

The Shibolet Times

Published by SHIBOLETH (NY)

A ROUNDUP OF LEGAL AND COMMUNITY NEWS IN NEW YORK & ISRAEL

Vol. 2. No. 2 Fall 2007

You're Fired!

Kimberley Grotell, Esq. of our employment department, presents the basics of terminating employment

You're fired!!! Donald Trump made this phrase famous on his television show, "The Apprentice", when he fired contestants that could not perform. A corporate employer should be able to do the same thing. In reality however, firing an employee who cannot meet expectations is a difficult task. In this article we highlight some of the precautions a corporate employer should take before firing an employee for inadequate performance.

At-Will v. Contractual Employment

Before you, the corporate employer, decide to fire an employee that fails to perform at an acceptable level, you must first determine whether the employee is an at-will employee or whether the employee has an employment contract. If an employee has an employment contract, it may limit your ability to fire the employee.

At-will Employees

"At-will" technically means that you can fire an employee as flippantly as Donald Trump eliminated contestants on his show. However, you must have a legitimate business reason for doing so to avoid legal problems such as claims of discrimination, retaliation, or even defamation.

Employment Contracts

Employment contracts may be express or implied. A document labeled "employment contract" that describes employment terms is an express written employment contract. Courts have found an implied employment contract exists where, while offering a position of employment or during a performance review, the employer informed the employee that he or she would only be fired for failure to perform his or her job well. You must typically prove "good cause" for firing an employee with an employment contract.

Termination Pitfalls

It is prohibited to discipline, fire, demote, harass, or refuse to hire, train, or promote any employee for failure to perform based on the following justifications:

Discrimination

Federal and state laws prohibit discrimination or harassment on the basis of race, relig-

"At-will" technically means that you can fire an employee as flippantly as Donald Trump eliminated contestants on his show

ion, gender, national origin, disability, age, pregnancy, or medical condition. In many states, discrimination or harassment based on sexual orientation or marital status is also prohibited. Therefore, you cannot fire an employee if he or she cannot perform a specific task because of his or her protected status unless there is a specific business or job necessity (e.g. a strength test to qualify to be a firefighter has the effect of excluding most females from the profession). You should consult an attorney to ensure your company is in compliance with the applicable state and federal anti-discrimination laws.

Retaliation

It is also prohibited to retaliate against an employee who asserts rights under federal and state anti-discrimination laws. In other words, you cannot discipline, fire, demote, harass, or refuse to hire, train, or promote an employee shortly after the employee complains about an instance of discrimination or other unlawful employment practice in the workplace or who takes a leave of absence under the Family and Medical Leave Act or the Military Leave Act. Otherwise, you face the risk of losing a retaliation lawsuit even if you had a legitimate business reason for firing that employee. Retaliation has become a hot button issue in employment litigation.

If you are found guilty of wrongfully discharging an employee in violation of state and federal discrimination laws, your company faces significant damages including, back pay, promotion, reinstatement, front pay, compensatory damages, required reasonable accommodations, injunctive relief, punitive damages, and attorneys' fees.

How to Protect Your Business

Whether or not the employee has entered into an employment contract, following the steps listed below may make it easier to justify the termination of an employee.

Company Policies

It is important to treat all employees equally. Otherwise, an employee may claim that he or she received disparate treatment in violation of federal and/or state anti-discrimination laws. Implementing the following company policies will help ensure the company deals consistently with all employees.

Regular Performance Reviews

A designated member of the company should meet with each employee at regularly scheduled intervals to discuss his or her work performance. To ensure you are effectively communicating with the employee, obtain his or her feedback and document the employee's feedback in writing. Also, document the time, date and content of these meetings.

Termination Policy

Create a termination policy to be followed each time you decide to fire an employee that cannot do his or her job. A termination policy can include an investigation procedure to conduct prior to firing an employee. (The termination policy can also include choices for the employee being discharged.) You can give the employee the option to voluntarily quit rather than being fired, or you can offer the employee a severance agreement in exchange for release of all claims.

Severance Agreements

There is no law requiring you to provide an employee with a severance package upon termination (unless you contractually agreed to do so). Nonetheless, by entering into a severance agreement, you can get the employee to agree to sign a general release of all claims relating to the employment relationship, that is, agreement not to sue you, in exchange for certain bene-

(Continued on page 2)



fits. Among the benefits typically included in exchange for signing the release are 1) pay (for example, a week's pay for each year of employment); 2) payment for accrued, unused vacation days; and 3) insurance benefits for a period of time after termination.

Consult with an attorney before drafting a severance agreement and general release. Some state and federal laws mandate that a release include specific language. Also, an attorney will tailor a severance agreement and release to cover your company's needs and the particular employment situation.

Federal and state laws prohibit discrimination or harassment on the basis of race, religion, gender, national origin, disability, age, pregnancy, or medical condition

Complaints

Create a policy to effectively deal with complaints from employees about the terms of their employment or work environment; to whom these complaints should be directed and how the company should and will respond. The policy should include a statement that no employee will be penalized in any way for reporting a complaint to the company.

Disclaimer

If you have at-will employees, your corporate policies should include a disclaimer stating that the existence of company policies does not affect the employees' at-will status.

A corporate employer should seek the assistance of an attorney to create company policies.

Personnel File

You should create a personnel file on each employee. This file should contain the following:

- Copies of all correspondence between the company and the employee about the terms of his or her employment, including wages, hours, vacation time, sick days, responsibilities and benefits;
- Document all wages paid to the employee, including cancelled checks;
- Documentation of all meetings with the employee;
- Documentation of all requests and/or complaints made by the employee concerning the terms of employment or work environment and the company's response; and
- Documentation of any instances the employee failed to adequately perform, such as if an employee misses due dates, is insubordinate, or disrupts the company environment.

Termination Meeting

If an employee cannot perform at an acceptable level and you have taken all the above precautions, it is time to fire that employee. Call the employee into a meeting where the only people present are you, the employee, and a neutral party to record the events of the meeting. During the meeting, you should do the following:

1. Explain why you are firing the employee;
2. Offer the employee the option to voluntarily quit instead of being involuntarily discharged;
3. Give the employee sufficient time to decide whether to enter into a severance agreement where he or she will receive benefits in exchange for signing a general release;
4. Ask the employee to provide a memo-

- random stating what he or she was working on, including contact information for the client, customer, or supplier, a status report, location of files, etc.;
5. Give the employee a final paycheck in accordance with state mandated time limits - New York State Labor Law §191 requires that an employer give a departing employee a final paycheck by the next scheduled payday;
6. Give the employee sufficient time to gather his or her things; and
7. Escort the employee from the premises.

Once an employee is terminated, make a brief statement to the rest of the company that the terminated employee is no longer with the company and indicate who will assume his or her job responsibilities.

Future References

If, in the future, you are called upon to provide a reference for a former employee, just briefly explain the former employee's dates of employment and job responsibilities. Avoid all temptation to explain how and why you terminated that employee to avoid the risk that a former employee will bring a defamation claim against the company.

Conclusion

Heeding all of the precautions described above may minimize the risks involved in firing an employee. Nevertheless, your former em-

Avoid all temptation to explain how and why you terminated that employee to avoid the risk that a former employee will bring a defamation claim against the company

ployee may still decide to file a charge with the United States Equal Employment Opportunity Commission or to commence a state or federal court case.

An employee asserting a violation of any of the laws enforced by the United States Equal Employment Opportunity Commission, except the Equal Pay Act, must file a charge with the United States Equal Employment Opportunity Commission within 180 days from the date of the alleged violation before bringing a federal lawsuit. If the charge is also covered by a state or local anti-discrimination law, the 180-day filing deadline is extended to 300 days. The United States Equal Employment Opportunity Commission will investigate the claim, provide the employer with notice of the charge filed by its employee, and offer the employer and the employee the option to participate in their free mediation program.

You will find it easier for the company to defend itself armed with the company policies and the personnel file you will have created detailing the legitimate legal business reason for firing the discharged employee.

