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BUSINESS & EMPLOYMENT LAW

NEWSLETTER

ISSUES IN FIRING AN EMPLOYEE

The Employment “At Will” Rule

Employees who do not have employment contracts or participate under a collective bargaining agreement may be fired for no reason at all at any time. This should be made clear before the employee starts work. In order to maintain this broad termination right, employers should use care to prevent triggering an exception to the general “at will” rule.

Exceptions to the “At Will” Rule

1. Statutory Claims - - There are numerous statutory exceptions to the “at will” rule. Employers cannot fire employees for reasons that violate federal anti-discrimination laws like Title VII, the Age Discrimination in Employment Act, or the Americans with Disabilities Act. Ohio employers are also subject to the Ohio Civil Rights Act which prohibits employment discrimination based on race, color, religion, sex, national origin, handicap, age, or ancestry. Ohio also has a whistleblower statute that provides employees with a claim against the employer if they have been discharged in retaliation for reporting what they believe to be unlawful conduct.

2. Contract Claims – Ohio Courts recognize two contract exceptions which may alter the presumption of “at will” employment – 1) implied or express contractual provisions; and 2) promissory estoppel.

Appellate Courts have held that oral representations made by the employer to the employee may constitute an implied contract that the employee would not be fired without just cause. Courts have also held that language in some employee handbooks could be interpreted to be a contract. It is important to carefully draft the employee handbook to avoid such interpretations. Whenever possible, include conspicuous disclaimers on job applications and employee handbooks that specifically notify the employee that employment is “at will” and that neither oral representations nor the employee handbook will constitute a contract.

When an employer makes a promise which the employer should reasonably expect to induce action or forbearance by the employee, and the promise does induce such action or forbearance, the Doctrine of Promissory Estoppel provides that the promise must be enforced against the employer if injustice can be avoided only by such enforcement. For example, an employer’s promises of continued

employment, termination only for cause and confidentiality, could create a cause of action for promissory estoppel.

3. Additional Claims – In terminating an employee, an employer has to be careful not to act in an outrageous or extreme manner which could produce a claim for intentional infliction of emotional distress and/or defamation or invasion of privacy.

4. Public Policy – Ohio Courts recognize a public policy exception to employment “at will.” These cases typically fall into one of four areas:

- a. Refusing to commit unlawful acts;
- b. Exercising a statutory right;
- c. Fulfilling a public obligation (i.e. jury duty or military service); and
- d. Whistleblowing.

Other Areas of Potential Liability

1. Employee Handbooks –

- Avoid language that creates reliance or implied or express contracts. The best procedure is to include a highly visible disclaimer, in bold face type, that specifically states that, “this handbook does not constitute a contract” and that the employment relationship is “at will.”
- Beware of dangerous terms such as “job security,” and the like.
- Make sure the employee acknowledges receipt of the handbook in writing.
- Keep the handbook current.

2. Oral Representations – Words of encouragement that actually nurture the employment relationship may cause problems. Limit language which refers to future employment or advancement. Avoid using such terms as “lifetime,” “permanent” or even the promise to be “fair.” The best motto is, “We do not know what the future holds.”

Reducing the Risk of Termination Lawsuits

- Clearly state the “at will” language on all employment applications and related forms.
- Avoid just cause statements.
- Conduct timely, accurate and honest evaluations and keep written evaluations and all disciplinary actions in an employee file.
- Avoid bias in evaluations.
- Avoid evidence of discrimination such as racist, sexist or age related comments.
- Avoid inconsistent treatment of employees.
- Avoid treatment that varies from established rules and policies.

How to Discharge an Employee

The best way to terminate an employee involves four steps:

1. Notice to the employee of a problem;
2. Opportunity for the employee to correct the problem;

3. Investigation of the facts justifying discharge; and
4. Documentation which is accurate and drafted in neutral, professional terms.

Documentation of the steps that lead to a dismissal are not required under the “at will” rule. However, when an employer adequately documents the discharge process, the employee is less likely to raise unfair dismissal claims. Whenever possible, the employer should ask the employee to sign an acknowledgement to the effect that the employee has seen the documentation. As an alternative, the document can be emailed or mailed to the employee and the employer can keep a copy of the sent documentation as proof that the employee received notice of the deficiencies.

Firing an Employee

- Never fire an employee in anger or haste.
 - If necessary, suspend the employee until you can determine whether termination is warranted.
 - Choose a good time to discharge the employee. If at all possible, avoid holidays, vacations, or the employee’s birthday.
 - Script your remarks for the termination interview in advance.
 - Tell the employee the basic reason for dismissal in accurate and concise terms.
 - Never apologize for the termination decision. If possible, have a witness of appropriate management rank present at the termination interview.
- o Choose the witness wisely – The witness may later be called to testify and you will want a witness that would make a good impression on a jury.
 - o The witness is present to observe and take notes, not to talk.
- Use a private and neutral place for the discharge interview.
 - o Close the door to prevent others from observing or hearing the interview.
 - o Do not engage in melodramatic door locking or blind drawing.
 - Have the employee’s final paycheck and papers prepared, or at least be able to tell the employee how and when they will receive them.
 - o Be prepared to answer questions about 401K or other benefits and non-compete agreements that may have been signed.
 - Know what property, such as access cards, keys, credit cards, computers, etc. belongs to the company and arrange for their return. It is usually a good idea to lock the employee out of their computer at the time of the exit interview.
 - Know the company’s policy on references and act consistently with that policy.
 - o If you are willing to give the employee a neutral or better reference, tell the employee at the interview. However, be careful about what you promise. The safest advice is to agree to tell

potential employers that the employee worked at your company, the dates of employment and the employee's position.

- Do not force the employee to return to his work area or to encounter others while he is visibly emotional.
 - Arrange for the departure of the employee and his personal property with as little visibility and exposure as possible.
 - If appropriate, give the employee the options of collecting his personal property before he leaves, arranging

later time for pickup or having his property sent to him.

- Do not utilize extra security measures unless it is truly necessary. Make sure the benefits of extra security will outweigh the harm. In no situation should the employee be humiliated.
- Do not talk to anyone about the underlying reasons for the discharge or the termination interview unless that person needs the information for a business reason.
- Above all, be factual, neutral and professional and treat the discharged employee as you would want to be treated.

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