Terminations:
Understanding the Legal Landscape and Strategies for Limiting Potential Liability

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Road Map

• Laws and regulations impacting termination decisions
• Pre-termination considerations
• Importance of documentation
• Tools for managers/supervisors
• Tools for human resources
• Documenting termination
• Getting your “ducks in a row”

Laws and Regulations: Employment “At Will”

• Either employer or employee can terminate employment relationship at any time, with or without notice, for any lawful reason
  • Many employers equate with, “we don’t have to give a reason for termination” or we can be vague (“going in a different direction”; “not a good fit”)
  • True. But is it a best practice?

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Employment “At Will”

• Pitfalls of not providing a reason
  • 1st question from employee: Why?
  • If no/vague answer, human nature to assume hiding something or “pretext” for unlawful reason
  • Perceived lack of “fairness” even if not legally required
  • Unintended consequence: cause terminated employee to seek legal advice or file a claim against employer

Employment “At Will”

• Pitfalls of providing a false reason:
  • Layoff or reduction in force: terminated employee aware company advertising/recruiting for same or similar position
  • Vague explanation: may be sign of lack of supporting documentation or evidence that similarly situated employees treated differently
  • Significantly impacts ability to explain/defend decision

Employment At Will
(aka “Because, Because, Because”)

• Failure to provide reason = belief real reason is BECAUSE:
  • I complained about a supervisor making racial comments
  • I asked about my right to take Oregon sick leave
  • I told HR the company had misclassified me as “exempt” and that I should be getting overtime pay
Employment At Will
(aka “Because, Because, Because”)

• Result: defend unarticulated/vague reason for termination months or years later if legal challenge
  • Decision makers’ credibility
    • If no reason given at time of termination why should fact finder believe stated reason now?

Employment “At Will”
(aka “Because, Because, Because”)

• Witnesses’ recollection
  • Often vague/different over time
  • May no longer be employed; not as likely to be invested in assisting employer’s defense

Employment “At Will”
(aka “Because, Because, Because”)

• If do provide reason, should be truthful
  • Beware of shifting reasons
    • Without the particular fact/incident, would termination decision have been made
      • Clearly and honestly articulate actual reason(s)
Employment “At Will” Exceptions

- Law/Statute
  - Race, religion, age, sex (gender, including sexual harassment, sexual orientation, gender identity, failure to conform to sex stereotypes), national origin, marital status, physical/mental disability, military/veteran status, genetic information
- Leave laws (OFLA, Oregon Sick Leave, FMLA)
- Workers’ compensation rights/claim
- Association with someone protected by law (e.g., spouse of cancer patient; parent of disabled child)

“Public Policy” (socially desirable motive)
- Reporting alleged harassment or other alleged wrongdoing
- Complaining about failure to comply with wage law
- Health/safety complaint

Whistleblower
- Good faith report of criminal activity by employer
- Bring civil proceeding against employer
- Testimony at unemployment benefits hearing

Contract/agreement
- Employee handbook
  - Progressive discipline policy
  - Attendance/call in policy
- Employment agreement
  - Termination for specified reasons
- Collective bargaining agreement
  - “For cause” termination
Pre-Termination Considerations

• Employment policies
  • E.g., mandating progressive discipline vs. ability to impose any appropriate discipline, including termination; specific policy implicated by reason for termination (attendance, use of company's electronic systems, etc.)
  • Job descriptions, performance evaluations, corrective action/warnings addressing particular issue

Pre-Termination Considerations

• Comparative situations
  • What has the company done in the past under similar circumstances
    • If previous transgression resulted in lesser discipline, what is justification for terminating now

Pre-Termination Considerations

• Ensure direct and indirect decision maker(s) able to articulate non-discriminatory, believable reasons for termination
Importance of Documentation

• Review personnel file and any “supervisory” file
  • Existence of supporting documentation
    • Who created document (name)
    • Dated
    • Does it say what you think it says
      • Performance evaluations often do not reflect issues resulting in termination
      • Documents may not exist or specifically address issue(s)

• Lack of or weak documentation = greater reliance on credibility of decision maker and consistent application of particular policy/standard

Tools For Managers/Supervisors

• Train managers and supervisors about employment laws to understand context of termination decision
• Require consultation with HR prior to making termination decision
  • HR should not be relegated to payroll and post termination “clean up”
• Analyze timing of decision: close in time to any protected activity results in problematic decision even if non-discriminatory reason
• Consider authorizing HR or decision maker to consult with employment counsel if particularly risky termination
Tools For Human Resources

• If problematic termination consider authorizing human resources to offer severance package in exchange for employee's release/waiver of claims
• Can offer any form of severance employee not otherwise entitled to by contract (e.g., handbook policy, law/statute or terms of employment or collective bargaining agreement
  • Signed release/waiver reduces potential legal exposure

Tools For Human Resources

• Release/waiver of claims
  • Certain language required to secure effective release/waiver of employment claims
  • Advise consultation with employment counsel

Documenting Termination

• Consider providing employee with letter briefly outlining (truthful) reason for termination
  • Emotional situation; employee not necessarily going to hear or retain substance of termination conversation
  • Best practice even if not legally required
Preparing for Termination Discussion
(Are your “ducks in a row”?)

• Decision maker and HR should consult regarding substance of discussion
  • If provide termination letter, suggest using letter as “script” for conversation
  • Purpose not to debate reasons for termination; rather, to convey fact of decision and general explanation

Preparing for Termination Discussion
(Are your “ducks in a row”?)

• Plan ahead:
  • Who will participate
    • Decision maker and possibly HR representative
  • Day of week and time of day
    • Generally not advisable to conduct on Friday or late in day
  • Where will conversation be held
    • Ensure privacy and confidentiality
  • What will co-workers, clients and others be told after employee informed of termination
    • Simple, brief message that does not discuss reasoning

Preparing for Termination Discussion
(Are your “ducks in a row”?)

• Information technology issues
  • Immediately turn off/eliminate employee’s access to electronic systems/networks/servers
  • Require return of laptop computers, cell phones, etc.
    • Require employee to disable access to e-mail system on personal device
  • Obtain passwords for all files, websites
  • If offer severance, require return of documents/data as condition to receiving
Preparing for Termination Discussion
(Are your “ducks in a row”?)

• Document/data return
  • Understand potential for downloading/transferring/taking documents and data at or prior to termination
  • Consider assigning HR representative to monitor employee’s exit and prohibit access to computer and taking documents, thumb drives, etc.

• Require return of keys, access cards, credit cards
  • Ensure expense reimbursement requests submitted within limited time

• Comply with final paycheck rules
  • If employee discharged, due not later than close of next business day
  • Understand definition of “wages” due and owing
    • Does policy/past practice require payment of accrued PTO

Thank You!

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