

**YOU'RE
FIRED!**



PHELPS

Illustration by staff
artist Joey Phelps

ISSUES TO CONSIDER WHEN TERMINATING AN EMPLOYEE

by Michael B. Berger, Esq.

This is my fourth and last in a series of columns that focus on the legal issues employers may encounter when hiring and firing employees. In previous columns, I addressed employer use of criminal background and social media investigations during the hiring process and the questions an employer may legally ask a prospective employee during a job interview. I will now focus on legal issues pertaining to terminating an employee. Unlike Donald Trump, who can fire “employees” with impunity on his TV Show *The Apprentice*, real-world employers must use caution.

Employees with an Employment Agreement

If an employer wishes to terminate an employee who has a written employment agreement, the employer should first carefully review the agreement to ascertain the terms and conditions of the employee’s employment. Does the agreement provide for an employment for a specific term or does the agreement preserve the “at-will” nature of the employment (discussed in more detail below)? If the agreement is for a specific term, can the employer terminate the agreement early “for cause” or “without cause,” and if so, what are the ramifications for an early termination? If the employer terminates the agreement early, how much severance and/or other compensation must be paid to the departing employee? It is highly recommended that an employer use competent legal counsel to help draft any such employment agreements to protect the employer in the event the employment relationship does not work out as expected. Legal counsel should also be consulted at the time that the

employer is considering whether to prematurely terminate the agreement.

At-Will Employment

The balance of this article will focus on termination issues pertaining to employees that do not have a written employment agreement or who have a written agreement that is specifically terminable “at-will.” What does “at-will” employment mean? In simple terms, an “at-will” employment relationship means that either the employer or the employee may terminate the relationship at any time and for any reason, or for no reason at all.

The vast majority of states in the U.S. are “at-will” employment states, meaning the employer can terminate an employee for any reason or no reason at all (except for illegal or improper reasons that will be addressed below). Oddly, Montana is the only state that is not a traditional at-will employment state. After a Montana employee survives his or her “probationary period” (90 days from hire date), a Montana employee is protected by the “Montana Wrongful Discharge From Employment Act,” Montana Code Section 39-2-901 et. seq. (1987). A discussion of the Montana Act is beyond the scope of this article, but if you are a Montana employer, please be mindful of the requirements of the Montana Act and the ramifications for violating it (potential liability for up to four years’ worth of lost wages and fringe benefits and punitive damages).

Limitations on At-Will Employment

Just as it is against the law to make hiring decisions based on discriminatory motive against a “protected class,” it is also illegal to fire an employee for being a member of a “protected class.” Therefore, it is illegal to terminate an

employee based on the employee’s age, race, gender, birthplace, marital status, religion, disability, and nationality. A growing number of states, counties, and cities have passed laws or ordinances that also cover other “protected classes” such as sexual orientation.

It is also improper to fire an employee for complaining about illegal activity, discrimination, safety violations, or harassment in the workplace. Each state has its own “whistleblower” laws, so an employer should check with its attorney if the employer wishes to fire someone who has filed a complaint or testified against the employer.

Lastly, an employer should not fire an employee for exercising his or her legal rights. For example, an employee should not be fired for serving on a jury, for requesting or taking family or medical leave, military leave, or time off to vote.

Recommendations

In order to avoid potential lawsuits relating to terminations, regularly and consistently document employee performance issues. Even though you may terminate an employee for reasons that are totally legal and acceptable, that does not mean the employee will not perceive things differently and consider hiring a lawyer to file a discrimination or wrongful discharge lawsuit. An employer with a well-documented personnel file is much more likely to avoid such litigation, which is very expensive, distracting, and time-consuming.

As with the hiring decision, whether to terminate an employee should focus on the employee’s job performance, not the employee’s age, race, religion, gender, or sexual orientation. If you need to make economic layoffs, there will be additional factors,

**BUILT WITH
TRADITION
FOR QUALITY
SINCE 1923**

**THE BEST, MOST RELIABLE & COMPLETE LINE OF
HOSE, CORD & CABLE REELS**

USA MADE • QUALITY • SUPPORT

800.269.7335 • info@coxreels.com

www.COXREELS.com/pw



COXREELS

CROSS CLEANING SOLUTIONS



Cross Cleaning Solutions, LLC builds and maintains its own pressure washing systems. We offer everything from small, cold water units to large high-volume, hot water mobile wash rigs.

903.988.1364
CROSSCLEANINGSOLUTIONS.COM

²³ Then He said to them all, "If anyone desires to come after Me, let him deny himself, and take up his cross daily, and follow Me. ²⁴ For whoever desires to save his life will lose it, but whoever loses his life for My sake will save it." — Luke 9:23-24



**Capture wash water and liquid spills
with Vacu-Boom**

- Powerful suction action seals boom to any hard surface indoors or out.
- Simultaneously captures and extracts fluid from surface.
- Can be arranged to suit any location.
- 100% effective. Complies with environmental laws.
- Set-up/take down – 5 minutes or less. Extremely portable.

PRESSURE POWER SYSTEMS, INC.
P.O. BOX 917, KERNERSVILLE, NC 27285
PHONE: (336) 996-5585
FAX: (336) 996-6217
<http://www.vacuboom.com>
vacuboomsales@spartanmanuf.com

such as the salaries of the employees under consideration to be laid off. However, the same concerns apply in an economic layoff, and you should not make your decisions based on illegal or discriminatory reasons.

My last recommendation is that you consider obtaining Employee Practices Liability Insurance ("EPLI"). This type of insurance offers protection to employers against potential wrongful discharge, discrimination, and other employment-related claims. EPLI will indemnify the insured and pay for defense costs (which can run tens or hundreds of thousands of dollars). EPLI is not inexpensive. However, if you have enough employees and therefore enough potential exposure to employment-related claims, you should contact your insurance agent and get premium quotes.

Conclusion

Documenting employee performance issues and considering EPLI insurance can help protect employers. Unfortunately, we live in a very litigious society. An employer's best protection against having to deal with employment lawsuits (frivolous or otherwise) is to treat its employees fairly and consistently and to regularly consult with legal counsel to ensure that the employer's hiring and firing decisions are made in a lawful manner.

Michael Berger, Esq., is a Partner with Carpenter & Berger, PL. For more information, call (954) 772-0127, e-mail mberger@carpenterberger.com, or visit www.carpenterberger.com.

Disclaimer: The information provided in the Law Advisor column should not be considered legal advice. This column is intended only to provide general educational information. You must never rely on the information provided here as legal advice. Only your attorney can evaluate your specific situation and provide you with legal advice. Except as provided below, you may feel free to forward, distribute, and copy the Law Advisor column, as long as you forward, distribute, and copy it without any changes and include all headers and other identifying information. You may not copy it to a website without the author's prior, written consent. **CT**