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Employer Tips for Lawfully Ending the Employment Relationship

Brian Arbetter and Maria Biaggi, *New York Law Journal* – *August 12, 2019*

This article addresses best practices for discharging an employee in order to decrease the risk of potential exposure to a lawsuit and to maximize an employer's ability to defend against a claim of discriminatory discharge.

Absent contract terms to the contrary, most employees in New York are employed on an "at-will" basis. This means that employers can fire employees at any time for any reason, or for no reason at all, provided that the reason is not unlawful. If an employee is employed pursuant to a contract (whether an individual employment contract or a collective bargaining agreement), then the terms of the contract apply, and the company should carefully review the contract before making a decision to terminate an employment relationship. It is also unlawful to terminate an employee, or to take any adverse employment action against an employee (e.g., decrease in pay, diminished job responsibilities, etc.), because of the employee's age, race, religion, sex, national origin, actual or perceived disability, or any other class protected by federal, state and/or local law. Examples of protected classes under the New York City Human Rights Law include gender identity, marital status and partnership status, pregnancy, sexual orientation, status as a veteran or active military service member, arrest or conviction record, caregiver status, credit history, unemployment status, salary history and status as a victim of domestic violence, stalking and sex offenses.

Despite the fact that an employer may have a legitimate, non-discriminatory business reason for terminating an "at-will" employee, an employer may find itself to be the subject of a discriminatory termination lawsuit. This article addresses best practices for discharging an employee in order to decrease the risk of potential exposure to a lawsuit and to maximize an employer's ability to defend against a claim of discriminatory discharge. (This article assumes that the employee is at-will and is not part of a unionized workplace, public employment or employed by contract.)

Before the Termination

An important and common theme underlying many discriminatory termination lawsuits is that of perceived fairness: Did the employer act reasonably and fairly under the circumstances? Proper documentation and consistent application of an employer's policies and procedures are essential to successfully avoiding or defending against wrongful termination claims. Employers should require employees to sign and date an acknowledgement that they have received, reviewed and understood the employer's policies and procedures, so that they cannot later claim that they were unaware of a policy that they were alleged to have violated. Consistency is key. An employer should not impose more severe discipline on Employee A than Employee B when they have both engaged in the same misconduct, absent a legitimate reason (e.g., Employee A is a repeat offender). Inconsistent application increases an employer's risk of exposure to a discrimination claim and undermines the employer's credibility.

Brian Arbetter is an employment and labor partner based in Norton Rose Fulbright's New York office.
Maria Biaggi is a counsel also based in New York.

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An important policy with respect to terminations is progressive discipline. Does the employer have a progressive discipline policy? If so, the employer should ensure that the policy is followed by those with the authority to enforce it. If a company does not have a written policy, an employee should still experience some form of documented counseling and performance feedback over time, absent an egregious act by the employee, prior to the decision to terminate his or her employment.

If an employee is placed on a performance improvement plan, the plan should consist of specific, measurable action items for the employee, so that it is clear whether or not the employee has achieved the terms of the plan. If the employee fails to achieve objective performance criteria, this lays the proper groundwork for a sound termination. To this point, it is important to clearly define performance expectations. Employees should understand the expectations and requirements of the job. If the employee is unable to meet those expectations, the employer should create a clear record of the employee's failure to do so.

One common mistake made by employers is not accurately evaluating an employee's performance. A supervisor or manager may be disinclined to provide negative feedback in a written performance review, only describing the positive aspects of the employee's performance. The supervisor's reluctance may create an issue later on if, for example, the employee's performance becomes untenable but the employer lacks the documentary evidence to support his or her poor performance and/or the documentation that does exist contradicts that the employee was a poor performer. Employers should also avoid including personal comments and speculation in an employee's performance evaluation, which may undermine the employer's credibility.

Documentation becomes particularly important if an employee makes a complaint of discrimination or harassment. If the employee's performance was unsatisfactory prior to the complaint, but there is only a record of poor performance after the complaint, this may create the appearance of retaliatory animus (i.e., "my supervisor only gave me a negative performance review because I made a complaint") and further undermine the credibility of the proffered reason for the termination.

Most importantly, employers are best served to have every new employee sign an express, written document confirming the at-will nature of the employment. This type of document should be a stand alone, rather than buried in an employment handbook; this is to preempt any future employee litigation arguments that the language was so buried that it was never noticed or in fact acknowledged. Also, in today's world of class actions and frequent litigation, employers are well advised to consider having new employees sign valid written arbitration and class action waiver agreements.

The Decision to Terminate

When making the decision to terminate an employee, the employer should specifically identify the reason(s) for the termination. For example, did the employee violate a company policy? Which policy? Is the termination part of a layoff? Is the decision based on the employee's performance? If the reason for the termination is poor performance, what are the specific issues with the employee's performance? Are there concrete examples of the identified issues? The employer should carefully review the relevant records and documentation to ensure that the reason for the termination is supported and that there is no unlawful reason, such as discrimination or retaliation.

Many employers wonder why do they need a reason if the employee's employment is at-will. While it is true that at-will means that the employer is generally free to end the relationship without reason, the reality is that a reason is always required in fact. This is because without a reason, most employees will assume that there was no reason and that they are being discriminated against or otherwise wrongfully let go. In employment litigation, even where the relationship was legitimately at will, the employer will need to explain to a trier of fact why the termination decision was made. For this reason, it is crucial to know that reason and ensure it is legitimate and legally defensible before acting.

Preparing for the Termination Meeting

How the decision is communicated to the employee is also key to ensuring a smooth transition and mitigating the risk of a potential lawsuit. The individual communicating the decision should prepare a list of talking points to ensure that all points are addressed during the meeting and should be

prepared to address any questions the employee may have. The company representative should likewise be prepared to address questions regarding pay and benefits and should review the status of any employee benefits. Under New York Labor Law §191, employers must pay all unpaid wages no later than the regular payday for the pay period during which the termination occurred (with special rules for the payment of sales commissions). Vacation policies can provide that employees lose accrued benefits under certain conditions, including forfeiture of vacation pay on termination. However, employers must provide written notice of those conditions. New York Labor Law §195(5). In addition, the employer should be ready to address the procedures for returning company property, such as corporate credit cards, laptops or cell phones, as well as any confidentiality or non-disclosure policies or agreements in effect.

The Termination Meeting

The meeting should be held face-to-face in a private area and in the presence of a third witness, typically a human resources representative. The presence of a third party to witness and take notes of what is said during the meeting allows the speaker to focus their full attention on delivering the message. The witness's notes also create an important record, which can help avoid subsequent disputes over what was said during the meeting.

It is of utmost importance that the termination decision is communicated accurately, directly, and concisely. If an employee is being terminated for poor performance, the employee should not be told that there is no longer a need for the position. Likewise, if an employee is terminated for performance reasons, the employer should not communicate to its workforce that the employee has resigned, or send a company- or department-wide email thanking the departing employee for his or her hard work. Similarly, the company representative should avoid making inconsistent statements, or any statements that may be perceived as inconsistent, such as "This wasn't my decision." While it is appropriate to show compassion towards an upset and/or angered employee, the employer should be direct and remain firm on its decision. Once the decision is communicated, it is because it has been carefully reviewed and is final. An employer should give the employee a chance to express themselves; however, the termination meeting is not a time to argue over the validity of the employer's decision.

After the meeting, employers should present or send the employee something in writing summarizing the meeting and the fact of termination. This document should also inform the employee of all required rights, such as rights to unemployment, rights to COBRA insurance continuation and the like. What is required varies from state to state and city to city.

An employer may also consider limiting legal risks by offering something to which the employee is not otherwise entitled (small severance) in exchange for the employee signing a separation and release agreement, which should be prepared and reviewed by an attorney in advance of the termination meeting. An employer may also wish to consult with an employment attorney before making and communicating the decision to terminate depending on the circumstances of the particular case. Attorney fees incurred for preventive advice and counsel are small compared to the time and expense of defending against a lawsuit and the potential disruption to the employer's business operations.

NORTON ROSE FULBRIGHT

Contacts

If you would like further information please contact:

Brian Arbetter
Partner
Tel: +1 212 318 3360
brian.arbetter@nortonrosefulbright.com

Maria Biaggi
Counsel
Tel: +1 212 318 3039
maria.biaggi@nortonrosefulbright.com

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