Best Practices for Employee Terminations

By Timothy H. Howlett

A strong workforce is a critical component for any employer's success, and work is at least as important for employees. Work is a source of much more than income; it is a source of dignity and self-worth for employees. As a result, employment terminations can have high stakes, both because of the risks of litigation and the impact on the workplace.

The legal risks

Terminations can involve costly litigation. Accordingly, an employer must be counseled on the legal risks of the termination. The first inquiry will be whether the employee has an employment agreement providing for just-cause termination established through a written contract or an offer letter, or instead is an at-will employee who can be terminated with or without cause and notice. This inquiry includes whether at-will employment has been established in writing by an employment application, job-offer letter, handbook, written policy, or other written document. The legal presumption is at-will employment,[1] but an employer can be at risk of a claim of an oral agreement to terminate for cause if there is no documentation confirming at-will employment.[2]

Some employers believe that at-will employees can be terminated without risk. Clearly, that is not the case. The employee has several protections. As the attorney counseling the employer, you need to determine whether the employee is in a protected category under statutory law which may include race, national origin, gender, height, weight, age, religion, disability, sexual orientation, and military or veteran status.[3]

The inquiry also must determine whether the employee has raised concerns that could lead to a retaliation or whistleblower claim or a claim of interference with protected, concerted activity under the National Labor Relations Act. This protection extends to non-union employees. The inquiry must also include whether the employee has used the Family and Medical Leave Act, filed for worker's compensation leading to a retaliation claim, or has medical issues that could result in a disability claim.

The employer may claim that it has a legitimate nondiscriminatory reason for the termination, such as poor performance, but the employee may claim that the explanation is pretext and that other employees not in the protected category were treated differently.

If the employee is in a protected category, the analysis will include how comparable employees—including those not in protected categories—have been treated. Also, it is important to review the employee's performance evaluations, pay history, discipline, and performance improvement plans if the termination is for poor performance. A history of positive evaluations or pay raises that compare favorably to other employees could cast doubt on a claim that termination was for poor performance. Also, it is important to determine if the employer has a history of overlooking similar performance issues for the employee or others. Another important question is whether the employee was warned of the consequences of the behavior.

It is important to ensure that the employee has been given an opportunity to address the concerns before termination to determine if there is a satisfactory explanation. Jurors expect at least that basic level of fairness.

If the termination is part of a workforce reduction, the analysis will include looking at the basis for selection, reviewing comparable employees, and analyzing selected and retained employees as to protected categories. For example, what are the ages of terminated employees compared to retained employees? Are the expressed bases for selection supported by documentation? If the employer claims that selection was based on performance, do performance evaluations support that explanation?

An analysis of the risks will also include looking at other factors that could affect the employer's explanation. For example, has the supervisor had issues with other employees? Has this supervisor been disciplined?

Some employers believe that at-will employees can be terminated without risk. Clearly, that is not the case.

"Best Practices" is a regular column of the *Michigan Bar Journal*, edited by Gerard Mantese and Theresamarie Mantese for the Publications and Website Advisory Committee. To contribute an article, contact Mr. Mantese at gmantese@manteselaw.com.

Is the supervisor new? Will previous supervisors and other employees be favorable witnesses for the employee? Are the necessary witnesses still employed and on good terms with the employer? It is usually not a pleasant surprise to learn during litigation that the supervisor has been terminated.

Another analysis concerns the nature of the performance issue: is it an issue that can be corrected with coaching and progressive discipline, or is it a trust issue that has caused enough damage to the employment relationship that continued employment is not feasible?

If the case goes to trial, the jury is most likely to evaluate the decision from a fairness standpoint rather than follow technical jury instructions. It will look at many factors to determine fairness, including length of employment, whether the employee was given the chance to improve, whether the employee was given the chance to explain, employee evaluations, and whether the employee received regular pay raises, which would be inconsistent with performance claims.

Nonlegal considerations

Just because an employer can terminate an employee with minimal legal risks does not mean that it should. Part of your role in counseling the employer is to discuss the potential impact of the termination on the workplace.

The employer should consider the impact of its decision on the workforce in general. For example, is the employer supporting its supervisors when they make difficult decisions or making it more difficult for them to perform their jobs? Additionally, if a decision is made not to terminate an employee, will the workforce believe the employee was given favorable treatment? Was the conduct such that the workforce would expect the employee to be terminated, and a significant morale issue would develop if the employee was not terminated? Is there a concern that the conduct in question will lead to similar behavior from others if not appropriately addressed?

On the other hand, if the employee is terminated, will the workforce believe the employer overreacted or treated the employee unfairly, creating a perception that this is not the type of place where people want to work?

Counseling suggestions

Are there alternative approaches that would address the issue but avoid the risks associated with termination? Examples include a suspension without pay or a last-chance agreement.

You should counsel the employer to preserve emails, determine if an email policy states no expectation of privacy, and, depending on the issues, counsel the employer to review the employee's emails.

Ask if there has been a Bullard-Plawecki Act request.[4] If so, discuss with the employer the difference between a personnel file and personnel records under the act to protect the employer's rights to use key documents.

Determine if there has been a claim for unemployment compensation. If so, counsel the employer as to whether to contest the claim and what information to include in the response.

Ask if the employer has employment practices liability insurance so that it can make a claim. A demand letter or Equal Employment Opportunity Commission charge may require notice to the insurance company.

Explain the litigation process in detail, including the client's time commitments, risks, attorneys' fees, costs, and potential verdicts. Also note the risk of paying the employee's attorney's fees if the case goes to trial.

An employer will also want to identify any public-relations issues. Will taking no action against the employee reflect poorly on the employer or, conversely, are there potential public-relations ramifications for moving forward? In significant cases, the employer may want to retain a public-relations consultant.

The employer may also want to provide a separation agreement, which will avoid legal risks and provide certainty. If so, the employer must make sure the agreement complies with Age Discrimination in Employment Act of 1967 provisions if the employee is 40 or older.

If the decision to proceed with termination is made, the employer should have two representatives at the termination meeting to reduce the likelihood of a misrepresentation as to what was said. One person should take detailed notes. The employee's computer access should be turned off to avoid the transfer of documents and communications with other employees. The termination should be carried out respectfully. The employee should be given an opportunity to be heard, but the employer should avoid debating the merits of the decision. The employee's dignity should be protected upon exiting the building.

Conclusion

Employment terminations can involve significant legal risks with a broad range of potential legal claims. Just as importantly, terminations involve significant nonlegal considerations. As a result, counsel should address both. ■

This article is based in part on materials compiled for the 2017 Labor and Employment Law Institute sponsored by the Institute of Continuing Legal Education.

Timothy H. Howlett's practice focuses on employment litigation and counseling. He leads Dickinson Wright PLLC's Labor and Employment practice group and is a former chair of the State Bar of Michigan Labor and Employment Law Section. A Fellow of the College of Labor and Employment Lawyers, he received the Distinguished Service Award from the SBM Labor and Employment Law Section in 2018.

ENDNOTES

1. *Lytle v Malady*, 458 Mich 153, 163; 579 NW2d 906 (1998) and *Rood v General Dynamics Corp*, 444 Mich 107; 507 NW2d 591 (1993).
2. *Lytle* and *Rowe v Montgomery Ward & Co*, 437 Mich 627, 645; 473 NW2d 268 (1991).
3. Title VII of the Civil Rights Act of 1964; the Michigan Elliott-Larsen Civil Rights Act; the Americans with Disabilities Act of 1990; the Age Discrimination in Employment Act of 1967; the Uniformed Services Employment and Reemployment Rights Act of 1994; and the Veterans Employment Opportunities Act of 1998.
4. Bullard-Plawecki Employee Right to Know Act.