Employment Law Advisor: Employee Terminations

Avoiding Claims and Liability

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Employee terminations result in more lawsuits than any other employment action. Despite the general rule in Massachusetts that the employment relationship is "at-will" and can be terminated at any time, with or without notice, reason or cause, there are many exceptions to the at-will rule, which can make each termination open to potential legal challenge. This edition of the Employment Law Advisor focuses on how employers should handle employee terminations and the steps employers can take to reduce the risk of legal claims and liability.

Bases for Unlawful Termination Claims

An employer's ability to discharge an employee is subject to statutory, contractual and common law restrictions. Statutory restrictions are those imposed by federal, state and local laws, such as laws prohibiting employment discrimination and retaliation.

Contractual restrictions are agreed to by the employer, for example, restrictions contained in employment agreements. Contractual restrictions also may arise from statements made in offer letters or through other written or oral promises.

Common law restrictions are those created by the courts to protect employees from some types of employer conduct not prohibited by statutes, such as discharges that violate "public policy." Firing an employee for refusing to engage in unlawful behavior on behalf of the employer is one example. There are other common law claims that can arise from the manner in which a discharge is handled, such as defamation claims.

How to Reduce the Risk of Claims and Liability

Employers can take the following steps to reduce their risk:

1. Determine the precise reason(s) why the employee is being discharged. When a termination decision is challenged as unlawful, the employer is required to articulate a legitimate business reasons for its action and the claim often will turn on the employee's ability to show that the reason given by the employer is untrue. When an employer says one thing at the time of termination and something else later to a court or agency, the employer's defense may be severely impaired.
2. If discharging for misconduct, be certain that there was a competent investigation of the employee's conduct. Give the employee an opportunity to explain his or her side of the story. Document any admissions by the employee. If discharging for poor performance, determine whether the performance problem is documented.
3. Avoid surprise. Determine whether the employee was given prior notice that his or her misconduct or continuing poor performance would result in discharge. While not legally required, the failure to provide notice may be viewed with suspicion unless the situation involves egregious misconduct.
4. Consider the appearance of unfairness and how a third party will judge the employer's actions. Is discharge clearly warranted for the employee's misconduct or poor

performance? Are there any mitigating circumstances? How have other employees been treated in similar situations?

5. Review the employee's personnel record: (i) to get an accurate picture of his or her work record; (ii) to make certain the documentation is complete; and (iii) to determine whether any materials do not belong in the file.
6. Review any employment agreements, offer letters, and pertinent personnel policies to determine whether the employer has complied with any requirements.
7. Assess whether there is any particular vulnerability to legal challenge. Is the employee a member of a protected group (e.g., age 40 or older)? Has he or she exercised a legally protected right recently (e.g., taken Family and Medical Act leave, filed a complaint of discrimination or harassment)? Are there any contractual restrictions to discharge? Are any public policy issues involved (e.g., the employee objected to doing something because of legal or ethical concerns)?
8. Plan the termination meeting carefully. Who will be present? Where and when will it be conducted? Be discreet. Avoid causing unnecessary embarrassment to the employee.
9. Be accurate in telling the employee the reason(s) for the discharge, in a direct, concise, firm and respectful manner. Be prepared to discuss the employee's benefits or other issues, including any severance pay, any accrued vacation pay, group insurance continuation, the form of reference the employee will receive, and the employer's position on unemployment benefits. Also be prepared to discuss any transition matters and any continuing employee obligations (e.g., non-disclosure and/or non-competition restrictions). Prepare a memorandum documenting what was said in the meeting.
10. Provide the employee with a final paycheck. The Massachusetts Payment of Wages Act (the "Wage Act"), requires that discharged employees be paid their final wages on the date of discharge, including pay for all accrued and unused vacation time. Employers should not make any irregular deductions without careful consideration of the potential legal ramifications.
11. Provide notice of the employee's (and other beneficiaries') rights regarding health insurance continuation under federal law (COBRA) or state law.
12. Massachusetts law requires that employers provide terminated employees with a notice from the Department of Unemployment Assistance ("DUA") concerning how to file for unemployment benefits.
13. Take all appropriate security measures to protect co-workers if there are safety concerns, and to protect the employer's business interests (e.g., obtain employee's laptop, keys, and terminate computer access).
14. Take appropriate steps to keep confidential matters surrounding the discharge. Generally, a "need-to-know" rule should be followed to reduce the risk of a defamation claim.
15. As discussed below, in appropriate circumstances, consider presenting the employee with the option of receiving additional termination benefits in exchange for a legal release of all legal claims.

Separation Agreements

Whether to offer a terminated employee a separation agreement that provides severance benefits in return for a release of claims depends on the situation. Such agreements can be particularly useful when the employee is viewed as litigious or to prevent litigation in the context of layoffs, where there are risks of multiple claims. However, offering severance to an employee fired "for cause" may be inappropriate because it will send the wrong message to other employees.

If a separation agreement is used, it must be drafted carefully so that it will be enforceable. Non-compliant or poorly drafted agreements may be found unenforceable by a court, which could result in the former employee getting to keep the severance pay but also having the right to sue the company. For example, the Massachusetts Supreme Judicial Court recently ruled that a release of claims under the Wage Act will be enforceable only when the release is stated in "clear and unmistakable terms," and specifically refers to rights and claims under the Wage Act. In

addition, releases of age claims under the federal Age Discrimination in Employment Act ("ADEA") must contain very specific provisions, such as a 21-day consideration period and a 7-day revocation period. Omitting these and other provisions may mean that the release does not waive age claims under federal law. Employers also should be aware that in situations involving the termination of two or more employees additional special rules apply to release ADEA claims.

Conclusion

Our experience in defending hundreds of claims by discharged employees tells us that what is said at the time of termination, and how the termination process is handled by the employer, often determines whether an employee will subsequently file a legal claim. When an employee does file a claim, an employer's contradictory statements, insensitive conduct or other missteps at the time of termination almost always adversely impact the employer's defense of the claim and increase its exposure to damages. We believe that taking the steps outlined above will help employers manage employee terminations more effectively and avoid the mistakes that so often lead to employee claims.

If you have questions about this topic, please contact any member of our Employment Law Group.