Termination

TERMINATION

While no employer likes to terminate employees, it is an inevitable and sometimes critical step to ensuring the business can function, grow or maintain compliance. Generally, in New York, the doctrine of at-will employment provides employers with broad latitude in determining whether or not to terminate an employee. Being employed at will means that the employer can terminate the employment of an employee at any time, with or without advance notice, and with or without severance pay. Thus, in essence, an employer may terminate an employee for whatever reason the employer deems appropriate, including a subjective reason that the employee is simply "not working out" or "not a good fit with the company culture."

However, terminating an employee should be carefully considered before execution. Almost every termination carries a risk of some employment-related claim, although there are certainly some terminations that are more risky than others.

First, there could be a "wrongful termination" claim that is premised on a breach of contract. The general at-will principles can be superseded by a specific employment contract, which protects the employee from termination unless there is good cause. And in the collective bargaining context, employers often agree to terminating employees in the bargaining unit only for "just cause." Thus, while the at-will rule generally applies in New York, some contract-created rights may protect employees from no-cause terminations. In these unionized and employment contract settings, employers must be particularly diligent in determining whether and when to terminate an employee, because a groundless termination could result in a grievance from the union or a breach of contract claim from an employee.

Another often-claimed basis that terminated employees will assert to challenge a termination arises out of the myriad of employment laws that protect employees. As discussed in other sections of this book, there are a number of federal, state and local laws that protect employees from discrimination on the basis of protected characteristics, retaliation, and harassment. Employees who belong in one of these protected categories, and who are looking for a way to sue an employer that has discharged them from employment, will often latch on to that protected category and claim that the employer terminated them unlawfully "because" of their age, skin color, race, military status, medical disability, national origin, gender, sexual orientation, religion, or any one of other protected categories. In the overwhelming majority of cases, the protected class has nothing to do with an employer's decision to terminate an employee who has engaged in misconduct , or who has bad performance. However, due to the broad latitude that employers have under the at-will employment doctrine, these discrimination statutes provide a way for employees to assert a claim to challenge their termination whereas they otherwise would not have a claim for wrongful discharge. It is imperative that employers are sensitive to this fact

so that they may make sound decisions when terminating an employee who might be in a protected category. In other sections of this book, we have discussed various laws that protect employees from discrimination. Employers should have a mental checklist that they can apply when evaluating whether to terminate a particular employee, or a group of employees.

In addition, employees are increasingly becoming sensitive to claims under anti-retaliation and whistleblower statutes. Generally speaking, these laws protect employees who have raised concerns or filed complaints in the workplace from being subject to adverse employment action (such as a termination) by the employer against which the complaint or concern was filed. As a result, employees who have engaged in the "protected activity" of filing a complaint in the workplace gain a "protected status" and any termination of their employment could give rise to a retaliation lawsuit. Employers should carefully consider any such protected activity by the employee in the last 12 months preceding the contemplated termination.

Lastly, employees may claim that they were either discharged or forced to resign (sometimes referred to as constructive discharge) as a result of harassment in the workplace. Harassment, like discrimination, must be based on a protected category. Generalized "bullying" of an employee by another employee or supervisor is not legal harassment and does not give rise to a claim for harassment, unless the bullying was motivated by someone's protected class. In other words, if the person being bullied is being bullied because they are of a certain religion, then that bullying is legal harassment. But if the person doing the bullying is a known jerk in the workplace, it might be difficult for an employee in a protected category to sustain a claim that they were specifically being targeted. Because of these concerns with harassment, employers, when considering termination of an employee, should consider whether that employee has recently been hinted to be or been the subject of harassing conduct by another employee or a supervisor. Oftentimes, the Human Resources Department or the direct supervisor will have information about any such harassment because the employee will have likely gone to HR or a supervisor to complain or at least suggest that there was a problem.

In all of the discrimination, harassment and retaliation claims, it will be critical for the employer to be able to prove that there were legitimate nondiscriminatory reasons for the employment action at issue. In this chapter, we are specifically discussing termination of employment. Therefore, the employer who is defending a discrimination, harassment, or retaliation claim will have to establish objective and verifiable reasons for the termination. For example, where the reason for the termination was poor performance, the employer will have to demonstrate that there were measurable metrics which were applied and showed that the employee was performing below expectation. If there is evidence that the expectation is uniform for all employees in a particular department, and the employee belonged to that department, the employer will have to establish that the employee was performing below the standards that are

expected for all employees in that category. Be aware, however, that the employee has the right to seek information about the other employees who might be subject to the same performance standard. In this case, it will be crucial for the employer to establish that other employees were treated in the same manner as the employee who might be making the claim. In other words, the employer will have to establish that the performance level at issue is such that anyone with that performance level is terminated.

As discussed in other sections of this book, this is where consistent application of workplace rules and standards, including performance standards, becomes critical to the extent there was an exception made in the performance expectations for someone who was not in a protected category, that could prove fatal to the employer's case. For example, if the standard is for all employees to assemble 50 widgets per shift and an African-American employee is terminated for only being able to assemble 20 widgets per shift, the employer will be in trouble if discovery of its personnel files establishes that a number of Caucasian employees who are able to assemble only 20 widgets per shift continue to be employed.

MITIGATING LEGAL RISKS IN TERMINATING EMPLOYEES

The first step in reducing legal risks in terminating an employee involves the implementation of a fair, professional, consistent and objective process. All employees should know and understand the process for how they may lose their employment. This process can be memorialized in an employee handbook/manual, and explained at the very outset of employment during orientation. Employees who know and understand, and especially employees who feel that the process was fair, are less likely to sue after termination. However, employees who feel that they were not given some sort of a "due process" are more likely to seek the advice and encouragement of a plaintiff's attorney, who is likely to find some arguable basis for why the termination was unlawful.

Depending on the business at issue, there may be multiple layers of supervisors who are interacting directly with employees and participating, on at least some level, when making decisions whether to terminate employment. It is just as important to teach these direct supervisors about the laws that apply and affect their ability to make termination decisions with respect to employees under their supervision.

Workplace policies do not have to be written, but it is highly recommended that the conduct and performance standards be stated in writing to the employees. Some time should be taken to train employees on what it means to their employer to act professionally and responsibly, how to call off from work or request time off, or how to deal with a colleague when there are personality issues. Again, when employees know what is expected of them, they are less likely to feel that the process was unfair should they be terminated for deviating from the expected rules and standards.

The standards should be consistently applied. To the extent there are exceptions, those should be documented. In case the employee sues for discriminator termination, the employer, in proving their case, will have to show how it has handled similar circumstances in the past. If the premise of the employer's defense is that it was simply implementing its policy to the employee, then the employer must establish that the policy is legitimate and applied to all other employees similarly. Therefore, if the rule in the handbook is that the employer will take disciplinary action against employees who threaten other employees, then the employer should document and discipline all employees who make any sort of threats against other employees.

As part of this process, when enforcing the standard and ordinary workplace rules, employers should make sure that employees understand what is happening. If an employee is being investigated for misconduct, he or she should be questioned and informed of the concerns against the employee. The employee should have an opportunity to respond to the complaint or issues that have led to the investigation. Specific policies should be cited when speaking with the employee, so that the employee understands that the employer is merely following its standard policies and procedures and enforcing the rules that apply to all. To the extent that employee is disciplined as part of a multistep disciplinary process, the supervisor or human resources professional should be sure to explain the consequences of any further misconduct.

In the ordinary course of managing employees and considering termination, employers should be comfortable conducting an investigation. An investigation is simply another word for review. Depending on the circumstances, an investigation can mean simply reviewing an employee's personnel file and speaking with the employee. More often, however, an investigation involves doing all this and also speaking with other employees who may have been witnesses or have some information about a particular set of events involving the employee. In some circumstances, it may be necessary to have a witness when employees or the employee who is the "target" of the investigation are being interviewed by the investigator. An investigation should be documented, as objectively as possible. The "investigator's" personal opinions and inferences should not appear anywhere in the documentation. Rather, the documentation

should simply state facts and observations of the information that was gathered and elicited through interviews.

Once the investigation into any circumstances that might necessitate termination is complete, the employer should gather the full record and make an assessment of whether to terminate the employment of the individual at issue. Before making any decision to terminate, however, the employer should consider the state and federal laws prohibiting discrimination, harassment, and retaliation, and evaluate whether the decision to terminate could trigger a lawsuit or some other legal proceeding by the employee who is the subject of the termination. In this regard, the employer should consider the following:

1. Is the employee employed at will?
2. How long has she/he been employed by the company?
3. Does the employee's personnel file and documentation support the termination?
4. Has the employee had disciplinary issues in the past and, if so, was he/she on a "last chance" status?
5. Is the termination decision consistent with the company's past practices and treatment of similarly situated employees?
6. Has the employee been involved in any recent protected activity that could give rise to a retaliation claim?
7. To the extent the employee is being terminated for workplace rule violations, has the employee received the rule at issue and acknowledged that he/she will abide by that rule?
8. Is the employee a member of a protected category?
9. Will the employee be replaced and, if so, does the replacement employee belong to the same protected category as the terminated employee?
10. What is the general protected class makeup of the workforce? Is the terminated employee – based on his/her particular circumstances – considered to be in the minority in the workplace?

MAKING A DECISION TO TERMINATE

There are a number of reasons an employee could be terminated. They could be terminated as a result of factors completely out of their control, such as business closing, reduced sales, job consolidation, or loss of work that the employee was performing. In other circumstances, employment termination could be strictly the result of the employee's own misconduct, poor attendance, or malfeasance. The termination decision could also be made as part of a larger reduction in workforce, a subject that is discussed in another section of this book.

Whatever the reasons may be, accurate documentation of the employer's decision and reasons to terminate should be made. Months later, the employer could be asked about the decision to terminate this particular employee. The question could come up in the context of an unemployment claim, a lawsuit, or a reference check. Whatever the reason might be, it is best practice to identify the reason underlying the termination rather than just documenting in the file that the employee had left after being terminated.

Another reason why the decision to terminate should be documented is because contemporaneously created records of the decision to terminate and the actual termination itself carry a lot of weight in employment proceedings, including unemployment, workers' compensation, and any discrimination lawsuits that might be filed.

COMMUNICATING THE DECISION TO TERMINATE

Terminating an employee is a delicate undertaking in the best circumstances. While terminations are ideally conducted in person, there is no legal requirement that employers terminate employees in person. Moreover, there is no requirement that the termination be conducted in any particular matter. Thus, what follows below is the best practices protocol for termination, to minimize the likelihood of a claim.

Ideally, a representative of human resources (or, if none, senior management) should be present at the meeting in which the employee's manager communicates the discharge decision. Someone who attends the discharge meeting should document carefully the reason provided to the employee for the discharge and any response by the employee.

The termination meeting should be short and to the point and the decision to terminate should be conveyed unemotionally and candidly. The employer should not try to soften the blow by complimenting the employee on other areas of performance as this sends mixed messages to the

employee. The employee should be treated with dignity and respect at all times. Employees who feel they were treated unfairly in the termination process are more likely to file a claim for wrongful discharge.

Employers should keep in mind the following points when conducting a termination meeting:

1. Inform the employee that he or she is being terminated shortly after starting the meeting.

2. Review the employee's employment history briefly with the employee, commenting on specific problems that have occurred and the attempts to correct these problems. However, do not engage in any argument with the employee if he/she wishes to refute the company's findings. Move past this.

3. Explain the decision clearly and concisely.

4. Avoid counseling the employee or complimenting the employee.

5. Make sure the explanation given for the termination is consistent with the truth. The reason provided to the employee for the termination is essential should a lawsuit be filed. In some cases, failure to state the true reason for the termination or stating reasons inconsistent with reasons later stated has been held to be evidence of bad faith or discrimination. It is possible to say too little or too much, so careful consideration should be given to any documentation stating the reason for the termination. When the termination involves a complicated matter, it may be wise to seek legal advice concerning the drafting of the separation notice.

6. Explain fully any benefits, including COBRA, retirement/pension and unemployment compensation, that the employee may be entitled to receive. If the employee is not entitled to certain benefits, explain the reasons for this.

7. Allow the employee the opportunity to respond. Pay close attention to what the employee says, but do not argue with the employee or otherwise attempt to justify the decision.

8. If the employee has the right to an internal review of the decision by a higher level of management, be forthright in advising the employee of this option. If the decision is final, inform the employee of this fact.

9. When an employer is firing an older employee, a pregnant employee, a minority employee or any other employee who falls into any other protected category, it is

essential that the person conducting the conference not make any reference to the protected characteristic that could be later be used as evidence of discrimination. This includes any references to race, color, sex, age, religion, national origin or disability, or any protected characteristic covered under federal, state or local law.

10. The manager or human resources representative conducting the meeting should be organized and confident in communicating the termination decision.

11. During or after the meeting the employer should document what the employee was told and how the employee responded.

12. At the time of the actual discharge, there should always be at least two managerial employees or at least one manager and one human resources employee present.

13. Provide for the return of materials, documents, computers, cell phones, tools, etc. in the personal possession of the employee. If there is any suspicion that a lawsuit may be filed, consider making arrangements to preserve electronic evidence by making backup copies of hard drives before they are repurposed to another employee.

14. Establish a procedure to retrieve IDs, delete passwords and change locks and related security matters. Plan ahead if physical security preparations are needed.

15. Remind the employee of any noncompetition, non-solicitation or confidentiality requirements that may apply and confirm this in a post-termination letter to the employee.

16. If appropriate, consider seeking a release of liability.

17. If appropriate, conduct a well-prepared exit interview and follow up on any useful suggestions made by the exiting employee.

18. Ensure the employee physically leaves with as much dignity as possible. In the case of discharge, give specific thought to transportation arrangements if the employee is impaired or added security measures if the employer has reason to worry about any potential workplace violence issues.

19. Remove the employee's ability to access the company's computer system so that sensitive documents are not removed or destroyed by a disgruntled employee.

20. Ensure all employment-related documents are brought up to date and that they are complete, accurate, signed and approved as appropriate and dated.

21. Make sure termination procedures and exit interviews are consistent with all employees.

DOCUMENTS FOR TERMINATED EMPLOYEES

In New York, employees who are terminated must receive, within five days of the termination, a notice confirming the termination, the date of termination, and the impact of the termination on their benefits. The form can be issued to the employee during a termination meeting, or it can be emailed or mailed to the employee.

In addition, the Unemployment Insurance Law requires employers to issue a "Record of Employment" notice to employees who are separating employment, irrespective of the reason for the termination and regardless of whether the separation is temporary or permanent. The written notice to any employee who goes off the payroll must include the employer's name, the New York State Employer Registration Number, the mailing address where payroll records are kept, and instructions to employees to give the information on the form to the UI Claims Center. Employers may print the Record of Employment form on the (IA 12.3 form) from the New York Department of Labor website, www.labor.ny.gov, under the Unemployment Insurance tab (under the Forms and Publications link).

WAIVERS OF CLAIMS AND RELEASES OF LIABILITY

If the employer believes the employee may file a claim following the termination or if there is an ongoing dispute between the employer and employee at the time of termination, it may be in the employer's best interest to enter into a separation agreement that contains a release of liability from the employee. (Unless there is a policy in place to offer such separation agreements, some courts may permit an inference that the mere offer of the agreement is evidence of possible discrimination or other legal liability. Therefore, it would be wise to consult with company counsel before offering separation agreements on an ad hoc basis).

In a separation and release agreement, the employer agrees to provide some consideration (usually in the form of monetary compensation) in exchange for the employee's agreement to release the employer from any claims the employee might have that arose during employment with the employer. An employer that demands a full release for providing only minimal

additional consideration runs the risk of antagonizing the terminated employee and encouraging that individual to get a lawyer to sue the company.

A release must be knowingly and voluntarily entered into to be enforceable. This means that employees must understand that they are releasing certain specific causes of action that they may have after termination and they are signing the release without coercion or duress.

Separation and release agreements should always be prepared by the employer's attorneys. If these documents are not carefully drawn, they can prove to be ineffective to protect the company and may have disastrous tax consequences for the affected employees. Under the deferred compensation rules pursuant to section 409A of the Internal Revenue Code, if a severance agreement is not properly written, taxpayers can be forced to pay a 20% excise tax, recognize taxable income early even if it is never paid to them, and have to pay interest from the time that the deferred compensation vested. As a result, great care must be taken with separation agreements that call for the payment of any form of severance pay to a terminated employee.

Another reason for involving counsel is to ensure that the release complies with applicable federal, state and local laws. For releases that seek a waiver of claims under the Age Discrimination in Employment Act (ADEA), the release has to include specific statutory language in order to be binding on the employee. Without such language, the employer runs the risk of having the release signed by the employee, paying the employee the agreed-upon consideration for the release, but then being sued under the ADEA because the release was actually not a valid waiver under the law.

In addition, there are some relatively new developments when it comes to separation agreements that purport to waive and release an employer from claims related to sexual harassment. The Tax Cut and Jobs Act prevents an employer from claiming a tax deduction for any settlement related to sexual harassment or sexual abuse if the settlement or payment is subject to a nondisclosure agreement. The law also prohibits a tax deduction for attorney's fees related to such a settlement or payment. As a result, when crafting a separation agreement for a terminated employee, care must be taken either by dropping any nondisclosure provision or by taking steps to avoid any implication that any payment is linked to a sexual harassment allegation.

In addition, prompted by the #meToo movement, New York has also banned nondisclosure provisions in settlements involving claims of sexual assault, harassment or discrimination on any basis, to the extent they restrict the complainant from disclosing the facts and circumstances of the underlying claims. This prohibition may be waived by the employee complainant, if it is his/her “preference” to include a non-disclosure provision in the document resolving the claims.

To memorialize the person's preference, the parties must comply with the following steps and timeframe:

1. Any such term or condition must be provided to all parties, and the person who complained must have 21 days from the date the term or condition is provided to consider it.

2. If after 21 days, the term or condition is the preference of the person who complained, it must be memorialized in an agreement signed by all parties.

3. For a period of seven days following the execution of an agreement containing the term, the person who complained may revoke the agreement and the agreement will not become effective or be enforceable until any revocation period has expired.

Additionally, any provision in a contract or other agreement between an employer and any employee or potential employee of that employer entered into on or after January 1, 2020, which prevents disclosure of factual information related to any future claims of discrimination is void and unenforceable; unless it notifies the employee or potential employee that it does not prohibit him or her from speaking with law enforcement, the EEOC, the State Division of Human Rights, a local commission on human rights, or an attorney retained by the employee or potential employee. This requirement pertains to any confidentiality clause entered into by an employee, such as a confidentiality agreement entered into as a condition of employment.

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