



ahead of the curve

Employee Terminations:

Best Practices and Lessons from the Trenches

January 19, 2017

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What We Will Cover Today (Quickly)

- **At-Will Employment**
- **Protected Classes**
- **Disparate Impact**
- **Retaliation**
- **Performance Documentation**
- **Disabilities**
- **The Older Workers Benefit Protection Act**
- **Questions and Answers**



Important Safety Tip: Don't be Mean

- **Employees go to see lawyers when they feel they have been treated unfairly.**
- **Juries and even judges like to punish bad actors, regardless of the law.**
- **Unnecessary rudeness, callousness, or insensitivity can undermine an otherwise strong defense.**
- **Style matters!**



Important Safety Tip: Don't be Mean



- **This point cannot be overemphasized.**
- **Employment law is hard and everyone makes mistakes.**
- **The difference between an “honest mistake” and one for which a jury punishes an employer is often a matter of style.**

Is the Employee At-Will?

- **Employees can be fired or quit without cause or notice**
- **UNLESS, the termination is for a wrongful reason, or**
- **The parties have agreed otherwise, either verbally or in writing.**



“Cause” Provisions

A photograph showing light trails from cars on a road at night, with a bright light source at the end of the road.

- **Does the employee’s employment agreement alter the at-will relationship?**
- **More senior employee’s, such as executives, may have “for cause” language in their agreements.**
- **These clauses may entitle the employee to severance or other benefits if terminated other than “for cause.”**

“Cause” Provisions

- **The definition of “Cause” can vary greatly from employment agreement to employment agreement.**
 - **“Basically have to kill somebody” definition**
 - Usually requires a felony or intentional misconduct resulting in loss to the Company.
 - Almost never get triggered.
 - **Inadequate performance definition**
 - Usually requires written notice and 30 days’ to cure
 - Can still be difficult to establish.
 - Courts often put on a thumb on the scale for the employee.

“Cause” Provisions

- **Performance manage to the definition of “Cause.”**
 - **If you are issuing performance improvement plans, consider tracking the definition of Cause.**
 - **Make sure you satisfy any notice and opportunity to cure provisions in the employment agreement.**
 - **Document any losses to the Company as a result of the employee’s actions.**
 - **If you fail to act on issues that constitute “Cause” under the agreement today, it will be hard to do so tomorrow.**

Is the Employee in a Protected Class?

- Race
- Gender (and often, gender identity)
- National Origin
- Religion
- Marital Status
- Sexual Orientation
- Age
- Disability
- Past Illegal Drug Use
- Domestic Violence Survivor
- And Many, Many More



Is the Employee in a Protected Class?

- **Have similarly situated employees outside of the protected class been treated differently?**
 - *But Tom did the same thing and he wasn't fired.*
- **Has anyone said or done anything overtly discriminatory regarding the employee? Or even generally?**
 - **Emails? Witnessed conversations? Off-color jokes?**
- **Has the employee complained of discrimination?**
 - **Check the employee's file. Ask managers. Don't assume there is nothing there!**

Is the Employee in a Protected Class?

- **Do you have an objectively demonstrable non-discriminatory reason for firing the employee?**
 - **Objectively demonstrable poor performance**
 - Lowest sales out of all salespeople in the company
 - Multiple examples of poor work product, especially as compared to peers
 - **Objectively demonstrable insubordination**
 - A profanity laced email
 - Multiple witnesses to specific insulting statements towards supervisor
 - **Don't gild the lily**
 - Judges and juries punish untruthfulness

Is the Employee in a Protected Class?

- **Do you have an objectively demonstrable non-discriminatory reason for firing the employee?**
 - **Vague reasons for termination such as “fit” are dangerous.**
 - Jurors and courts interpret “fit” as code for discrimination.
 - There are always bad emails or off-color jokes you aren’t aware of to support a discrimination claim in the absence of an objective reason for the termination.
 - **A weaker but honest reason is better than a stronger but ginned up reason.**
 - It is better to admit that you fired someone due to a personality conflict rather than try to invent a record of poor performance. Dishonesty = liability.

Disparate Impact Discrimination

- **Does a reduction in force disproportionately impact a particular protected class?**
- **Statistical evidence: Two Standard Deviation Rule.**
- **Discrimination can be unintentional, yet courts may still hold the employer liable.**



Disparate Impact Discrimination

<u>Protected Category</u>	<u>Number of Employees</u>	<u>Number of Employees Laid Off</u>	<u>Expected Number of Layoffs</u>	<u>Minus Two S.D.'s</u>	<u>Plus Two S.D.'s</u>
Female	16	4	5	3	8
Male	8	4	3	0	5
Asian	0	0	0	0	0
Black	2	2	1	-1	2
Hispanic	4	4	1	-1	3
Native American	1	0	0	-1	1
White	17	2	6	3	8
Two or More	0	0	0	0	0
40 and over	12	6	4	1	7
40 to 49	2	4	1	-1	2
50 to 59	0	1	0	0	0
60 to 69	10	1	3	1	6
70 and over	0	0	0	0	0
Disabled		0	0	0	0
Total Number of Employees	24	8			

Disparate Impact Discrimination

- **Intent really does not matter.**
- **Yes, you might have to rework that layoff to include fewer employees in protected classes, even if you used facially neutral criteria.**
- **Run your disparate impact analysis sooner rather than later so that decision makers don't get attached to a plan they cannot implement.**

Retaliation

- **Hardest type of claim to defend against.**
- **Weak discrimination claims turn into strong retaliation claims.**
- **Temporal inference: if a person is fired anywhere near in time to protected conduct, there is an a legal presumption that it was retaliatory.**



Retaliation

- **A Plaintiff must generally show:**
 - **Statutorily-protected activity**
 - **An adverse employment action**
 - **A causal connection between the two**
- **Plaintiff also may have to show that relevant decision-maker knew of protected activity prior to deciding upon allegedly adverse employment action.**

Retaliation

- **Has the employee recently complained of illegal or wrongful conduct?**
 - Discriminatory conduct on the basis of the employee protected class, either against the employee him or herself or another employee
 - Other violations, such as safety, financial, etc.
- **Has the employee recently exercised a legally protected right?**
 - Disability leave, FMLA, sick and safe leave, etc.
 - Jury duty, worker's compensation
- **Has the employee recently participated in a company investigation?**
 - EEOC? L&I?

Retaliation

- **Tips for avoiding retaliation claims from employees you intend to fire.**
 - **Carefully consider whom you tell about employee complaints. You can't retaliate against what you do not know.**
 - **Carefully monitor co-workers for shunning behavior. Tell them they aren't helping things by trying to punish the complainant.**
 - **Don't engage the employee in argument.**
 - **Carefully document performance issues and the fact you are considering termination before the employee has the chance to set up a retaliation claim.**

Understanding The Law

Types of Claims

Statutory Bases for Retaliation Claims

- **National Labor Relations Act**
- **Family and Medical Leave Act (FMLA)**
- **Employee Retirement Income Security Act**
- **Occupational Health and Safety Act**
- **Fair Labor Standards Act**
- **Title VII of the Civil Rights Act of 1964**
- **Americans with Disabilities Act (ADA)**
- **Age Discrimination in Employment Act (ADEA)**
- **Public employees can also bring retaliation claims under 42 U.S.C. § 1983**
- **Sarbanes-Oxley Act / Dodd-Frank Act**
- **Washington Law Against Discrimination (WLAD)**

When Ignorance is Bliss

- **You cannot discriminate or retaliate against something you don't know**
 - (Except for adverse impact discussed previously).
 - If an employee claims he was fired because of his religious beliefs, but the decision maker wasn't aware of those beliefs, there is no discrimination claim.
- **If the relevant decision makers have already made up their minds, more information can be a bad thing.**

When Ignorance is Bliss

- **Example**

- **An employee's performance drops precipitously and management makes the decision to fire the employee.**
- **The employee has not raised any health issues or asked for an accommodation.**
- **Interviewing the employee about why his or her performance has declined could reveal a health issue that could require an accommodation if the company were to be come aware.**

When Not to PIP

- **Performance improvement plans can be great where there the employer is providing an honest chance to turn things around.**
- **It is generally a bad idea, however, to put an employee you plan to fire anyway on a PIP.**
- **If the employee satisfies the PIP and you fire the employee anyway, it makes the reason for the PIP look like pretext.**
- **This can turn a low-risk termination into a high risk termination.**

Terminations Against Public Policy

- **Catch-All Style Claims**
- **Arise when an employee is fired for a reason that is not specifically illegal, but which goes against an important government policy.**
- **Examples:**
 - **Whistleblowing (even if there is not applicable whistleblowing statute)**
 - **Arguing against illegal conduct internally**
 - **Safety complaints**

Do You Have Documented Poor Performance?

- **Tangible Versus Intangible**
 - **A consistent failure to meet a hard numerical quota is more compelling than “the employee has a bad attitude.”**
- **Has the employee been given verbal or written warnings, or put on a performance improvement plan?**
- **Have other employees been terminated under similar circumstances?**

Effective Documentation

A long-exposure photograph of a road at night, showing light trails from cars. The trails are primarily red and white, curving into the distance under a dark sky.

- **Documentation must focus on facts, not opinions**
- **Exercise: Which is fact, which is opinion?**
 - “He was harassing her”
 - “She has a bad attitude”
 - “She was late this morning”
 - “She is a slow worker”
 - “It took him three hours to file those documents”
 - “He is insubordinate”
 - “I told him he needed to stay late, and he refused”
 - “She sent him an obscene email”

Terminations and the ADA

- **Safely terminating an employee who has raised ADA issues is extremely challenging.**
- **Be prepared for a long drawn out process.**
- **Certain related issues like intermittent FMLA cannot be avoided and just have to be survived.**
- **This is an area where it is extremely important to get advice from experienced counsel.**

Everything Is A Disability

- **Disability Defined**

- **Just about anything can qualify as a disability**
- **Includes mental and physical disabilities**
- **Poor performance is not enough if a reasonable accommodation would have helped**
- **Even if someone isn't disabled, but people might think they are disabled (perceived as disabled), the Americans With Disabilities Act applies**

The Interactive Process

- **The “interactive process” must be interactive.**
 - You cannot fire someone after giving a single take it or leave it accommodation ultimatum.
 - You want to make at least three attempts to find a reasonable accommodation before you give up and fire the employee.
 - Never reject any but the most outlandish requests out of hand.
 - It is always better to consider the request then explain why it is not feasible (if it is not feasible).

When it is safe to terminate under the ADA

- **If the goal is to safely fire the employee, manage towards these outcomes.**
 - **Push the healthcare provider to assess whether any other accommodations might work.**
 - **Ask the healthcare provider to certify that the employee can safely perform the essential functions of the job**
 - **If you have some basis for doing so.**
 - **Try what the healthcare provider is recommending, even if you believe the employee will not be able to perform.**
 - **Stick with it! Let the employee give up on the interactive process before you do.**

When it is safe to terminate under the ADA

- **Under the ADA, you are generally safe to terminate in the following cases:**
 - **The employee or healthcare provider states that no accommodation will allow the employee to perform the essential functions of the job.**
 - **The employee or healthcare provider states that only accommodation X will allow the employee to perform the essential functions of the job and accommodation X is ridiculous.**
 - **The employee refuses to engage in the interactive process while the employer is still acting in obvious good faith.**

When it is safe to terminate under the ADA

- **Switch from the language of discipline to the language of essential functions.**
 - **Avoid putting employees on “probation” or giving them written warnings or PIPs.**
 - **Instead, send employees communications as part of the interactive process assessing whether the employees are performing their essential functions.**
 - **Constantly demonstrate your efforts to find and try reasonable accommodations.**
 - **But also insist on full performance of essential functions.**

Family and Medical Leave Act (FMLA), and Other Leaves

A photograph showing light trails from a car at night, with red and white streaks curving into the distance against a dark background.

- You can *technically* fire someone who is on, about to go on, or just finished FMLA leave.
- But it is risky! Retaliation claims.
- Typically only done where the employer learns of severe misconduct while the employee is on leave.

Family and Medical Leave Act (FMLA), and Other Leaves

A photograph showing light trails from a car at night, with red and white streaks curving away from the viewer into the distance.

- **You cannot fire someone because FMLA is burdensome. You just have to suffer through it.**
- **Intermittent FMLA can result in an employee taking every Friday off, and there is little you can do about it.**
- **Your best tool is to insist on regular documentation from the employee's healthcare provider.**

Wage & Hour Issues

- You cannot withhold money owed to the company from a paycheck unless the employee authorizes it in writing.
- Wage complaints are another form of protected activity.
- Make sure the employee gets his or her final paycheck on time. In Washington, this means the next scheduled payday.



The Older Workers Benefit Protection Act

- **The Older Workers Benefit Protect Act (OWBPA), mandates that employees over 40 be given**
 - **A period in which to consider a severance and release agreement , and**
 - **A period in which to rescind a severance and release agreement after the employee signs it.**
- **Failure to follow these rules makes any release of age discrimination claims ineffective.**

The Older Workers Benefit Protection Act

- **For individual terminations, employees over 40 must be given 21 days to consider the agreement and 7 days after signing to revoke the agreement.**
- **For group terminations, employees over 40 must be given 45 days to consider the agreement and 7 days after signing to revoke the agreement.**
- **In both cases, the employee can sign sooner if they choose, but cannot be forced to sign sooner.**
- **The 7 day revocation period starts once the employee signs.**

The Older Workers Benefit Protection Act

- **The OWBPA contains certain required disclosures that must be included in the severance and release agreement.**
 - **Must be written in a manner that can be clearly understood.**
 - **Must specifically refer to rights or claims under the Age Discrimination in Employment Act.**
 - **Must advise employee to consult with an attorney.**
 - **Must not waive rights or claims arising after the agreement is signed.**
 - **Must be supported by consideration (money) to which the employee is not already entitled.**

How to Communicate During the Termination

- **Less is often more.**
 - **Anything you say can and will be used against you.**
 - **Any reasons you give can be picked apart later by the employee's lawyer.**
 - **If you give one reason during the termination, it will be harder to give a different one later.**
 - **Remember, the default rule is employment "at-will."**
 - **If you give detailed reasons, make sure to say "including but not limited to..."**
 - **Don't get drawn into a debate, the decision has been made.**
 - **But, if you are given new crucial information in what was supposed to be a termination meeting, it is ok to pump the brakes.**

How to Communicate During the Termination

- **Listen!**
 - While you don't want to get into it with the employee, listen to what the employee has to say.
 - More information is always better.
 - You may learn helpful information about problems in the workplace.
- **Be civil.**
 - Even if the employee is rude or challenging, just listen without arguing.
 - It is always helpful to be prepared with resources to offer the employee.
 - Outplacement services? EAP?

How to Communicate During the Termination

- **For tricky terminations:**
 - **Make sure you have a wing person.**
 - You will want a witness to the conversation.
 - People are often less willing to be belligerent when there is more than just one other person in the room.
 - **If you are worried the employee could get heated...**
 - Make sure you are closest to the door.
 - Have a table between you and the employee.
 - When in doubt, take precautions. Don't worry about giving offense.

Important Safety Tip: Don't be Mean

- **Specific Tips**

- **Be cordial in emails. Say thank you, even if the employee is being abusive.**
- **Don't put anything in writing you don't want to have to defend in court.**
- **When in doubt it is usually better to give the employee more rope (but not always.) Examples:**
 - **One more attempt at the interactive process**
 - **A PIP rather than an immediate termination**
 - **Investigate an employee's claim, even if it seems a little ridiculous.**

General Strategy

- **Risk of litigation and liability vs. the disruption to the workplace and the cost of continuing to employ the employee.**
- **Consider:**
 - **How good are the employee's claims? (How likely is the employee to win?)**
 - **How much money is the employee likely to win?**
 - **Key factors include**
 - Age
 - Pay
 - Possible emotional distress

General Strategy

- **Consider (cont.):**
 - **How much is it costing to continue to employ the employee?**
 - **Is the employee likely to quit? If so, when?**
 - **Are there any business risks associated with keeping the employee on?**
 - ***E.g.*, important customer threatens to leave if they have to keep working with the employee.**
 - **Other employees might leave**
 - **If these risks are big, you might want to terminate even if the employee had a decent case.**

General Strategy

- **Termination chicken**

- It is almost always better if the employee quits rather than being fired.
- Constructive discharge requires showing that the workplace was intolerable.
- If the employer looks like it is trying to work with the employee, courts and juries will be less sympathetic to an employee who quits.
- Employees will often push boundaries trying to get fired. Let them push!

Managing Within the Law

QUESTIONS?

SHRM Recertification Credit

Activity ID: 18-X863E

Title: How to Handle Employee

**Terminations: Best Practices and Lessons
From the Trenches**

Start Date: 1/19/18

End Date: 1/19/18

Professional Development Credits: 1

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*Presented by:
Jenifer Lambert
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February 16th, 2018
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