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EFFECTIVE TERMINATION PROCEDURES CAN MINIMIZE THE RISK OF EMPLOYEE INSTIGATED LITIGATION

T. Stewart Rauch

One of the most common mistakes employers make when terminating an employee is acting hastily. Failure to carefully analyze a termination decision, especially with poorly performing or problem employees, prior to delivering notice of the termination can lead to the unpleasant experience of litigating an employment law claim. Even worse, such inattention can potentially provide the basis for such a claim.

It is critically important for the employer to review and analyze the key factors inherent in the termination decision -- including the reason for termination, the decision making process, the employer's motivation, all relevant employment policies and procedures, the employment relationship, and all documentation, including the personnel file -- prior to making any decision. Thoroughly considering the decision to terminate the employee can minimize the risk of employee instigated litigation following termination. Moreover, employing an effective review procedure can also help the employer catalog and build a coherent, legitimate and effective defense in the event the employee institutes litigation. Best practice dictates that under difficult circumstances the employer should involve in-house or outside counsel in any such analysis. Any effective review procedure should involve the following steps: (1) assess the employment relationship; (2) review all documentation concerning the employer's policies and the employee's employment history, and (3) analyze the relevant facts pertaining to the termination decision.[1]

1. The Employment Relationship.

The decision maker should first analyze whether the employee's employment is based on an employment agreement or is at-will. If there is an employment agreement, that agreement (along with other agreements between the parties) should be reviewed in order to establish the parameters of the relationship. In states where employment is presumed to be at-will, the employee can generally be fired for any reason at any time absent an employment agreement containing contrary language. An employer that intends for an employment relationship to be at-will should include explicit at-will language in an offer letter and/or the employer's employee handbook. These documents should be reviewed for such language. Even where there is explicit at-will language, however, the employer should be wary of any evidence of an implied in fact contract not to terminate except for good cause, which could alter the at-will relationship. Such a commitment may arise where a long term employee with positive employment history including raises and/or promotions is promised continued employment. Accordingly, the decision maker should question the employee's supervisors and check any offer

[1] This article assumes that relevant, accurate, and complete records have been kept throughout the employment relationship as a matter of policy. Accordingly, detailed record keeping is not directly addressed here.

letter and/or the employer's employee handbook for language requiring modifications or amendments to the employment relationship to be in writing.

The employer should keep in mind, however, that although the employer needs no "reason" to terminate an employee at-will, the employer's decision should be based on a legitimate rationale. Where the employer does not provide the employee with a reason, the employee is more likely to feel alienated and, therefore more likely to institute litigation. A demonstrable legitimate business reason for the termination goes a long way toward placating the employee and establishing a defense for the employer should the employee initiate litigation.

2. Document Review.

After analyzing the employment relationship, the decision maker must review relevant documentation to determine if it supports the employer's basis for termination. Generally speaking, the more abundant and detailed the documentation the easier it becomes for the employer to support termination for poor performance or misconduct. The employer should always review (a) any agreements with the employee; (b) all appropriate policies and procedures contained in the employer's employee handbook, and (c) the employee's personnel file.

Agreements. If there is an employment agreement, the agreement should be reviewed in order to determine, among other things: (1) whether the employee may only be terminated for cause; (2) if so, what constitutes appropriate "cause" for termination; (3) what the employee's job description is and what the employee's job-related duties are (especially important if performance based concerns are the basis for termination); (4) whether there are severance requirements; and (5) whether there is an arbitration provision. Review other agreements relating to the employee's employment, such as agreements regarding benefits (e.g. stock options, severance), non-compete agreements, shareholder agreements, partnership agreements, and confidentiality agreements. These agreements can define the employer/employee relationship, the employee's obligations, and the employer's obligations (rights and benefits the employee is entitled to). For example, an agreement, such as a stock option or severance agreement, may be critical to an understanding as to whether the employment relationship is at-will or not. An agreement, such as a confidentiality agreement, that sets forth employee obligations, may provide the basis for termination for cause. Finally, an agreement may dictate whether the employer will have financial obligations to the employee notwithstanding the termination of the employment relationship.

The Employee Handbook. The employer should examine and assess the employer's policies and procedures regarding, among other issues, discrimination and harassment, reporting, investigation, and discipline. These policies and procedures should be set forth in an employee handbook or other documentation, which all employees are required to review. At a minimum, the following considerations should be addressed during analysis of the policies and procedures set forth in the handbook.

- Does the handbook contain an in-depth, detailed, and up-to-date policy against all forms of discrimination and harassment? If so, an employer, faced with a discrimination or

harassment charge by a discharged employee, could present such a policy as evidence that the employer takes such concerns seriously.

- Does the anti-discrimination and harassment policy provide a reasonable reporting procedure for the employee to articulate concerns? The employee's failure to use an established reporting procedure may provide the employer with a defense in subsequent litigation that it was not aware of, and could not have been aware of, the conduct about which the employee is complaining.

- Does the reporting procedure provide for multiple reporting avenues so that an employee may report a concern to someone other than his/her immediate supervisor? If the procedure requires an employee to complain only to his/her immediate supervisor and the employee charges that the supervisor is the alleged harasser or discriminator, the employer's position would be far more tenuous.

- Does the handbook set forth a specified internal procedure for investigations into discrimination, harassment or other misconduct? If the employer follows the policy, a detailed written report can provide evidence of the employer's appropriate response to a claim of discrimination or harassment. The employer should consider having any such investigation conducted by two employer representatives, at least one of whom has no relationship with the parties involved, in order to provide corroboration and avoid a "he-said-she-said scenario." The employer should also consider including signed statements of the parties involved and witnesses. Finally, any report should be compiled contemporaneously or immediately upon conclusion of the investigation.

- Does the handbook set forth a disciplinary policy? If so, the employer should consider whether it is a progressive disciplinary scheme, in which case employer discretion regarding termination may be constrained, or whether it allows for discipline commensurate with the severity of the employee's misconduct.

The Personnel File. In addition to considering the employer's policies and procedures, it is essential that the employer examine all documentation in the employee's personnel file. Any reasonable assessment should begin with a review of the employee's basic employment information, written performance reviews, written warnings or discipline, and any investigations involving the employee.

Even basic employment information, including any background checks, the date of hire, the length of employment, job responsibilities, and whether the employee is salaried or paid an hourly rate, is often relevant to the termination decision. A review of any background check or other due diligence that was part of the employee's application process may provide information relevant to the decision process. For example, showing up late for or leaving early from work, or taking excessive breaks, may be far more probative in the decision to terminate an employee with a short employment history who is paid on an hourly basis than it would be with respect to a long tenured, salaried employee.

A written acknowledgment of receipt of and agreement to policies and procedures contained in the employee handbook is often critical. It can demonstrate that the employee was aware of the employer's policies and procedures set out in the handbook. Employers should consider a new written acknowledgment every time the handbook is amended.

Written performance reviews will go a long way to informing the decision maker whether there is support for a termination based on poor performance. Written warnings by supervisors or documentation of other discipline related to misconduct may also prove crucial evidence to support a termination for misconduct. Reviews and warnings on a standard form using the same or similar criteria for all employees provides the employer the ability to compare and differentiate the employee being terminated from others "similarly situated." Reviews and warnings approved by an employer representative with knowledge of the employee's performance or misconduct in addition to the reviewer may supply the employer with corroborated evidence of performance or misconduct. Reviews and warnings contemporaneously acknowledged by the employee may enable the employer to establish that the employee was apprised of his performance or misconduct on an ongoing basis. An employee can't later claim surprise by a termination, and the employer can argue that the employee was given an opportunity, but failed, to improve his performance.

Finally, detailed proof of investigations into misconduct by the employee or misconduct reported by the employee can be critical. Such an investigation can not only support a termination for cause, but it can also demonstrate that the employer took an employee's claims seriously and provide significant supporting facts in any litigation.

3. <u>Analysis Of The Relevant Facts Pertaining To The Termination Decision.</u>

A review of the appropriate documentation comprises only half of the battle in making the termination decision. Any effective termination decision must include an analysis of all relevant information -- anything swept under the rug can only come back to haunt you. As part of that analysis, the decision maker should consider, among other things, the following:

a. Consider the reason for termination. Is the termination based on employee misconduct or performance or business necessity (such as a reduction in force)? Make sure that the reason for the termination can be clearly articulated; that it is both legitimate and supported by the documentary evidence. Arriving at a clearly articulated, legitimate reason prior to terminating the employee allows an employer representative -- and there should always be two representatives present -- to convey both the decision and the reason behind it to the employee in clear, concise, effective terms. If the reason is poorly explained or vague, the employer's motivation may be questioned.

b. Who made the recommended the termination decision? The employer should scrutinize the recommended decision and be comfortable that the decision was made objectively. Termination decisions should be appropriately vetted. An independent decision is always preferable. A termination decision -- even when legitimate -- made by a supervisor with a history of problems with the employee is cause for concern.

c. Does the employee fall within a protected classification? Review whether the employee in question falls within one of the protected classifications: race; color; religion; sex (including pregnancy); sexual orientation; national origin/ancestry; age; and disability.

d. Has the employee engaged in protected activity? Examine whether the employee, among other things, has recently filed a claim with an agency such as the EEOC or the NLRB (or the state equivalent); filed a worker's compensation claim; taken leave under the Family Medical Leave Act; engaged in union activity; invoked the employer's internal reporting procedures to complain about harassment or discrimination; assisted another employee in filing a claim; or filed a claim on behalf of another employee. If so, careful consideration should be given to whether the criticism of the employee's performance or concerns about his conduct arose only after the employee engaged in the protected activity in order to avoid a potential retaliation claim.

e. Consider the timing of the termination. The timing of the termination may lead to the perception that the decision was improperly based even if appropriate and based on a legitimate business reason.

f. Is the employee being treated the same as similarly situated employees? The employer should consider whether the employer is treating the employee the same as it is presently treating other similarly situated employees. Additionally, the employer should assess whether the employer is treating the employee the same as it treated other similarly situated employees in the past. It may be important to evaluate the employer's past responses to similar issues. Any time the answer is even arguably no, the employer should determine whether there is an appropriate basis for distinction, and if so, such distinction should be documented.

g. Consider all reasonable alternatives to termination. Based in part on the foregoing considerations, as well as the employer's disciplinary policy, the employer should consider whether less severe discipline such as verbal or written warnings, counseling, or demotion is appropriate. The employer should also determine whether the employee has been given a reasonable opportunity to improve his performance. If so, then the decision to terminate is more defensible.

h. Severance and Releases. After checking the requirements of any employment agreement, the employer should evaluate whether to offer a severance package to the employee in exchange for a Settlement Agreement and General Release. The severance package must represent consideration in addition to that which the employee is entitled. As part of this evaluation, the employer should balance the benefits of offering a severance package, such as certainty and finality with respect to ending the employment relationship, versus the risk that such an offer may lend a perception of legitimacy to the claims to be released.

i. Consider the current status of the law. Of course, it is advisable that as part of this analysis the employer should obtain an assessment of the current state of the law by in-house or outside counsel.

Conclusion

Although there is no guarantee to avoid litigation, an analysis of the factors outlined above should lead to an appropriate decision that minimizes the risks of litigation. Even where litigation ensues, however, a proper termination analysis and documentation should enable the employer to prepare its most effective defense.