Be Wary of “WRONGFUL DISCHARGE”

Gone Are the Days When You Could Fire Someone at Will: The Courts Are Finding Employees Have Additional Rights

By Gerard P. Panaro, Esq.

Third, several states have held that employees may not bring legal action based on “wrongful discharge” if there is another specific remedy provided by law.

Fourth, and perhaps most important, employers can make it more difficult for a dismissed employee to succeed on a complaint of “wrongful discharge.” There are, however, some very important qualifications: (1) employees have many grounds other than “wrongful discharge” upon which they can base a complaint; (2) employees can, and do, allege almost anything in a complaint (allegation is one thing; proof is another).

Guidelines To Follow . . .

Employers should take the following steps to minimize the risk of being hit with a “wrongful discharge,” “unjust dismissal,” “retaliatory dis-

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charge,” “abusive discharge” or “bad faith discharge” claim:

1. If you wish to retain the right to fire employees at any time or for any reason (other than for any clearly illegal reason), say so. You can do this by telling an applicant at the time of the interview, or by including a statement to that effect on application forms, in letters confirming employment or in the company handbook/policy manual.

2. Don’t do or say anything inconsistent with your policy of “employment at will.” Let your supervisors and managers know that you expect them to do the same. For example, if your application form states that “applicant understands employment is at will,” you and your managers should never say, “Oh, don’t worry about that. It’s just some legal mumbo-jumbo our lawyers make us put in there so we don’t get sued.” Explain what it means.

3. Know your employees’ rights under the law where you operate your business. This includes federal, state, county and city laws. As a rule, state and local laws are more comprehensive than federal laws. For example, employers are covered by the federal Equal Employment Opportunity Act only if they have 15 or more employees. The Equal Employment Opportunity Commission administers this law, which forbids discrimination on the basis of sex, race, color, religion or national origin. Separate federal laws cover discrimination according to age or pregnancy. But the State of Maryland, to cite but one example, has a “human relations” statute which is broader than the federal law. Individual counties have also enacted such laws in their county codes. Montgomery County (Md.) employers with as few as six employees are covered by such a law, which not only forbids discrimination on the bases stated in federal law, but also on the bases of “ancestry,” “marital status,” and “handicap.”

Employers should also familiarize themselves with the various other laws that regulate employment relationships. These include the Civil Rights Act, the Fair Labor Standards Act, the National Labor Relations Act, the Occupational Safety and Health Act, the Age Discrimination in Employment Act and the Employee Retirement Income Security Act. Most of these statutes also have state counterparts.

There are also perhaps two dozen other federal statutes (and state enactments) that contain sections prohibiting discharge or discipline for employees who exercise their rights conferred by statute. Some of these statutes contain no explicit language regarding discharge. Courts have, however, ruled that the statutes imply such protection. Such is the case in Pennsylvania where an employee sued because he was fired for refusing to drive overweight trucks on state roads in violation of the state truck weight...
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limit laws. He was given the opportunity to prove his claim in court. 
(Shaw v. Russell Trucking Line, Inc., 542 F.Supp 776 (W.D.Pa., 1982)).

4. Employers should provide employees with some measure of “due process.” It can include some or all of the following:

The employer will take no action without sufficient evidence. “Evidence” may include eyewitness accounts, employee admissions or circumstantial evidence, for example, when the employee was the only person on the premises at the time something was taken.

The employer will give the employee an opportunity to state his or her case even when evidence is persuasive. This may include something as simple as a one-on-one conversation or something as formal as an arbitration proceeding with counsel, witnesses and an “impartial judge.”

The employer will treat employees consistently by handling cases involving similarly situated employees and similar fact patterns in as nearly the same manner as possible.

The employer will establish one or more levels of “appeal” and “review” either within or outside the company. Some companies and associations have bylaws which state that the chief executive can be dismissed only by a majority vote of the board of directors.

The employer will make certain employment procedures are known to everyone and adhered to by everyone.

5. Make certain that all management or supervisory employees know the law and company policy; that they obey them; that they apply them equally, fairly, and consistently; and that they do not vary, ignore or disregard them by word, deed, action or omission.

6. Make it a policy for all employees to refrain from commenting on topics that, by their nature, could form the basis for discrimination charges. Thus, an employer should make it clear that it is undesirable for staff to make “jokes” or to “tease” anyone about color, hair style, ethnic background, weight, religion, politics, spouse, sexual habits or other sensitive areas. What may sound funny among friends at a company picnic will sound sinister when repeated at a hearing or adversary proceeding, especially if it is a “standing joke” in the office.

7. Avoid taking action spontaneously or in anger. On the other hand, don’t delay discipline to the point that the action appears to be a pretext for something else. For example, suppose an employee does something in January that merits dismissal. Nothing is done immediately, even though the boss resolves to fire the employee. The employee goes to the Wage and Hour Administration in February to find out what his rights are under the Fair Labor Standards Act. He tells his supervisor erroneously that he is entitled to a rest period after four consecutive hours of work. The supervisor repeats this to the boss. The boss calls in the employee and uses this opportunity to dismiss him for the mistake he made in January. Under the circumstances, the company has needlessly created complications in proving that the employee was fired solely for
a legitimate reason and not for the improper reason that he visited the Wage and Hour Administration office.

8. Once you decide to terminate an employee, don’t pay him any money beyond that to which he is entitled (wages for hours worked, accrued vacation) unless and until he has signed a release and “covenant not to sue” agreement. Otherwise, the employee could take whatever severance pay you offer and still sue. Note, however, that an employee may be entitled to some severance pay based upon the organization’s policy.

Don’t rush an employee into signing such a release, however. A release signed under duress is unenforceable. Give the employee a reasonable time to read the agreement. Let him take it home to review by himself or with an attorney. Make certain that the agreement contains a clause stating that the employee entered into the agreement knowingly, willingly and voluntarily after having the opportunity for, or benefit of, consultation with the person(s) of his choosing. The agreement should also recite the consideration (i.e., “company pays employee ‘x’ dollars in return for employee’s promise not to sue company”) and contain a statement that the parties desire to settle their differences amicably through the agreement. The employer might also want to consider having the positions of both parties stated in the agreement.

Don’t disburse any funds until you have the executed agreement in your hand.

9. Respect the employees right to privacy and confidentiality. Don’t discuss anything about an employee with anyone who does not have a right or need to know. Under some circumstances, an employee may have the right, under the National Labor Relations Act, to have an employee witness present at any investigation of wrongdoing. This may apply even in the absence of a collective bargaining agreement. In addition, employers should consider when it is wise for them to have witnesses to conversations with employees.

10. Review all forms and documents every six months or every year to make certain they are consistent and that they say what you want. It is also wise to have these forms and documents—as well as any unwritten rules, practices and procedures—reviewed by a labor law expert to make certain that new enactments or judicial decisions have not undermined or rendered them illegal.

Remember that no list, such as the one above, is ever complete or specific enough. The best advice is to be aware that there are numerous “legal tentacles” that can ensnare even the careful, scrupulous and innocent employer.

Prepare yourself for potential claims by having, following, coordinating and periodically updating a set of employment practices that you have determined are best suited to your operation.