BEFORE YOU TERMINATE. . .

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The good news for attorneys who practice litigation, plaintiff or defense, is that we are in a very litigious period of time. The bad news for attorneys who employ associates and staff is that we are in a very litigious period of time. Pennsylvania is an "employment-at-will" state. What that means in plain English is that anyone can be terminated at any time, or tender a resignation at any time, with or without cause, with or without notice, as the case may be. It is acceptable to terminate for no cause. It just isn't acceptable to terminate for an illegal cause.

The reality of employment-at-will is that many circumstances can give rise to an exception to this doctrine, creating an employment contract of sorts. Or at the least, giving the *impression* of having created a relationship other than one of at-will employment. In addition, termination without cause can be easily misconstrued as a termination done in bad faith or in violation of protective laws like the Americans with Disabilities Act (ADA) or the Family and Medical Leave Act (FMLA). So even though an employer acts in good faith and within the rights of an employer in Pennsylvania, the employer may nonetheless become embroiled in expensive litigation, defending itself against claims which may indeed seem credible to a jury.

There is insurance nowadays to cover this eventuality. It is called Employment Practices Liability Insurance (EPLI). And it has become a big seller among law firms, where even low level employees have developed enough familiarity with their "rights" as to be more prone to bring suit and to vigorously defend rights they may feel have been violated. The Bar-endorsed insurer, Colburn Insurance, offers an EPLI policy. If you have significant turnover or have had disquieting experiences with employees you have terminated, you should contact them for a quotation and review of the policy.

Having an insurance policy is, however, no substitute for good employment practices. The purpose of this article is to assist the reader in defining what should be done before termination, and what to take into consideration, in order to help avoid the possibility of a claim.

The Employee Handbook:

Is there a handbook? If so, does it contain a conspicuous statement which defines the employment relationship as one of at-will employment? Make sure that there is no language in there that can be construed as creating an expectation of employment other than at-will. For example, if there is an initial probationary or trial period of employment, does the handbook describe employment beyond that point as "permanent employment"?

Does the handbook set forth causes for termination? Does it provide for a progressive discipline? If so, you must make sure you are within the scope of the policy before you terminate, or can show good cause why you are not. For example, if your policy states that lateness may be cause for termination, but lateness is one of many stated problems which requires counseling and a warning before termination, then you cannot terminate someone for lateness without the necessary steps first, even though employment is at-will.

Does the handbook set forth a grievance procedure? If so, be sure that the employee has no grievances before terminating, whether reported to date to the properly designated individuals or not. Although there is some defense in not knowing of a grievance if the employee did not follow procedure and inform the proper person, it has been found that if the employee notifies anyone in the organization, it can be found sufficient cause of notification to the employer to result in a claim of retaliation.

In spite of these caveats, a properly written employee handbook can actually protect the employer from potential suits, by clearly spelling out the at-will relationship and the rules of conduct the employer requires for continued employment.

Examine Collateral materials:

Very rarely does an employer read carefully the booklets prepared by outside vendors such as medical insurers, long term disability insurers, pension managers etc. However, there can be language hidden in these "stock" booklets which can create an expectation of other than at-will employment. Read carefully to ensure that phrases like "permanent employment" do not appear anywhere. The word "regular" is a suitable replacement. Do not hesitate to require an insurer "clean up" its language either through an amendment to the booklet which changes language, or through a revision to the booklet itself, which is preferable.

Document the file:

There is an understanding among administrators that if the file is properly documented, and the employee has been properly counseled as to his/her failings, termination will rarely be required – the employee will usually leave voluntarily. And a voluntary resignation is a fairly strong defense against the possibility of a lawsuit, except perhaps for a hostile work environment.

No one wants to be terminated. Usually, when it seems inevitable, an employee will seek other employment, so as to leave on his or her own terms, and with dignity intact. Therefore, it is always in the best interest of the firm to openly discuss shortcomings with an employee, and to document the file immediately concerning the content of each conversation. This becomes particularly critical if a handbook calls for progressive discipline. If you terminate an employee and find that person is surprised, you have not met your responsibility to candidly communicate your dissatisfaction over time.

For employers, it is difficult to have a forthright conversation. It is uncomfortable, often emotional, and too often confrontational even though it shouldn't be that way. And so it is often avoided. Also, most employers would rather have the deciding hand on when and how the poorly performing employee is replaced. You may want to first find a replacement, so as to minimize disruption to the firm, before making it clear to the employee that they are not performing and are being terminated. While a good strategy from one perspective, it is sure to result in a very angry ex-employee who will be highly motivated to seek revenge. And it may also leave the firm vulnerable without proper documentation in the employee's file.

Prior Evaluations:

We all know that often attorneys give an undeserved glowing review when it is not called for, in order to preserve "peace" with his/her secretary or frequently used associate. Don't expect to terminate someone for performance issues when their file is full of glowing past evaluations, without having to pay the piper. One cannot defend the firm to a jury by saying that those evaluations were not really accurate. If the file contains several years of good evaluations, then the firm will have to wait while it more fairly documents the file before terminating. So even though employment-at-will is still at play, the wise firm has to properly prepare and document the employee's file in order to avoid a potentially costly lawsuit.

Protected categories:

Is there any way that your action could be construed as being based on race, color, or national origin? For example, suppose your mailroom staff is largely African-American, and the rest of your firm is predominately Caucasian, and you anticipate doing a labor reduction of only mailroom staff. You had better be prepared to present the sound business reason for the cutback, as your actions could be viewed as specifically targeting a minority.

Could your action be deemed to be based on religion? Are you terminating an employee who previously asked for a holiday off you did not really consider religious? Did it result in any vigorous disagreement on the part of the employee, but which you have since forgotten? In that instance, termination might be construed by the employee or a jury as retaliatory.

For employees age 40 or older, might your action be seen as age-related? For example, a desire to bring in less expensive staff can easily be seen as age-related discrimination, as those earning the most are usually the oldest, and would likely be replaced with those earning far less, who are usually younger workers.

Is the employee pregnant? Disabled? Suffering from a mental disability like extreme stress? Are you aware of any problems the employee may be experiencing which could result in a later claim under ADA? It has been found that an employer stance of "Don't Ask: Don't Tell" doesn't necessarily work. An employer has a responsibility to try to ascertain if there is a disability which requires accommodation, even if the employee makes no mention of it, and particularly if that disability may be impacting job performance.

Has the employee made any claims of mistreatment, harassment, hostile work environment, or suspected illegal or unethical activity at the firm? If so, termination may violate public policy under a variety of statutes from Title VII to the 'Whistleblower" statute.

Seek professional advice:

This article is not, nor is it intended to be, legal advice. However, it should raise your "antenna" as to a variety of situations and conditions which may reasonably give rise to a claim. If you think that terminating an employee before you have a replacement, and only after repeated counseling and documentation to the file is disruptive, think of the possible disruption and cost which would result from having to defend yourself in a EEOC investigation or subsequent civil action.

Clearly, you are best advised to avoid that possibility to the best of your ability. Yes, you can do everything right, and still be the victim of a nuisance suit. And yes, it is maddening that even in an at-will state an employer must go to great lengths to protect itself from lawsuits. Nonetheless, you shouldn't permit your emotions to refrain you from seeking qualified counsel early on when you think you are facing a situation which might be dicey. Early counseling can assist the firm in greatly reducing or eliminating the possibility of litigation.

The three essentials of employee management include a straight-forward policy handbook which clearly sets forth the at will-relationship and the firm's rules and expectations; a consistent policy of documenting the employee file with honest evaluations and notes; and frequent candid counseling with employees who are falling short of the mark. If these elements are followed, the chances of a lawsuit are virtually eliminated. In fact, the firm may find that termination becomes unnecessary as substandard performers leave voluntarily.

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