Suggestions on Avoiding Lawsuits by Terminated At Will Employees

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NOTE: These guidelines are general in nature, reflect Pennsylvania law, and should not be construed as providing legal advice. The circumstances of any particular problem are important in analyzing legal issues, and an employer seeking guidance for a particular question should seek specific legal advice.

I. WRONGFUL DISCHARGE CLAIMS -- EMPLOYER BEWARE

A. Introduction

A troubling trend for employers is that more and more discharged employees are asserting that their terminations were illegal and that they should be able to recover damages against their former employers. Disgruntled employees can take a variety of approaches:

- "Wrongful discharge" lawsuits allege that the employee was terminated either for an illegal reason or in breach of an implied contract.

- Courts have recognized fraud claims against employers for misrepresentations made when recruiting.

- The majority of employees are in a "protected class" and, as a result, their employers are vulnerable to discrimination claims asserting that employment decisions were motivated by consideration of the employee's age, sex, race, national origin or as retaliation for claims of discrimination.

- Increasingly, employees are claiming that the employer acted in violation of the Americans with Disabilities Act or the Family and Medical Leave Act.

B. It's a Litigious Environment for Employers - - An Overview

It is a perilous time for employers who find it necessary to discharge employees. Even though the law of at will employment seems to give employers the right to make employment decisions unfettered by any requirement that terminations be "for cause," any employment termination must be approached cautiously in view of all the potential claims existing for employees. Fortunately, many lawsuits can be avoided if an employer is careful in the manner in which it handles its relations with at will employees. In the final section of this paper, 12 tips are discussed which will help an employer prevent lawsuits alleging wrongful discharge or related claims.

Although all employers are likely to be faced at some point with a lawsuit filed by a terminated employee, employers who have been careful, and who have not been improperly motivated, have an array of legal defenses available to them, especially if they have engaged in

proactive conduct to avoid employment claims. It is the purpose of this paper to discuss several of the most common problem areas and provide guidance to employers which will be beneficial in avoiding -- or defending -- lawsuits by terminated employees.

An employer facing employee terminations – whether a single employee who has become problematic, or a large group of employees who must be terminated because the company's economic fortunes have changed – should seek specific legal advice before key decisions are made. How a specific termination is handled, or how employees are selected in a downsizing move, can be extremely important – not only for the employer's future, but also in furtherance of the employer's goal to avoid post-termination litigation.

C. Wrongful Discharge Claims - - Employer Beware

Where an employee does not have a contract, and there are no specific legal requirements mandating the employee's retention, the employee is considered to be an employee "at will." The traditional law is that such an employee may be discharged at any time, for any reason, or for no reason at all. Thus, personality differences and incompatible attitudes are as valid as poor work performance in determining that an employee should be dismissed.

The employer must be aware, however, that there are an array of improper reasons for discharges. In addition, the employer must make certain that it has not inadvertently entered into a contractual relationship, either expressed or implied, with the employee. And, an employer must avoid any "appearance of impropriety" which might fuel an employee's claim.

Employment at will is often regarded as a rebuttable presumption. Thus, it is possible for an employee to establish that the relationship actually existing is not "at will," but, rather, one which inhibits unilateral decisions by the employer to discharge the employee. Basically, there are three avenues by which an employee can overcome the presumption of at will employment. First, the employee can establish that the dismissal jeopardized clear public policy. Secondly, the employee could prove an implied-in-fact contract whereby the employer guaranteed employment security. Thirdly the employee could establish a contractual obligation through promises in handbooks or policies.

Federal and state laws prohibit discrimination in the workplace on the basis of age (over 40 years old), sex, race, national origin, religion, disability, or as a result of retaliation for assertion of a protected right. If a dismissed employee can prove that the action against him or her occurred as a result of one of these factors, the employer will be responsible for damages, and possibly reinstatement. In addition, statutes, such as the Americans with Disabilities Act and the Family and Medical Leave Act, present challenges for the employer because each imposes certain affirmative duties on the employer. In contrast with the discrimination statutes - - which are couched in "Thou Shall Not" terms - - the Americans with Disabilities Act and the Family and Medical Leave Act statute require the employer to initiate accommodating actions. A discharged employee could prove he or she was wrongfully terminated if the dismissal breached either of these laws.

D. Claims Available to Discharged At Will Employees

(1) Violation of public policy

An employer may be liable for wrongful discharge if it is proven that the employment action violated "a clearly mandated public policy." It has been held that the policy must be one which "strikes at the heart of a citizen's social right, duties, and responsibilities." However, some of the cases permitting claims based upon violations of public policy do not appear to have quite matched that standard. At least at the trial court level, judges are frequently hesitant to dismiss wrongful discharge cases based upon public policy, regardless of how frivolous the claim appears to be.

Case law has established a wide variety of discharges to be in violation of public policy. Illustratively:

(a) Termination for serving on a jury.

(b) Refusing administration of a statutorily prohibited polygraph examination.

(c) Refusing to participate in an allegedly illegal price fixing scheme.

(d) A termination effected for the purpose of substantially reducing pension benefits.

(e) Termination allegedly occurring because plaintiff refused to commit a criminal offense.

(f) Retaliation for filing a workers' compensation claim.

(g) Disclosure of self-dealing under Federal securities statutes.

(h) A discharge motivated by complaints about occupational hazards to a state agency.

(i) Retaliation for utilizing unemployment compensation.

(2) Breach of Implied Contract

Employers potentially may be subject to a wrongful termination claim on the basis of breach of an implied contract. This claim arises most commonly where an employee has changed jobs and is terminated after working for only a brief period of time.

The short duration of new employment, alone, is insufficient to establish an implied contract claim. However, where there are other factors -- such as representations by the employer that the job would not be short term, and special sacrifices by the employee -- such as relocating for the purpose of taking the new job, liability risks arise when the employment term is short.

In order to establish an implied in fact contract, proof is generally required in the following areas:

(a) That the employer promised job security.

(b) That the employee detrimentally relied upon the promise and gave consideration.

(c) That the employer breached its promise by terminating the employee.

(d) That the employee suffered damages.

In analyzing implied in fact contract claims by terminated employees, the court will often consider what the parties had expected. The focus will be on how specific the promise of the employer was, how much the employee relied on the promise, the extent to which the employee undertook special acts as a result of the promise, and the means of communicating the promise -- such as, whether it was verbal or set forth in a handbook. In examining the issue of expectations, the bottom line is an assessment of how a reasonable person would have perceived the situation considering all of these factors. If it is determined that either there was a bargained for agreement whereby the employee could reasonably believe that the employer had promised an extended term of employment, or if there was justifiable reliance based upon representations of the employer, the employee may recover.

An employer should be honest and forthright in entering into an employment relationship. While an employer may be enthusiastic and optimistic in discussing a person's future, care should be taken to avoid statements which could be misconstrued as commitments to an extended term of employment. Comments such as "we want you to retire with this company," may prove problematic if things do not work out. A better approach is to express the hope that the employment relationship will be as successful as both employer and employee anticipate and that, if events proceed as both hope, that there will be a long-standing relationship. Most particularly, promises about what <u>will</u> happen in the future, or how long the employee <u>will</u> be retained should be avoided.

(3) Liability Through Handbooks or Policies

Employers must be careful not to inadvertently create employment contracts through handbooks, policies or written communications with the employee. Employer publications such as handbooks should specify that they are not contractual in nature and that the employer has the right to change them. In lawsuits based upon express representations, both the specificity of the promise in the handbook, and the employee's reliance on the representations are material.

Usually, courts hold that statements in handbooks are not contractual in nature, unless there is language to the contrary. Nonetheless, problems and potential liability can be avoided by clear disclaimers in the handbook. These should specify clearly that the employment is at will in nature and that general statements regarding employment security or commitments of the employer should not be relied upon. An employer should specify in the handbook or policy manual that it can make unilateral changes. An application might include language to the effect that the employer preserves the right to terminate any employee with or without cause and that the employer forbids informal agreements to the contrary.

Employers should expect to be held to the commitments made in the writings given to or made available to employees. All of the employment-related communications by or on behalf of the employer should be reviewed carefully to make sure that they articulate exactly what is meant. If policies, procedures, rules or methods of dealing with employees are described, they

should be followed precisely. This is particularly true with regard to following the employer's stated disciplinary policy.

II. PREVENTING INDIRECT WRONGFUL DISCHARGE CLAIMS

A. Discrimination Claims

When making employment decisions, employers must be aware of the discrimination statutes and the possibility of a claim if a person in a protected category is adversely affected. However, the employer must be careful in this regard so that its "awareness" of the employee's status is not misinterpreted to support a claim that such status was a significant factor in the decision-making process. Every effort should be undertaken to assure that improper factors -- such as age, sex and race -- are not material to the employment decision. In the case of large layoffs, for example, tentative decisions should be analyzed before implementation to be sure there will not be any improper discriminatory impact.

If a discrimination lawsuit is filed, the employer will be called upon to specify the reasons why the decision was made. If "poor performance" is specified, the employee's personnel file, evaluations, attendance, and disciplinary record will be scrutinized. If the documentation does not support the claim that there was poor performance, the employee will argue that the employer's asserted reason is merely an excuse to cover-up illegal discrimination. Even though at will employees may be discharged without cause, the employer must be aware that if the employee is in a protected class the employer may well be called upon to explain the

basis for its decision. Unquestionably, an explanation that the employee was discharged for "personality reasons" or something of the sort could be more readily interpreted as a pretext for discrimination than could a well-documented record of disciplinary problems.

A person who believes he has been discriminated against must file a claim with the Equal Employment Opportunity Commission and/or the state or local human relations commission. The employer will then be obliged to respond to the complaint. In addition, the administrative agency generally will require the employer to furnish extensive documentation and/or participate in a fact-finding proceeding. Accumulation of the requested information, procurement of the required statements, and related tasks are time consuming and constitute a distraction to all those necessarily involved in the process.

Employers should work hard at preparing solid responses at the administrative level. Employers do not want to receive an adverse finding by the agency which might be admissible at trial, or which might prompt the administrative agency to file suit itself against the employer.

Although agency proceedings do not require participation of lawyers, it is usually advisable to obtain legal advice before responding to any type of an administrative complaint. The materials prepared and submitted to the administrative agency by the employer can be acquired by the employee once a lawsuit is filed. Thus, it is important to respond with an eye toward the effect of the responses if the employer later faces a trial before a judge or jury. An employee's lawyer will emphasize and endeavor to exploit any discrepancies between the nature and theory of defense at the administrative level and that which is used at trial. Accordingly, the

employer's complete "game plan" for defending the lawsuit -- to the extent possible -- should be considered before responding to the administrative agency.

After certain waiting periods following the filing of an administrative claim, the employee may file suit, regardless of what decision has been made at the administrative level. Employees often will seek their "right to sue" letter as soon as possible so as to avoid an unfavorable recommendation by the administrative agency.

B. The Americans with Disabilities Act

The Americans with Disabilities Act prohibits discrimination against "a qualified individual with a disability." The term "qualified individual with a disability," as well as the definitions it encompasses -- "disability," "individual with a disability" and "qualified" -- are all defined by the Act. The ADA requires employers to provide "reasonable accommodations" to those individuals who have disabilities, had disabilities, or are perceived as having disabilities.

"Individual with a disability" includes more than just those who currently have a "disability." It also protects individuals with a record of having had a disability, such as an individual who is recovered from a disability or a person who was wrongly classified as having a disability. This could apply, for example, to a person who had a false positive HIV test. The Act also protects individuals who are perceived as having a disability, even though they are not actually disabled. For example, it protects a person whose facial disfigurement might offend certain individuals.

The Americans with Disabilities Act broadly defines the term "disability" to include individuals who have "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." The Equal Employment Opportunity Commission has established guidelines as to what is included by the term "physical or mental impairment." According to these guidelines, it encompasses all of the following conditions and problems:

> "(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or
>
> (2) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."

The determination of whether a person has a disability or not is assessed without regard to the availability of reasonable accommodations or auxiliary aids, such as hearing aids or medication.

In most cases, covered physical or mental impairments are permanent or long-term disorders. The Act is not intended to encompass short-term, non-chronic impairments such as broken bones or sicknesses such as the flu. Also, the Act does not cover disabilities which involve typical physical characteristics (such as left-handedness or an individual's height); common personality traits (such as poor judgment, having a quick temper, etc.); pre-dispositions

to illness or disease; or conditions such as pregnancy. The Act also exempts from protection homosexuals and bisexuals. Drug addiction and alcoholism do constitute disabilities under the Americans with Disabilities Act, but the Act specifically exempts from protection individuals who are currently engaging in the illegal use of drugs.

According to the specific definitions within the Americans with Disabilities Act, a physical or mental impairment does not constitute a disability unless it "substantially limits one or more of the major life activities of such individual." The regulations define "major life activities" as including -- although not necessarily limited to -- the life functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

An important term to understand in applying the ADA is "qualified individual with a disability." This means a person "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position the person holds or desires." In assessing whether a person is a "qualified individual with a disability," the factual inquiry actually breaks into two steps. First, can the individual satisfy the pre-requisites for the position? In other words, does he or she have sufficient training, education, and other applicable qualifications. If the person meets these fundamental requirements, the second issue is reached: Can the person perform the essential functions of the job with or without reasonable accommodations.

Obviously an important issue which is raised is "what are the 'essential functions' of the job?" In making this determination, the first issue is whether employees holding the position actually are required to perform the function. If the answer to this inquiry is in the affirmative, the next question is whether removing that function would fundamentally change the job.

The EEOC's regulations identify several reasons why a function might be considered essential:

1. The position exists to perform the function.
2. There are a limited number of employees available to perform the function or among whom the function can be distributed.
3. A function is highly specialized.

Many different types of evidence could be considered in determining whether a function is essential. Relevant evidence, at least, should include:

1. The employer's judgment.
2. A written job description prepared for the position before advertising or interviewing applicants for the job.
3. The amount of time spent in performing the function in question.
4. What the consequences would be of not requiring a person to perform the function.
5. The terms of a collective bargaining agreement.
6. Work experience of people who have performed the job in the past and work experience of people currently performing similar jobs.

In any situation where an employee is disabled, has a history of being disabled, or even is perceived as disabled, supervisors and managers must be aware that special requirements may be imposed by the Americans with Disabilities Act. It is important to sensitize the entire work force to the requirements of accommodating disabilities. Before dispositive decisions are made, the human resources department should be consulted for advice and direction. The scope and requirements of the Americans with Disabilities Act are too complicated to expect each manager or supervisor to deal, alone, with the complex issues that often arise.

C. Family and Medical Leave Act

The Family and Medical Leave Act is designed to benefit workers who have either personal or family situations which preclude their ability to continue with full-time employment. Employers must be cognizant of the requirements of the Act so that they do not unknowingly fall short of its requirements.

III. AN EMPLOYER'S "MUST-DO" LIST TO AVOID EMPLOYEE LAWSUITS

Through careful attention to detail, good discretion, and appropriate restraint, employers can greatly reduce the chances that their acts will trigger a lawsuit. An employer can engage in conduct which will cause employees to have a better attitude toward their employer. An employee who is favorably disposed toward his boss and his company is less likely to sue, even

if he is discharged. Following the 12 principles set forth below will substantially reduce the number of employee lawsuits:

1. **Adopt sound policies which are capable of being understood and followed** -- Employment policies should be reviewed regularly to make certain that they are understandable, consistent, current, capable of being implemented fully and in accordance with legal requirements. Policies should be examined before any employment difficulties arise, and changed if necessary. Unnecessary or outdated policies should be eliminated. Misunderstandings and potential claims can be reduced through a disciplinary policy which is well structured, understandable, progressively applied, and equally enforced with all employees.

2. **Strictly adhere to the company's policies** -- Employers should mandate that their personnel policies be followed with precision. Employers should insist that the policies are fairly applied by supervisory personnel. Auditing of compliance should occur on a periodic basis. There is no reason why an employer should not be able to comply with its own policies and procedures.

3. **Treat employees fairly** -- The fairer the employer, the less often the employer will be in court. Arbitrary conduct breeds lawsuits. In today's environment, even the best intentioned employers must sometimes make decisions which are far from employee-friendly -- such as lay-offs or a reduction in employment benefits. Even in these situations, however, an employer will benefit if it is perceived as trying to deal with a bad situation in the fairest way possible, and if it is apparent to employees that the employer is doing its best to deal with

unfortunate circumstances. Public relations efforts and out-placement programs potentially can provide significant dividends to an employer. Perhaps more than anything else, consistency with respect to disciplinary policies and procedures will help the employer to convince sanctioned employees that they are not being singled out.

4. **Educate supervisors and managers** -- An "old school" boss (overbearing, non-communicative, unpredictable, precipitous, dictatorial) materially increases the likelihood of employee litigation. Education on effective employee relations, fair evaluations, and compliance with well conceived policies can improve the supervisory component of a company's work force. Education focusing on the basic fundamentals of employment law, the discrimination statutes, and the requirements for chronically ill or disabled persons, will help to acquaint supervisors with the standards by which their conduct will be judged and will aid in orienting them to methods which are consistent with the law.

5. **Document all employment matters clearly, consistently and uniformly** -- All employment decisions and employee disciplinary actions should be documented in an unambiguous manner. Employees will argue that if a disciplinary matter is not documented that it either never occurred or was insignificant. This is especially true when the company's policies specifically require documentation or if problem areas were noted with other employees.

Employers should be aware that all writings will be scrutinized very carefully, and that a displaced employee will seek to *misconstrue* the writing so as to support his or her claims that the employer engaged in improper conduct. Every effort will be undertaken to prove that

relevant documentation demonstrates bias or improper conduct by the employer or supervisor. Thus, care must be taken so that nothing either suggests or implies that any improper factor -- such as sex, age or race -- was material to the supervisor or manager. Employers must take considerable care to make certain that all documentation is written in a manner which makes it extremely difficult for anyone to argue that it means or reflects something other than what the employer intended.

Employers will also compare the documentation in their file with that in the files of others. If the scope or depth of documentation is inconsistent, they will argue that they were being singled out. Substantial documentation in the file of the dismissed employee may backfire if it is disproportionate to that which is written in the files of other employees. While there certainly may be additional documents -- such as disciplinary accounts -- in the file of a troublesome employee when compared with the file of a better employee, the employer must be careful not to exaggerate the problems in its documentation of the employee about whom it has concerns. "Were the other employees written up for this same alleged problem?" is an inquiry which will be made during discovery and at trial. Similarly, the documentation in the employee's file must not be so extensive that it appears that the employee is being disciplined for trivial complaints.

6. **Above all else, be honest** -- Honest interviews. Candid evaluations. Straight-forward responses to employee inquiries. Together, conduct of this nature will -- through its effect on both the legal factors and on human nature -- provide considerable benefit to the employer.

7. **Eliminate the "never had a problem with me before" syndrome** -- Problems with employees should be documented consistently when they occur. Evaluations should be candid and should note deficiencies when they exist. Many employers have faced the problem that there is nothing adverse in a poor performer's personnel file. More often than not, even problematic employees are given favorable written evaluations. Such situations provide substantial ammunition for an employee who alleges that recent action against him is discriminatory. This problem can be easily avoided by timely, accurate and complete documentation regarding the employee's performance. Yearly evaluations should not over-rate employees. A discharged employee's best piece of evidence frequently are the undeservedly favorable performance reviews which exist in his or her files.

On occasion, employers reach a point of no return with an employee, only to discover that the written employment file contains no documentation of what has occurred in the past. Although good historical documentation is recommended, and would be very helpful, the employer should not try to re-create the file or engage in documentation different from what was done with other employees. If overt efforts are undertaken to create a paper trail toward a pre-determined termination, the documentation is likely to backfire. An employer is much better off explaining as clearly as possible the reasons for its decision, while acknowledging that the written documentation could have been better.

8. **Maintain a fair grievance process** -- Employees should have a means of ventilating their complaints, without fear of retribution. In addition, they should have an avenue

available to dispute evaluations or disciplinary actions which they believe to be unfair or based upon erroneous information. It is helpful if both formal and informal grievance avenues are available. Employees should be given the right to respond to criticism.

9. **Avoid the trouble-maker** -- One of the best techniques for preventing employment claims is to use due diligence in hiring employees. Effective interviews, the diligent checking of references, and close scrutiny of credentials, together, will help to detect individuals who are likely, later, to be problem employees. Interviewers, themselves, can reduce the risk of future problems through honesty and by avoiding statements to interviewees which might create unjustified expectations.

10. **Don't make promises you might not want to keep** -- Most implied contract claims can be avoided, or at least made highly defensible, by:

(a) Carefully monitoring language in handbooks and employee communications.

(b) Written disclaimers in handbooks and applications.

(c) Exercising restraint in job interviews.

11. **Don't throw mud** -- Defamation claims can be easily avoided. In almost all cases, there is no need to publicize the reasons for an employee's termination. Confidentiality should prevail, and information regarding the employee should only be circulated to those with a need to know. If others are told negative facts about the employee, the employer is vulnerable to a defamation claim should these facts be shown

to be untrue. If only those with a need to know are told reasons which ultimately prove to be false, the employer should be protected from a defamation claim (on the basis of qualified privilege) and from a wrongful discharge claim (since it does not matter what the reasons for dismissal were as long as they were not improper reasons).

12. Aggressively respond to meritless claims -- Payment of one illegitimate claim or lawsuit conceives another. Employers will from time to time be subject to frivolous charges or lawsuits which are totally without merit filed by unhappy employees. To these, the employer must respond vigorously -- marshalling a strong defense so that other employees are not inspired to seek an easy recovery on the basis of an illegitimate claim.

IV. CONCLUSION

Employers should be most concerned about making personnel decisions which are appropriate for the business needs of their organization. At the same time, employers must be aware of the potential for lawsuits by employees who have been discharged. Through prudent procedures, however, and utilization of the tools described in this paper, claims and successful lawsuits can be greatly reduced.

An employer can benefit greatly by timely legal advice *before* problems arise. Often attorney guidance can help an employer establish a framework in which it is very unlikely that a terminated employee will succeed in a lawsuit. All claims cannot be avoided, but an employer

can position itself to decrease its vulnerability to litigation, and to increase its chance of success if a claim is filed.

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