Termination ? Breaking Up is Hard to Do: Legal and Practical Advice on Employee Discharges

September 16, 2003

A termination is the most common trigger for lawsuits and discrimination charges arising out of the employment relationship. When that happens, the ex-employee sustains a financial loss and may experience a wide variety of emotional responses that manifest themselves in the need to take some type of legal action. Developing an effective strategy for avoiding and defending those lawsuits is necessary long before the employment relationship starts to crumble. While no amount of planning and careful attention can prohibit every disgruntled ex-employee from filing a charge or a lawsuit, it can be the key to quickly, efficiently, and successfully defending those claims even in the case of the most litigious individuals. The following guide should help you to reduce your company?s exposure for firings. Before Trouble Begins Your company should have clearly defined policies regarding the reasons for a termination. Those policies may provide a list of infractions subjecting an employee to dismissal, but if they do, they should be open-ended, clearly permitting a discharge for any unlisted reason that you deem appropriate. Discipline and firing policies should also reflect the issues raised by modern technology, such as abuse of the company?s Internet, e-mail, computer, and telephone systems. Every compilation of your company?s employment policies should contain clear and conspicuous contractual disclaimers and affirmation of the at-will employment relationship (i.e., that either party may end the relationship at any time for any reason or no reason at all). ?Clear and conspicuous? means in a bold-faced font and all capital letters or italics, set forth at the beginning of the handbook, policy manual, or policy compilation as well as in other portions of the handbook that discuss the nature of the employment relationship. It?s also important that you adopt discrimination and harassment policies that provide mechanisms for complaints, the investigation of those complaints, and redress. Those policies should include retaliation provisions. Discrimination and retaliation claims are commonly filed after a discharge, and inadequate policies make it extremely difficult to successfully defend against those charges. Once you?ve developed the proper policies, you should diligently ensure that they?re disseminated to all your employees. The best strategy is to distribute them to all your workers when the policies are initially formulated and each time they?re revised. You should also distribute current copies of your employment policies to each incoming
employee. At least one copy should be kept in a location that’s accessible to employees. The policies also should be posted in a location frequented by most employees, such as a lunchroom or locker room. Each time that the policies are distributed to an employee, you should obtain a signed acknowledgment confirming that the individual has received and will read them promptly. Most important, a copy of the acknowledgment should be filed so that it’s accessible to your company later. It’s common for employees or ex-employees to claim that they never received a copy of the policies. Producing a signed acknowledgment is a sure-fire way to disprove that denial. **Before Big Trouble Begins**

Once you’ve gone through the time and expense of drafting and disseminating clear and flexible policies on discharges, you must apply them evenhandedly. That means applying them not just to trouble employees or low producers but to each employee. It’s all too common for employers to look the other way when high producers and otherwise good employees come to work late on a regular basis but to reprimand problem employees or low producers for the same conduct. That inconsistent application of the policies may later come back to haunt you when the problem employee or low producer files a lawsuit or discrimination charge after being fired. Even if the problem employee isn’t fired for violating the policy that was unevenly applied, the uneven application of that policy may lead an outside third party, such as a court, agency, or jury, to question the motivation behind the firing and the integrity of the policy on which it was based. If you have a progressive discipline policy, make sure that you follow it without deviation. That gives your employees notice of your expectations and the consequences of their failure to meet them in a given situation. That may also help to alleviate any later surprise on the employees’ part once they’re fired. It also makes your expectations clear and provides the employees with an opportunity to meet those goals. By doing so, your company appears fair and reasonable if a later firing decision is scrutinized by a court, regulatory agency, or jury. A frequent mistake that many employers and managers make that later haunts them at firing time is the inaccurate performance evaluation. Employers and managers are often reluctant to be too harsh in their evaluations even though an employee may have clear performance issues. Later, however, when those issues have reached the point of discharge, the evaluation is completely inconsistent with the employer’s stated reasons for the dismissal or the firing decision. Again, providing a fair and evenhanded report of sub-standard performance during regular evaluations provides employees with your expectations, their shortfalls, and an opportunity to improve performance to conform to those goals. An accurate evaluation may also lead an underperforming employee to start seeking work elsewhere and result in a resignation rather than a discharge. **The Final Straw**

At the point when the decision to discharge may seem appropriate, you shouldn’t be too hasty. If firing seems merited by misconduct, you should carefully consider whether a fair and complete investigation has been conducted before the dismissal occurs. A manager eager to get rid of what he considers to be a bad employee may have failed to look at all angles of the behavior at issue or question all appropriate witnesses. Often, managers overlook interviewing the employee whose behavior is in question and obtaining his/her side of the story. Even when the misconduct appears clear, there may be an explanation or mitigating circumstance for it. In any event, a third party examining the circumstances of a firing may question the integrity of an investigation or employment decision when the discharged employee wasn’t even interviewed. When making the final decision to fire, you should also look to whether past infractions have been accurately documented and addressed with the employee. Again, is the contemplated discharge
contradicted by recent evaluations? Unless there has been a significant decline in performance that can be demonstrated by objective evidence, the discharge may be difficult to defend. Thought should also be given to whether the employee being considered for firing is receiving the same treatment others have received for the same offense and, if not, whether there are legitimate and defensible reasons for different treatment. You must also look to whether the violated rule or expectation is reasonable both on its face and in the circumstance in which it?s being applied. Finally, you should look to whether the supervisor pressing for the firing is levelheaded or the issue is nothing more than a personality dispute. If the latter is the case, it may be more reasonable to examine whether there?s a less severe alternative to discharge, such as transfer.

The Deed ? The Termination Meeting

The discharge meeting shouldn?t be held in work areas or within earshot of co-workers. It should be attended by someone in the employee?s chain of command and a human resources representative if possible. When there?s no HR representative, another management employee should attend. Your notification of the decision should be direct and concise, providing the reasons without extended discussion, debate, or overly sympathetic or apologetic statements. If there?s a termination letter or notice, it should be provided to the employee at that time, and he/she should be given the opportunity to read it and asked to sign it. Company keys and other property should be retrieved during the termination meeting. If the employee has access to the company?s computer system or other sensitive data or information, that should be eliminated before or during the meeting. In many instances, employees have been fired and permitted to return to their desk briefly to retrieve personal articles and have erased company data or otherwise damaged the computer system. At the meeting, you should also remind the discharged employees about their obligations under any non-compete, non-solicitation, confidentiality, and other similar agreements. If severance benefits are offered to the employees, the issue should be discussed with them, and any severance agreement and release should be provided to them. Any termination notice provided to the employee should be direct and concise and state the reason for the discharge. It should clearly set forth the policies violated by the individual?s conduct (in the case of termination for conduct or behavioral reasons) or under which she?s being fired (in the case of performance-based terminations). It?s important to remember that third parties such as courts, regulatory agencies, and ex-employees? attorneys may read the notice. After the termination, when applicable, notification of benefit continuation rights must be provided to the employee and any beneficiaries covered under the ex-employee?s health care coverage through the employer. COBRA provides that you as the employer must notify the health benefits plan administrator within 30 days of a qualifying event, which includes termination. COBRA applies to employers with 20 or more employees in the previous year. The plan administrator, in turn, must advise plan beneficiaries of their health benefits continuation rights within 14 days of receiving notice from the employer. Health benefits continuation rights extend for 18 months after the discharge. A qualified beneficiary has 60 days to elect coverage. The first payment after the beneficiary?s election of coverage must be received within 45 days.

Happily Ever After

To soften the impact of a discharge, you may want to consider offering outplacement services, which provide assistance with resume writing, interviewing, and job search skills. Together with any other severance benefits, the outplacement services may shift the employee?s focus from the past ? the firing and the events leading up to it ? to the future. Of course, those benefits and services should be offered only in appropriate circumstances when there?s a
reduction in force or a layoff or for certain performance-related terminations? not in cases of misconduct in the absence of unusual circumstances. Providing severance or outplacement services may help to mitigate damages in any later litigation if the employee finds employment sooner rather than later. Also, employees who are quickly reemployed may find themselves in less desperate financial straits and with less time to stew over their firings. It also may help the fired employee (and any reviewing court, regulatory agency, or jury) view the employer as a more caring and engendered
less bitterness to the extent that may be possible under the circumstances.