Termination May Not End It

Insights
3.01.14

Webster's Dictionary defines "termination" as "the act of ending" or "the end." In the employment context, "termination" often is intended to be the end of the employment relationship. Perhaps the employee caused problems with coworkers, was an underperformer, violated company policies, or all of the above. Although terminations generally are stressful and unpleasant experiences for all, employers hope that this change will eliminate problems.

Unfortunately, an employee termination can be the source of a new problem for the employer and the beginning of another relationship between the employer and the now former employee. The former employee may file a wrongful termination claim alleging that his former boss and employer did something wrong. The employer's "wrongdoing" may be as simple as failure to take consistent disciplinary action or the timing of the termination itself.

While it's often true that the employee "should have been terminated a long time ago" (or should have never been hired, as is often lamented), bad timing and inconsistency often overshadow bad performance and conduct and increase the chances that termination will not be the end.

Take A Second Look
Many terminations result from a manager's emotional response to a situation or series of situations. When emotions or the exhaustion of patience take over, risks associated with terminations increase. Some decisionmakers do not recognize these risks while others downplay them based on an over-reliance and likely misunderstanding of the employment-at-will doctrine.

Under that doctrine, employees not employed for a definite time pursuant to an agreement can be terminated without cause or notice. On its face, this doctrine seems to make employers practically bulletproof because the vast majority of employees are employed at-will. But the at-will armor is far from impenetrable, as almost all wrongful-termination charges and lawsuits are filed by employees who were employed at-will. Raising the at-will doctrine as a defense to these claims generally goes nowhere fast.

Most wrongful discharge claims are brought in the form of a discrimination or retaliation claim or both. In a typical discrimination claim, the allegations are that the employer treated the fired employee differently than another employee who engaged in the same or similar misconduct or had the same or similar level of performance.

The dispute in the lawsuit generally is not whether the fired employee engaged in misconduct or underperformed. Often those facts are conceded. Instead, the dispute centers on the reason the employer did *not* terminate others who engaged in the same conduct. The former employee will allege that the reason for the different treatment was race, sex, religion, age, etc.

By way of example, an employer fired an African-American employee after the employee wrecked a company vehicle. On the surface, this termination decision seems like a no-brainer, especially since the employee was "at-will." The employee never denied wrecking the vehicle, even when he filed his lawsuit alleging race discrimination. His theory was that the employer had not terminated non-African American employees who also had damaged company property. In other words, his allegations were that the employer treated him differently because of his race. Whether or not race was a reason for the alleged difference in treatment will now be decided by a jury.

Retaliation

Retaliation claims take a similar route to the courthouse. Many employment laws include anti-retaliation provisions. For example, FMLA, OSHA, the FLSA, workers' compensation laws, and the anti-discrimination laws, among others, all prohibit employers from retaliating against employees who exercise their rights under these laws. The exercise of these rights is called engaging in "protected activity." An employer that terminates an employee for engaging in protected activity risks having to defend a difficult lawsuit. In the last few years, there have been more EEOC charges alleging retaliation than any other category of discrimination.

To illustrate how retaliation claims come to life, suppose you want to terminate an at-will employee for excessive absenteeism. With accurate records establishing attendance policy violations, this decision also appears on the surface to be a no-brainer. But what if that same employee had recently complained about harassment or discrimination, or made a safety complaint, or filed a workers' comp claim, or recently requested or taken protected leave?

And, what if that same employee had a terrible attendance problem that went unaddressed before he engaged in protected activity, or you have other employees with similar attendance issues that have not been terminated? These facts may suggest that something other than attendance was the real reason for the termination decision. If you still terminate the employee under these circumstances, the only no-brainer is that you may have a chance to explain your thought process and rationale in a legal forum.

Making Goodbye Mean Goodbye

While not all wrongful termination claims can be avoided, employers can take some relatively simple steps to increase the chances that the termination will be the end:

- Slow down and think before pulling the trigger on a termination. Involve someone else, *e.g.* Human Resources, who does not have an emotional investment in the situation. That person likely will have a more objective assessment and see things you may have missed;

- Ask yourself, is the action we are about to take consistent with our previous actions? Review what you have done in the past when faced with these facts or this situation or one similar to it. If termination has not always been the company's response, then ask yourself if there is a legitimate way to distinguish this situation from the others. If not, termination should wait;

- Ask yourself, has this person recently made a complaint, taken leave, requested leave, been involved in an investigation of misconduct or done anything else that would qualify as protected activity? If the answer is yes, ask yourself if your reason for termination is on solid ground. Hint: if you are using a dust-covered rule violation or performance standard as the basis for the termination decision, you may want to wait;

- Ask yourself, will the employee be surprised at the termination? A termination decision should never be a surprise. Either the terminable offense is one that no employee could reasonably expect to get a second chance, therefore not a surprise, or the employer has diligently documented counselings with the employee that include the warning that continued non-compliance will result in further disciplinary action, up to and including discharge, thereby eliminating the surprise element;

- Treat the employee with dignity and respect during the termination process, the same as you would expect to be treated. Being a jerk because you can be may make you feel good but also may give a recently terminated employee a reason to seek revenge;

- Seek legal counsel before making a risky termination. The cost of this advice will be money well spent if it helps you avoid an expensive legal challenge.

With patience and consistent actions, and perhaps a little guidance, employment terminations can actually be the end of the relationship.

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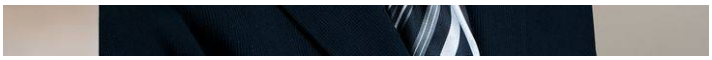

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