

HOW TO REDUCE THE RISK OF A LAWSUIT PRIOR TO TERMINATION

There are some specific areas where liability needs to be carefully monitored so that it can be avoided. But there are also some specific actions that a company can take to materially reduce the risk of a lawsuit prior to termination.

Company Termination Policy

First, create a company policy that is universally required to be read and signed off on, certainly for new hires, but also on some type of regularized interval of time for active employees. The policy should say that unless an employee has a very specific individualized employment contract with a definite duration of time, then he/she is an at-will employee and can be terminated at any time without cause or notice.

In that policy there should be a written statement as I noted above that no one on their own is authorized to either change the policy of at-will employment or to offer special contract-like assurances to any employee or perspective employee. Furthermore, it should be clearly pointed out to each new employee that by denoting a probationary period of employment, this is explicitly not intended to imply that subsequent to that probationary period that their employment is committed to for any specific period of time. In other words, the employees are always at-will employees unless they have a highly specific and individualized employment contract with a clear intent as to duration of the agreement.

Statutory Termination Checklist

Second, even though this writing has not focused on the prominent statutory requirements for the employer (Title VII, ADA, etc), previous to deciding upon any termination a checklist for those statutes must be reviewed. The review should pay particular attention to what the company has done in the past. The questions that need to be asked are: (a.) is this person being treated exactly as any other person with the same set of facts and circumstances? (b.) is there a rush to terminate this person and if

so, why? (c.) is there somehow the company would be better off if the person was not terminated providing there is another legal and procedurally appropriate way to handle the situation?

Document the Process with an Audit Trail

Third, the steps leading to a decision to terminate should be well-documented and well vetted, as I have note above. But just as important there needs to be an audit trail that is cogent and succinct and that actually proves that the process was followed. This will include some type of checklist or ISO type procedure that verifies the people and the times where the appropriate actions have been taken. The process needs to be current. For example, if last week for some reason there was a decision to terminate an employee based on a questionable set of circumstances and misunderstanding of company policies, don't blindly follow the potential mistake of the previous week. Just because a process is documented it is not automatically correct. If you need to take the time to re-verify the process, then do it.

Calibrate your Staff

Fourth, calibrating the HR and management staff. Too often, especially in large organizations, managers do not meet to discuss the methods they use for making decisions in the progressive disciplinary process, up to and including termination. Managers and HR staff members that manage the disciplinary and termination processes need to meet on some type of regular basis to review the processes they use. Invariably, even where an organization has a well-defined process, different staff members have a different understanding of how that process is actually to be implemented. Therefore it is critically important for folks to get together and review their understanding of how the procedures and processes are actually implemented. This is called calibration. Another method of getting some of this calibration done is for manager to discuss what he is doing with a peer or supervisor to see if they think the process has been implemented correctly and effectively. Preferably, this should be done before making final decisions.

Paper Trail

Fifth, the paper trail. Termination of someone's employment is the biggest step an employer can take with respect to its employees. Most HR staff members are very familiar with the cost, time, effort and work it has taken to bring folks in the door and get them trained as employees, and if only for that reason, the company's bottom line demands that people are terminated for some reason that is in the best interest of the organization. Having a well-defined, progressive disciplinary process makes the system work not only more efficiently, but it is less stressful on the staff involved. Of course, the progressive disciplinary process should be laden with disclaimers stating that employment remains at-will.

As a manager, my view has always been that, for the most part, people terminate their own jobs. They do that by being aware of where they are in the disciplinary process and being aware of the rules by which the organization operates.

For example, if an employee is in the fourth step of a disciplinary process and he is on notice that certain actions will result in his termination, when he then does what he is not supposed to do, the termination is a fairly straight forward process. A strong paper trail identifying and documenting each step in the process can certainly save the cost of an extended lawsuit, but just as importantly, it can save management time and can reduce the stress levels for those managers that must do the actual terminations.

From a legal perspective, where there is a well-defined process that is used in a consistent, calibrated way, the company's legal counsel has an opportunity to review that process and to suggest changes and adjustments as required by new court decisions, new statutes or new circumstances.

Progressive Disciplinary Process

There are many formulas for progressive disciplinary processes, but as an example, lets review a fairly traditional process.

Overview:

Employees must be made aware that progressive discipline is the primary process, but that there are actions that they can take that will lead to immediate termination, without the need of going through each step. Examples of this might be, fighting on the job, stealing or serious safety violations. It should also be stressed that the progressive disciplinary process is not a contract and that the employees remain at-will employees.

- Step 1: A written note to file of a verbal contact on an issue.
- Step 2: A formal corrective contact that notes the issues and potential ramifications from further inappropriate actions or behavior on the part of the employee.
- Step 3: Letter of reprimand. This type of letter clearly indicates to an employee that this is getting very serious and that his actions have been unacceptable.
- Step 4: Letter of probation. This type of letter very clearly lets the employee know that they are on the verge of termination. The letter should also explicitly spell out what the employee needs to do to keep their job, and it should have some certain timelines for review of the employees post letter performance.

In all of the letters and/or discussions that go on with the subject employee, the manager should note to the employee that if they need assistance to resolve these issues, that management is willing to discuss and help where appropriate.

Don't Rush the Process

Sixth: What's the Rush? Too often companies allow managers and supervisors to terminate employees without sufficient investigation. Unless there is some kind of safety concern or a concern for imminent harm to the business, there is no need to rush a termination. Supervisors should be trained that where they believe that what has occurred mandates termination, the first choice is to send the person home pending a decision by the company. This allows HR and others to be involved where necessary and it is especially important for late shifts and overnight shifts where the supervisor involved may not have access to all the information and guidance that is necessary to make a solid decision. Don't let your staff get rushed into costly mistakes.

Sign Off Authorization

Seventh: Sign off authorization. This may seem too simple, but it is critical for organizations to make clear, pro-active decisions on exactly who has authority to terminate employees. If for no other reason, it can at least force the delay of a termination until someone who understands the process and the liabilities involved has the time to review the decision.

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NOTE: This is general guidance ONLY and NOT specific legal advice for any specific case.

As always, be sure to consult an qualified attorney for legal advice.