

AVOIDING WRONGFUL TERMINATION LIABILITY

By Andy Wolfe¹

Employee terminations are, far and away, *the Number One cause of lawsuits against employers*. In California, where I practice law, it often seems like it's open season on employers. Why are there so many wrongful termination lawsuits? As soon as an employee gets fired, whatever loyalty that employee (we'll call him Joe) once had to his former employer will probably evaporate. Joe will almost always feel that the decision to fire him was unfair. He probably has bills to pay and mouths to feed. Angry, or afraid, or both, he recalls media stories about all the other ex-employees who filed lawsuits against their employers and got big money. He picks up the phone and starts looking for one of those lawyers who take wrongful termination cases on a contingency basis. There's a good chance his search will be successful.

Once he gets an attorney, Joe probably won't have much trouble coming up with a viable basis for bringing a wrongful termination lawsuit. Please note my use of the word "viable," rather than "valid." Joe's claims don't have to be true, just plausible enough to make it difficult and expensive for his employer to defeat.

What kind of claim can Joe and his attorney assert? Maybe "discrimination" - more than a dozen different forms of discrimination are now illegal, with the result that most employees are in at least one legally protected category. Maybe "retaliation" - if Joe exercised any one of a multitude of his legally protected employee rights shortly before getting fired (if, for example, he filed a workers compensation claim), he might plausibly claim that his employer fired him in retaliation for exercising that right. (The ease with which retaliation claims can be conjured up

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makes them particularly popular these days.) Maybe “whistle-blowing”- if Joe said anything before being fired that could be construed as a contention that his employer was acting illegally, he may claim that he’s being punished for telling truth to power. And these are only some of the many claims that a skilled lawyer can craft in an effort to establish a viable basis for Joe’s wrongful termination lawsuit.

All too often, my first contact with a client is a call from an employer who fired Joe for reasons that looked completely unassailable, who never expected to hear from him again, and who is now shocked to find itself the target of lawsuit in which Joe seeks astronomical sums of money for back pay, future economic losses, emotional distress and punitive damages.

Another familiar type of client is the employer who knows that keeping Joe on the job has damaged team performance and morale, but also knows that firing Joe might result in a lawsuit and will be an unpleasant experience the employer would very much like to avoid. Typically, this employer has been procrastinating about that deteriorating situation for a long time.

Fortunately, there is an alternative to firing an employee who must be let go, one that greatly reduces the risk of liability and greatly reduces the stress on employer and employee alike. Simply stated, the solution is this: instead of just going ahead and firing Joe, *negotiate a separation agreement with him*. From the employer’s perspective, the essential feature of the settlement agreements I recommend to many clients, and draft for them, is that Joe releases all of the claims that he would otherwise have been free to assert in a lawsuit.

To obtain such a release, the employer engages in a negotiation with him, one that has been carefully planned to maximize the opportunity for a mutually agreeable outcome. As in all negotiations, the employer will usually need to give Joe an incentive to come to an agreement,

and the size of that incentive will depend on the facts of the case. If Joe is someone who has been caught red-handed engaging in willful misconduct, he might be willing to sign such an agreement in exchange simply for allowing him to resign rather than getting fired for cause. On the other hand, if Joe has served the employer for a long time and isn't being terminated for unsatisfactory performance, a substantial severance payment may be warranted. Depending on the situation, there are many "bargaining chips" the employer may be able to use effectively in these negotiations and not all of them are monetary. Such bargaining chips may include, for example, a letter of reference for Joe, a commitment not to contest his unemployment insurance claim, a continuation of his insurance benefits, or allowing him to keep designated company property (such as his laptop, company car or cell phone).

The separation agreement should also be carefully drafted to resolve other important aspects of ending the employment relationship, like protecting the employer's trade secrets and deciding whether the agreement is to be kept confidential.

Seeking such an agreement isn't appropriate in every case. Sometimes the employer will conclude it's better to fire Joe in order to vindicate an important principle - for example, to "make an example" of Joe for engaging in willful misconduct. And, of course, terminating Joe by means of a negotiated separation agreement is apt to take more time and cost more than firing him ... in the short run.

But in many cases there are substantial benefits in the long run. A negotiated separation agreement usually is less stressful to achieve, minimizes the risk of future litigation, and is much less expensive than litigation. (Even if Joe loses his lawsuit, the employer's defense costs if the case goes to trial will usually be far in excess of \$100,000.)

In deciding whether or not to terminate an employee by negotiated agreement, a critical factor to assess is the risk of litigation. In most cases, that risk will increase with the status of employee who's being let go. If Joe is a high-level executive, he'll be much more likely than an entry-level employee to react to being fired by bringing a lawsuit, and he'll be able to claim much larger economic damages.

When offered an opportunity to leave his job by negotiated agreement rather than by getting fired, Joe rarely passes up the opportunity and rarely negotiates so unreasonably that an agreement cannot be reached. Employers are often surprised when I tell them this, but there are sound reasons why it is so. Joe almost always wants to avoid getting fired. Leaving his job pursuant to an agreement allows him to leave with his dignity (and his resume) intact. And negotiating that agreement gives him some say in how the termination will occur. Indeed, such negotiations often produce "Win-Win" outcomes - ones that are much more beneficial to Joe than being fired and that allow his employer to reduce its workforce in an optimally considerate and effective manner.

For these reasons, when the time comes to terminate employees, employers would do well to consider the option of negotiating separation agreements.