PREVENTING WRONGFUL TERMINATION EMPLOYMENT CLAIMS – AN OUNCE OF PREVENTION

Did you know that each year, the U.S. Equal Employment Opportunity Commission (EEOC) on its own and through various affiliated state employment commissions receives over 100,000 complaints on behalf of disgruntled employees? Complaints arise from a number of allegations including age discrimination, sexual harassment, race and a number of other protected status related complaints. The single most common allegation against an employer historically arises from the feeling by an employee that they were wrongfully terminated. Logically, it makes sense that an employee would be most motivated to sue when they are without a job and when they no longer worry about workplace repercussions that may result from their taking action against their now former employer. Also, employees are much more likely to sue when they are unable to find another job and with unemployment in the 10% neighborhood in most parts of the country, you can see why there has been a wave of additional employment practices claims, wrongful termination-based in particular.

Mr. Dithers. Perry White. George M. Steinbrenner, III. Donald Trump. These fictional and real employers evoke an immediate vision of the ultimate threat and/or promise, sometimes fulfilled, to employees - termination. But the days of a simple “You’re fired!” are long gone. The laws concerning the separation of an employee from their position, whether they are a middle manager, a cub reporter, a line employee, or the participant in a reality show, or whether it is called terminating, firing, canning, a reduction in force, layoff, or any other number of synonyms or expressions, present issues and potential “wrongful termination” exposure or for employers, regardless of size. There are simple steps to take in order to limit your exposure.

Consistently apply your discrimination prevention policies. If complaints are made about discrimination, investigate them. Even if the results show that the complaint was not validly made, care must be made to allow the process to be viewed as fair. There should be no retaliation against someone who makes an invalid claim unless it is so unreasonable and disruptive that a retaliation claim could be adequately defended.

The best defense to a claim of discrimination is a well documented file dealing with the true reasons for termination. These reasons can either be performance based or financial based.

A. **Performance Based Defense**

Just because an employee is a member of a protected class does not give them impunity to perform poorly. Any improper activities, failure to meet job requirements, e.g. lateness, improper time out of the office, failure to meet goals and targets, etc., must be consistently documented in your employees’ files. They should be advised of the problems and, initially, be given an opportunity to cure.
Another important factor in defending a claim is the consistent application of rules. Even if a file is thick with transgressions or improper actions, if other employees have similar issues and problems, and those other employees were not terminated or disciplined because of those problems, it could undermine a defense or reflect poorly on the termination. In other words, even if a member of a protected class is performing poorly and that is reflected in their personnel file, the defense may be undermined if the employee can show that others with similar problems have not been disciplined or treated consistently.

B. Financial Reason Based Defense (Business Necessity)
Employers may need to terminate employees for financial reasons. If a member of a protected class claims a wrongful termination, the employer must be in a position to prove that there were valid financial reasons for the termination of the complaining employee as opposed to other employees. Merely stating that “business is down” or that you need fewer employees may be deemed a “pretextual” reason created in order to justify termination when there are actually other reasons behind the termination.

Obviously, a wrongful termination claim can create broad problems for employers. Aside from the expense of retaining legal counsel, even if there is employment practices insurance, there is the time lost for hearings, conferences, depositions, and trials if the claim should go that far. Remedies for wrongful termination include back pay, front pay and even an order that the terminated worker must be rehired, although, that is rare in our experience.

We cannot stress enough the need for communication with employees and the preference to providing an opportunity for problem employees to rehabilitate or remedy their deficiencies. The preference is to meet with employees, explain the problems in a dispassionate manner and see if they can improve.

It is equally important to make sure that you hire people in a fair and nondiscriminatory fashion. It is also advisable to audit your trends and know your statistics. You should be aware of who you fire, when you fire them and what their backgrounds are. A strong statistical record of equal employment opportunities will support a claim of discriminatory termination if others in the same protected class are employed.

Termination of an employee should be considered as a last resort. It is not in the best interests of any employer to make it a regular practice. It is, however, often necessary because of legitimate business concerns arising from an employee’s poor performance or because of the ups and downs of a business. Awareness of the applicable laws at every stage of the employment process, from the inception of the business, through hiring, through employment, through termination, is important to avoid the potential pitfalls of a wrongful termination claim.

Courtesy of STEVEN L. YOUNG, Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
THOMAS R. HERENDEEN, Philadelphia Insurance Companies

Philadelphia Insurance Companies would like the following attached to the article:
Philadelphia Insurance Companies is a leading provider of employment practices liability, directors and officers’ liability and other management protection insurance products. With over 50,000 policyholders countrywide, Philadelphia has developed a depth of experience in serving employers of all sizes, particularly the unique needs of smaller firms, those with less than 100 employees. Wilson Elser is a national employment law firm with extensive expertise in employment law and risk control. Philadelphia has teamed up with Wilson Elser to provide a number of loss control tools which are available at www.phly.com. Steven Young, a Wilson Elser partner, provides insight on the difficult but necessary process of effective employee terminations, highlighting many of the issues and loss prevention steps that employers need to consider and apply in an effort to promote a positive workplace and avoid expensive and time-consuming employment claims.