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Practical Tips for Employment Termination

Ways to Limit Potential Liability

Savvy employers understand that workplace terminations must be carefully planned and executed to reduce the potential for costly legal claims. For most employers, discharging an employee is difficult enough without the additional stress of a lawsuit for wrongful termination, discrimination, retaliation, or other claims under federal and state employment laws.

Employers too often subject themselves to unnecessary liability through hasty decision-making, inadequate investigations, or common misunderstandings of the legal protections afforded to employees. By following a few basic principles, however, employers can reduce the likelihood that successful claims stemming from terminations will be brought against their companies.

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The Cavanaugh Law Firm, LLC is committed to your company's success. We are available to provide you knowledgeable advice on the full range of labor and employment law issues and to defend your company and its managers in lawsuits and agency proceedings. If you have any questions about the contents of this newsletter or about any issue affecting your company, please contact us.

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Pre-Termination

Before discharging an employee for misconduct or poor performance, consider taking the following steps to determine whether a lesser punishment might be appropriate:

- **Find out what actually happened.** Investigate the alleged misconduct by talking to witnesses and reviewing relevant records (such as production records, timecards, absentee reports, and doctors' notes) before reaching any conclusions. Consider whether the employee would benefit from special training.
- **Conduct a "due process" interview.** Allow the employee a reasonable opportunity to tell his or her side of the story. In doing so, you may learn additional facts that are worth exploring. In addition, you will increase the perception of fairness toward the employee if a jury is ever asked to decide the merits of a subsequent claim.
- **Document your findings . . . with caution.** Stick to the facts and leave anything that could be construed as a personal opinion or legal conclusion out of your notes. Remember, anything that you write down might be viewed by a jury someday. Thus, a statement that "John clearly harassed Sally in violation of the company's sexual harassment policy" is not something that should necessarily be memorialized in writing.
- **Be consistent.** Consider the bigger picture before imposing any type of discipline. You are setting a precedent for similar offenses in the future. For instance, if John was late in submitting his timecards and was merely suspended for a day, but Sally committed the same offense and was discharged, how will that look to a jury if Sally pursues a gender discrimination claim?

Termination

For better or worse, letting an employee go is sometimes the only reasonable solution. While most states follow the "at will" employment doctrine, don't be fooled into believing that terminations are without risk. Before discharging an employee, ask yourself:

- Does the employee have an employment contract? If so, have you reviewed it to see if your decision complies with its terms?
- Is the employee involved in union activity or covered by a collective bargaining agreement?
- Does the employee have a disability or medical condition? If so, have you offered the employee a reasonable accommodation or advised the employee of his or her rights under the Family and Medical Leave Act (FMLA)?
- Will the termination violate a state law or public policy against discharging employees (e.g., discharging an employee for attending jury duty, filing a workers' compensation claim, or refusing to engage in an illegal act)?
- Is there any inference of retaliation raised by the termination (e.g., has the employee recently filed a charge or otherwise complained of discrimination or harassment)?

This list is by no means exhaustive, but if you find yourself answering "yes" to any of these questions, you should stop and reconsider the decision to terminate.

Post-Termination

Finally, remember that employees are owed certain obligations even after their employment ends. The final paycheck must be sent in a timely manner. COBRA continuation notices must be sent to the employee and his or her family members. In addition, courts have recognized that retaliation can occur even though the employment relationship has ended.

In conclusion, no employer is immune from claims related to a termination, but following the above guidance can greatly reduce your company's exposure to potential claims.

Employers Beware: EEOC Stepping Up Disability Discrimination Enforcement

10 of the 22 recent lawsuits filed or settlements reached by the EEOC included allegations of disability discrimination. Some of the issues addressed by the EEOC in those cases include:

- A $72,500 settlement with an Akron, Ohio, medical transportation services company, which fired an EMT-paramedic with multiple sclerosis instead of providing additional leave as a reasonable accommodation.
- A $110,000 settlement with Norfolk Southern Railway Company, which medically disqualified a track maintenance worker because of degenerative disc disease without doing an individualized assessment of whether he could perform the essential functions of his job.
- A $90,000 settlement with a Tennessee nursing home facility, which terminated an HIV-positive nurse.
- An $18,000 settlement with an Alabama athletic apparel retailer, which fired a legally blind sales clerk (who lost full use of his sight while serving in the Army) without any consideration of whether an accommodation, such as a magnifying glass or a new computer monitor, might be reasonable.
- A lawsuit claiming a Wisconsin energy company fired a wheelchair-bound employee instead of providing his requested reasonable accommodation of an automatic door opener.
- A lawsuit claiming a Tennessee steel company refused to hire an applicant for a maintenance position after learning through a pre-employment medical examination that the applicant took prescription medications for an anxiety disorder and high blood pressure.
- A lawsuit claiming a Connecticut electrical contractor refused to hire a dyslexic carpenter, without first exploring any possible reasonable accommodations for his disability.

What do all of these cases have in common? They all involve employers that allegedly failed, in some way, to engage an employee or applicant in the interactive process to determine if he or she could perform the essential functions of the job with, or without, a reasonable accommodation. Instead, the employers are accused of having made snap judgments based on the individual's disability and related stereotypes.

Disability discrimination is very much on the EEOC's radar. Is your business sufficiently protected? Answer these questions:

- Do you have a reasonable accommodation policy?
- Do you have accurately written job descriptions?
- Do your managers and supervisors know what the interactive process is, and how to engage in it?
- Have you trained your employees on disability awareness and reasonable accommodations?

Unless you have answered "yes" to each of these important questions, your business is exposed to potential disability-discrimination issues. Considering how closely the EEOC is looking at these issues, is this risk one your business wants to take?

Illinois Gov. Quinn Approves Ballot Question to Raise Minimum Wage

On November 4, 2014, Illinois will vote on a ballot measure asking whether Illinois should boost its minimum wage from $8.25 to $10 by 2015. The measure is non-binding, but Quinn and other Democrats who want to raise the rate say it will give them the support they need to move the idea through the state legislature. Political opponents and business leaders say the raise could kill jobs and make Illinois less competitive with states where the minimum wage is lower. Illinois' current rate is $1 higher than the national rate.

Employers' Duties to Accommodate Nursing Mothers

"Lactation accommodation" describes the legal requirement that employers provide nursing mothers a private, sanitary place where they can express milk during their work hours. The Affordable Care Act amended the Fair Labor Standards Act to require lactation accommodation. In addition, a number of state and local governments have laws requiring lactation accommodation. The federal law, called the Nursing Mothers Act, requires covered employers to provide unpaid "lactation breaks" to non-exempt nursing moms as often as needed, and for as much time as needed, to express milk. Employers must also provide a private location away from co-workers and customers, with a flat surface (so that the pump can be stable), and it cannot be a restroom. Waiting periods for the lactation room are also frowned upon. Employers who have fewer than 50 employees, and for whom providing lactation accommodation would be an undue hardship, are not required to provide it. But the Department of Labor notes that both of these requirements must be met and that the bar will be high for the "undue hardship" standard. The federal law does not require that lactation breaks be offered to exempt employees, but if they are, the employer cannot make deductions from the exempt employees' pay.

Illinois has had a similar law, the Nursing Mothers in the Workplace Act, since 2001.

In April 2014, Missouri Gov. Nixon signed into law a bill exempting mothers who nurse or express milk in public from any indecency laws. The same law excuses nursing mothers from jury duty.

Obama to Sign Order Barring U.S. Contractors From Job Bias Based on Sexual Orientation

Last month, President Obama promised he would sign an executive order barring federal contractors from job discrimination based on sexual orientation and gender identity. He said he was acting on his own because a drive in Congress for a national non-discrimination law to cover nearly all employers, the Employment Non-Discrimination Act, had stalled. The White House has been promising to sign this order since 2012, but has yet to do so. In the meantime, especially after the Supreme Court's Hobby Lobby decision, religious groups are pressing for an exception for groups whose religious beliefs oppose homosexuality.

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