



Firing with Courtesy, More Than Being Nice

by Duncan MacKay

Do you have a specific procedure for terminating employees? Do you conduct exit interviews? Do you conduct fair and objective investigations into the events leading up to termination? Do you ensure that your employees know the rules and the penalties for breaking them?

These are just a few questions that a construction industry employer should ask before discharging an employee — less politely known as firing. When it comes to avoiding employment-related litigation, the most dangerous time for an employer is just before and after terminating an employee. It is then that the risk of incurring liability for punitive damages is highest. For instance, in *Rauson v. Sears Roebuck and Co.*, a jury awarded a former Sears employee \$19 million in punitive damages, based in part upon its conclusion that Sears fired the employee in a callous and demeaning manner. While this case was ultimately reversed on appeal, it starkly illustrates the high stakes employers potentially face with the wrongful termination of even a single employee.

There are several key factors you should consider in developing a fair and legally defensible termination procedure, including its objectivity, the verifiability and appearance of its objectivity, and the manner in which it is implemented. You should also consider the effect of your termination procedure on both present and future employees.

These considerations and those spelled out below may not stop your employees from filing lawsuits when they are terminated, but they should help you ultimately avoid liability.

Treat the Employee with Respect and Dignity

How you discharge an employee is extremely important. As much as possible, you should let people go with dignity and consideration. This is more than a matter of being nice — it's a matter of protecting yourself legally.

Generally, the employee who believes that he or she was treated unfairly by an employer regarding either the causes for termination or

the manner in which the termination was carried out is the most likely to seek an outside forum — such as a courtroom — to rectify the perceived unfairness. This is especially the case when an employee feels he or she has been denied a fair and unbiased review of the termination decision, or that he or she has extenuating reasons that may persuade a neutral third party that the termination decision was unwarranted.

Fortunately, this coin has a flip side: Employees who have been given a fair warning that their performance has not met the employer's expectations, a reasonable opportunity to improve, and a fair chance to be heard by an unbiased party, are less likely to sue. Most employees who have the opportunity to tell their side of the story and vent their anger and frustration will usually accept the employer's decision. Others will avoid pursuing avenues of redress out of fear that the termination decision, having been carefully considered and fairly conducted, will be confirmed by a neutral third party.

Leave a Paper Trail

To protect yourself, you should maintain complete and accurate written records concerning every employee's performance and disciplinary history, especially those events leading up to termination. You should also conduct a thorough and complete investigation of the incidents leading to the disciplinary or termination decision. The investigative process you follow, as well as your ultimate determination, should be clearly and completely recorded and maintained. This will enable you to demonstrate that you reached your decisions in an objective fashion.

The most difficult cases to defend are those in which an otherwise legitimate termination decision is injected with an unlawful motivating factor, such as illegal consideration of an employee's age, race, sex, national origin, or handicap. In such cases, known as "mixed motive" cases, the employee claims that the employer's stated legitimate reasons for terminating him or her were merely pretextual, or a cover-

up, for the actual unlawful reasons for the termination decision.

To defend such a case successfully, the employer must be able to substantiate the legitimacy of the reasons for the employee's discharge. Clearly, the most effective way to do this is by thoroughly documenting the employee's work history. The employee's full work history should be conveyed in the employer's personnel records.

Likewise, when you inform an employee that you are discharging him or her, you should give the complete reasons for the termination. This will remove any vacuum that could otherwise be filled by an allegation that illegal motivating factors were also present.

Put Your Employees On Notice

A common complaint among fired employees is that they did not know that they weren't performing up to the employer's expectations. Such warnings should not only be given, but should be made part of the employee's written employment record. This is important in determining the objectivity and fairness of your termination process. Courts often consider the extent to which the former employee was on notice of his or her poor work performance or below-standard behavior.

Every employee's personnel file should include documentation of all oral or written warnings, suspensions, demotions, and any other disciplinary action, including detailed information about your reasons for disciplining or otherwise warning the employee and the nature of such discipline or warning.

Conduct Exit Interviews

Exit interviews are an effective method for defusing the resentment and anger many employees may feel about being terminated. Again, the genesis for many discharge-related lawsuits is not so much why the employees were discharged, but rather how they were discharged and how they were treated. Employees who have not had the opportunity to vent their anger and frustration and who have been denied the opportunity to tell their side of the

story will often seek the courtroom as an outlet. Exit interviews provide the employee with this opportunity.

The exit interview itself should be short and sweet, limited to conveying only the necessary information to the discharged employee. For instance, you should inform him or her that you have done all you could, that is, that you notified the employee that performance had fallen below your expectations, that you gave the employee the opportunity to bring performance up to the expected standards, and that the employee was ultimately unable to achieve these goals.

This shows the employee that he or she has received objective and fair treatment and was given a reasonable opportunity to rectify the situation before you had to resort to termination. If appropriate, the employee should be given the opportunity to explain his or her side of the story, and you should sincerely and seriously consider the facts, mitigating circumstances, and other reasons offered. You should write down any such statements.

If you determine that a further investigation is warranted based upon such information received, you should temporarily stay your decision to terminate the employee until a follow-up investigation can take place. Such a follow-up investigation will substantiate your claim that you provided your employee with due process. It might even show you that your termination decision is no longer warranted under the circumstances.

This article should provide you with a few insights into how terminations sometimes trigger lawsuits from former employees. Taking them into consideration will go a long way toward avoiding such litigation. Before making a decision to terminate an employee, however, you should consult qualified labor counsel. ■

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