics, then there should be a straight forward recitation of those facts (e.g. the loss of a major customer or a general business slowdown) and the reasons the employee was selected.

Consistency in the documentation is key. Harmony between the employer's story for why the firing took place and the documentation on the employee's history can mean the difference between a simple parting of ways and a prolonged

and messy legal battle.

The documents need to support the "true" basis for the termination. Wrongful discharge suits are primarily brought when the employee does not believe the reason the employer gives for the termination. Many suits could be avoided by forthrightly explaining the basis for the dismissal rather than attempting to "soften" so as not to offend or make the person being terminated feel bad.

The most common employer errors involve: notice that is poorly timed; poorly stated reasons for the termination which give rise to questions of exactly why the employee was terminated (statements such as "not a team player;" "not meeting expectations;" and "it was just time for them to go") and/or terminations which are handled too "publicly" within the organization. Employers need to give specific reasons rather than platitudes. An employer that does not tell an employee the real reason why they are being terminated because they are trying to spare the employee's feelings is making a mistake.

An employee's termination does not guarantee a claim for unemployment benefits. However, the documentation created will provide a basis for future use should it be needed and will help to "jog the memories" of supervisors should they later be called on to explain the basis for the termination.

From a litigation perspective, employment attorneys will advise their clients that terminations are much easier to defend when they are justified by a legitimate business reason. Legitimate business reasons could include, for example: continuous problems; misconduct; a reorganization resulting in elimination of the employee's position; or financial considerations (as long as its choices are not based on discriminatory reasons). It should, however, be clear that the termination needs to be based on a well thought out, reasonably thorough assessment of the employment relationship. After all, that is what is being terminated, not just the employee or the position.

Thinking of termination in the context of what is good for the company, NOT the personal rejection of the employee, will help to avoid personalization and contamination of the legitimate reason with subjective, biased and one-sided attacks on the person, which are more likely to end in defensive and contentious litigation.

Furthermore, only those on a "need to know" basis should be told of the reasons for termination. It is likely that the terminated employee will maintain at least one relationship

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with a remaining employee and employers should assume that this is the case. Supervisors should never comment on the termination from a personal standpoint. Instead, they should make a generalized statement that the employee is no longer with the company and change the topic.

Upon pressure from other co-workers of the terminated employee, supervisors must be instructed to simply state that they are not at liberty to discuss the matter out of respect for the departing former employee. Emotionally charged statements and personal attacks on an employee who has left employment with the company involuntarily is never a wise, risk-free or recommended move on the part of the supervisor or any company representative.

Parting Thoughts

Deciding to terminate an employee is serious business for all involved. Remember that the ultimate test for any employment decision is the test that will be administered by a judge or a jury if you are sued and cannot get the case dismissed before trial. Although the law does not require employers to be "fair" in employment decisions, the people who decide employment cases often think it does. If you give your employees "due process" when disciplining and discharging them, they'll be less likely to sue, and if they do, your case will pass the unofficial (but very real) smell test with the judge or the jury. If you need a second opinion, consult *confidentially* with another member of management or your employment law attorney. Ask them if they think you have been fair and given the employee due process. If not, reconsider your decision and improve your process *before* proceeding with the termination.

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