Minimizing Risk in Terminations

In This Age of Litigation, The Employer Can Abruptly Be On the Legal Defensive Over a Termination Act

By Betty Southard Murphy and Evan Jay Cutting

A burgeoning area of concern to employers of all types and sizes is the wrongful discharge lawsuit by the terminated employee. While most employers have adjusted to the requirements of the various anti-discrimination statutes, the upswing in wrongful discharge actions has been for many a surprise with dreadful results. A recent study in California showed that 90% of the cases of this type which reach a jury result in a verdict for the employee.

These lawsuits are expensive to defend against and, if liability is found, the amount which an employer is required to pay can be staggering. Under some theories of recovery used by employees and their counsel, the liability can include not only back pay but even front pay (future earnings lost) and punitive damages. The latter is a monetary award which can be imposed on a defendant employer as a penalty to deter similar conduct in the future. A California court this past December ordered an employer to

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A recent study in California showed that 90% of the cases of this type (wrongful discharge actions) which reach a jury result in a verdict for the employee.

While there is no guaranteed way to avoid liability, there are steps which the prudent employer can take to minimize the likelihood of a negative outcome in any lawsuit brought by an employee. The actions to be undertaken fall into four major categories—general preparation, documentation, the actual termination of the problem employee and steps to be taken after termination.

The discussion which follows is primarily directed towards terminating the white-collar non-union employee. However, the general concepts, to the extent that they are consistent with existing labor contracts, even apply in a unionized setting.

**Prepare now for a Lawsuit**

The time to get ready for a lawsuit by a terminated employee is before any firings occur. Time and money invested now in getting your house in order will pay huge dividends down the road.

As a first step, have your applications and other employment forms reviewed by an expert. When an employee files an employment discrimination charge against your company, you do not want the Equal Employment Opportunity Commission or a state agency to see questions they view as illegal on the documents. During this review, consideration should be given to whether or not the application form should state that in the event employment is offered and accepted, both the employer and the employee can terminate the relationship at any time. While this is not an ironclad protection, it does assist in developing the parties’ expectations at the time of the hiring.

If your company has an employee handbook or personnel procedures guide, it is essential that it be scrutinized. First, the document should conform to how your company actually does business. If it does not, change it. Second, there is language which should be included to enhance your legal position in any litigation. The handbook should reflect a disclaimer that provides in substance that the policies do not constitute a contract and are subject to change at any time. A model handbook would also include, among other provisions, equal employment opportunity, sexual harassment and religious accommodation policies.

Your supervisors should be sensitized to the issues that are involved in terminating an employee. Hold a seminar for them that covers generally federal, state and local anti-discrimination statutes and the law pertaining to wrongful discharge. This seminar should also cover your company’s policies and procedures for terminating employees.

The procedures should include the designation of a specific individual whose concurrence must be obtained before an employee can be fired. This individual should be fully aware of the federally protected classifications—race, sex, religion, national origin, handicap (if your company is a federal contractor) and over the age of 40. He or she should also know the additional categories which may be covered by state or local law—sexual preference, marital status, matriculation, etc. Finally, the designee should know where the relevant state stands on the law of wrongful discharge. This centralization should help to insure consistent and knowledgeable treatment of employee terminations.

If it is appropriate in view of the size of your company, establish an internal appeal procedure that the employee can utilize if he or she believes the termination has been unfair or unreasonable. This should involve a written submission from the employee covering the termination, an investigation by a relatively high level employee which may include an interview with the fired employee, and then a decision either upholding or reversing the ter-
mination. For the appeal step to have credibility, it must be more than a rubber stamp of the initial decision and occasional reversals will be necessary. An appeal procedure reduces the likelihood of mistakes, may develop evidence that is useful in later proceedings and, quite simply, is fair.

If these steps are taken, you will have discovered and corrected any legal holes, sensitized and developed controls over supervision and established an internal mechanism for insuring that company policy is carried out.

**Documentation**

It goes without saying that your company should maintain a personnel folder on each employee. This file, however, should include more than just the employment application, tax withholding forms, payroll and attendance records and insurance information. It should include both written warnings and commendations. When an oral correction or, if more formal, an oral warning is given, the supervisor should jot a note for inclusion in the file. The note need not be elaborate, but can consist simply of the date and a supervisor signed notation that the employee was counseled concerning sloppy work, lateness or whatever.

For regular employees, a periodic evaluation program should be instituted if one does not already exist. Supervisors will need to be taught the system and it should be emphasized in the training sessions that the evaluations must be accurate. There is nothing more difficult than trying to uphold an employee's termination for poor work when the evaluations reflect only sterling performance.

Ideally, the periodic salary adjustments will be consistent with the evaluations. Thus the compensation history can provide another vehicle for documenting dissatisfaction with an employee’s performance.

When there is a particular incident that could lead to termination, it should be fully investigated. Statements should be taken from and signed by the witnesses. This will serve to protect the company from changes in the witnesses’ stories.

These steps will develop evidence that is crucial for establishing the sound business reasons for terminating an employee.

**Terminating An Employee**

After the facts have been gathered and analyzed, then the decision can be reached to terminate the employee. If the firing is to be done orally, reduce to writing, in an internal memorandum, the reasons for the termination. If a letter to the employee is necessary, it should be carefully drafted to ensure that all relevant points are covered so that the company's position is preserved for a later lawsuit. The internal memorandum or the letter, if one is used, should be reviewed by counsel prior to retention in the files or delivery to the employee.  

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At the meeting to terminate the employee, there should be present for management both a spokesperson and an observer. Under the federal labor laws, the employee need not be permitted to have a representative present at a session held strictly for the purpose of implementing a previously reached decision to terminate the employee. If the interview has an investigatory purpose, a union represented employee must be allowed a representative if he or she requests it. This right of representation was recently extended to non-union represented employees and then even more recently, that extension was overturned by the National Labor Relations Board.

The employee should be informed of the decision and generally the reasons which underlie it. If the employee has a blemished record, that fact should be alluded to during the meeting. The employee should be given a copy of the internal appeal procedure, if any. You can discuss, and agree upon if possible, a letter of reference to aid the employee in finding a job since it is in your interest that he or she do so as quickly as possible. After the meeting is completed, both management participants should prepare notes on what transpired.

Your company may, if it chooses, pay severance, tell the employee where to file unemployment claims or provide outplacement services. Severance pay, if discretionary under company policy, may be made conditional on the execution of a full and complete release. However, pay to which the employee is entitled should not be withheld until a release is signed. In some states, the withholding of accrued pay for an unreasonable period of time is a crime.

Post-Termination Handling

After the employee is terminated, there are steps which can be taken to avoid litigation. All reference inquiries should be channeled to a specific individual, who should maintain a log of the calls. A script should be worked out in advance of any inquiries being received. At a minimum, the reference can include dates of employment, start and end rates of pay and a statement that company policy prohibits the disclosure of any other information without a waiver from the employee. If a mutually agreeable letter of reference was worked out with the employee, the contents of the letter can be supplied. Remember, however, that references given can come back to haunt you in a later lawsuit.

If the employee files an unemployment compensation claim, your company will have to decide first, whether it has legally sufficient cause for opposing and second, whether it is advisable to oppose the claim. If a decision to contest is reached, you and your counsel should be alert to developing, in the course of the hearing on the claim, evidence that may be of assistance in later litigation.

Conclusion

While today’s employment environment presents numerous opportunities for an employee to contest his or her termination, there are steps which the prudent employer can take to minimize the risk of potential liability. The steps listed above will not prevent your company from being sued. They will, however, serve to build the best possible position before the litigation is brought.

Moreover, the recommended actions are quite simply good employee relations for all employees—not just the problem employees. They apprise an employee of what is expected of him or her and let the employee know how he or she is doing in meeting those expectations.

If your company follows the steps outlined above, it can feel confident that it has done the most that it can do to minimize the risk of liability to the terminated employee.