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Avoiding Pitfalls
When Terminating Employees

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‘Hell hath no fury like an employee scorned’

- **Terminations are a variation on a bad divorce**
- **Terminations must be handled very carefully from various perspectives:**
 - **Legal**
 - **Factual**
 - **Practical**
 - **Psychological**
 - **Business**
 - **Morale**
 - **Liability**

Nowadays, every employee knows someone who sued an employer and/or an attorney who sued an employer.

Handle terminations to reduce or eliminate risk of suits by employees

- **For this seminar, we will assume:**
 - At will employment
 - No formal employment contract in place
 - No collective bargaining agreement
 - No particular statutory provisions apply
 - No formal Reduction in Force program in place
 - No disparate impact issues
 - Not dealing with a publicly traded company bound by SOX
 - No Qui tam issues present

Best Practices: Consult Counsel before, during and after terminations

- **Review applicable laws and regulations:**
 - Federal
 - State
 - County
 - City
- **Handle each termination as a unique event on an ad hoc basis. No one simplistic approach should be applied uniformly or blindly.**

Terminate right by hiring and managing right

- **Completed employment application**
- **Background check**
- **Handbook and policies**
- **Training**
- **Consistent and uniform application of rules**
- **Reasonably prompt investigations well-documented**
- **Objective, fair, reasonable, non-discriminatory and progressive discipline**

At Will Employment

- **Basically, an at will employee can be terminated at any time for any reason or no reason**
 - So long as the reason is not “wrongful” i.e.,
 - **Illegal**
 - **Discriminatory**
 - **Retaliatory**
 - Title VII
 - FLSA
 - Workers compensation
 - Whistleblower (state or federal law (e.g., SOX))

Grounds for immediate termination

- **Circumstances may exist when it behooves the employer to terminate the employee immediately**
 - **Illegality**
 - **Violation of regulations**
 - **Health and safety concerns**
 - **Imminent threat related to potential violence (weapons in the trunk)**

An employer may have a duty/responsibility to terminate an employee, including circumstances where the employee may impose a threat. Otherwise, the employer could be liable for negligent hiring, supervision and/or retention.

For cause termination

- Thoroughly investigate grounds promptly
- Don't react impulsively
- Obtain statements from witnesses
- Discuss the issues with the employee
- Review all prior documentation and disciplinary history
- Examine records of employees with similar issues
- Determine if the employee is in a protected class and whether there has been or will be any disparate treatment
- Review the investigation with an objective third person
- Determine whether any adverse action violates any law
- Discuss the decision with final decision maker
- Determine the best time and place to carry out the action in the presence of a witness
- Document the discussion with the employee

Progressive Discipline

- **Document, document document--why?**
 - Apprises employee of status and is fair
 - Helps avoid charge later that the termination was wrongful or that the reason given for the termination was pretextual.

Policies and procedures

- If an employer has policies in place prohibiting discrimination, harassment and retaliation, and conducts training and has procedures in place to investigate claims, and conducts investigations reasonably and promptly, a terminated employee who later claims he/she was a victim will not prevail if it is shown that the employees didn't make a complaint or follow established procedures set up by the employer. In this way, an employer can rely upon the Faragher/ Ellerth defense.

Retaliation Claims

- **An employee can sue for retaliation, claiming he/she was terminated because he/she made a protected claim, even if the underlying claim was baseless.**
 - Title VII
 - FLSA
 - Whistleblower
 - Workers Compensation, etc.

Burlington Northern decision and “adverse action”

- **Almost any action by an employer which has an adverse effect on an employee can be grounds for a retaliation claim**
 - Almost any change in the condition of employment, e.g., re-assigned to a new position, new work station, different schedule, turning down vacation request, etc.

Before termination

- **Plan**
- **Protect the company's assets and personnel**
- **Control and prevent continued access after termination**
- **Plan when, where, and by whom termination will occur**

The termination event

- **Controlled environment**
- **Not on a Friday**
- **With witness present**
- **Involve someone who is not antagonistic**
- **Discuss reasons generally (if you avoid discussing any reason or get too specific, you're asking for trouble). Avoid the George Costanza "It's not you, it's me" approach.**
- **Apply the Golden Rule**
- **Avoid the perp walk**
- **Cut off the employee from access**
- **Communicate with the staff**

Separation agreements

- **Consider an amicable separation rather than a unilateral termination**
 - Full General Release
 - Confidentiality and non-disclosure of trade secrets
 - Non-solicitation
 - Non-disparagement
 - Confirming no additional claims
 - No re-applying for employment
 - Covenant not to sue
 - Return of all property

Make sure to consult with an attorney to ensure that the provisions are drafted correctly so that they are legal and enforceable

Pitfalls to Avoid

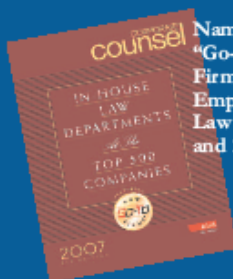
- Don't withhold or set off against last pay
- Don't defame
- Don't tortiously interfere
- Don't mess up unemployment claim
- Avoid the set-up
- Consider Qui Tam possibilities
- Don't discharge summarily (suspend if need be)
- Avoid letting supervisor handle entire process
- Inform employee in person
- Document everything
- Don't hesitate to pull the trigger
- Don't allow terminated employees to linger

Post termination

- **Try exit interview**
 - Ask if employee has any comments, suggestions, claims
- **Say THANK YOU**
- **Be sure to give a written reminder/warning to the ex-employee about preserving and not disclosing or misappropriating trade secrets or confidential information**
- **Handle all inquiries about the employee from any third parties or prospective employers carefully. It's best not to comment.**
- **Keep your fingers crossed and hope for best.**

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Our Employment Law Group serves the needs of employers across Florida and throughout the country



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PRACTICE AREAS

- FLSA Wage and Hour
- Title VII discrimination claims
- ADA public accommodation
- Handbooks and training
- Non-compete and trade-secret claims
- Severance agreements
- Family & Medical Leave Act, ADEA, FCRA

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