



Successful Employment Termination Strategies:

How To Get Rid of the Troublesome Employee



Fox Rothschild LLP
ATTORNEYS AT LAW

Successful Employment Termination Strategies: How To Get Rid of the Troublesome Employee

- Introduction
- **Litigation Avoidance From the Outset: Effective Recruitment and Hiring**
- **Building the Record: Effective Performance Appraisals**
- **Practical Concerns With Discipline and Termination**
- Conclusion

Introduction

In simplest terms, all employment litigation involves an allegation that the employer did not make a sensible and responsible business decision: that it broke a promise (such as failing to follow a procedure upon which an employee relied), acted for a reason that the law defines as improper (such as “whistle-blowing”) or irrelevant (such as race, sex or age) or behaved in a manner intended to cause harm and wholly unrelated to business interests (such as gossiping about the reason for an employee’s termination to those with no business need to know). While litigation is often unavoidable and ultimate success can never be guaranteed, the simple truth is that practices and decisions that make sound, practical business sense are the most defensible in litigation.

Put another way, “discrimination,” in the dictionary sense, is not only lawful, it is essential to the proper functioning of any organization. That is, when an employer chooses the better qualified candidate over the lesser qualified candidate, it is “discriminating” on the basis of merit. By ensuring that the standards utilized for this “discrimination” are fairly and, most importantly, demonstrably related to the job in question, the employer does both a better job of managing and lessens its exposure to claims of unlawful discrimination. The key to litigation risk reduction, then, is to ensure that the best business decision is made in the first instance and the factors underlying that decision are properly documented and communicated. Concomitantly, having made, or committed to make, the best business decision possible, it is senseless to expose that decision to legal challenge by introducing factors or considerations unrelated to business needs.

In short, an employment termination decision is, simply, a business decision with potentially significant legal consequences that should be considered, made and implemented with the same degree of care that attends any other comparable decision. It is important to the successful defense of a claim that an employer understand the different types of claims that may be raised. It is far more important in the prevention of such claims to understand the steps an employer can take to reduce the possibility of a plaintiff being successful.



Fox Rothschild LLP
ATTORNEYS AT LAW

Successful Employment Termination Strategies: How To Get Rid of the Troublesome Employee

- Introduction
- **Litigation Avoidance From the Outset: Effective Recruitment and Hiring**
- **Building the Record: Effective Performance Appraisals**
- **Practical Concerns With Discipline and Termination**
- Conclusion

Litigation Avoidance From the Outset: Effective Recruitment and Hiring

Because those of us in the human resources/employment law business seem to spend the majority of our time concerned with performance problems and employment termination issues, the questions of whom to hire and not to hire, and on what basis, often fail to receive the degree of attention they deserve. Generally speaking, a responsible employer should structure its recruitment and hiring program so as to accomplish three things: first, and most importantly, to obtain the best qualified and most company-oriented employee possible and to set a positive tone for the employment relationship; second, to establish clearly the terms of the employment relationship so as to avoid future misunderstanding and/or express or implied contract claims; and third, to avoid statements, procedures or decisions that could themselves be open to legal challenge. The first of these goals is beyond the scope of this document, and the following discussion will focus upon the second two areas.



Establishing the Terms of the Employment Relationship

Assuming that it is the company's intent to preserve the "at-will" character of employment, the recruitment and hiring process should be scrutinized for any statement or suggestion that could tend to rebut that presumption and, where appropriate, efforts should be made to strengthen that presumption through appropriate disclaimers of intent to contract.

The other alternative for the employer is to enter into written employment contracts designed to negate the existence of additional "implied" terms and that protect the employer's right to terminate. The benefit to this approach is twofold. First, from a contractual perspective, agreeing to be bound by the specific terms of the contract lessens the possibility that the employer will be held bound to what a court or jury later finds the employer to have "intended." Second, an employee employed under a contract of employment for a term — even if that term is indefinite and employment can be terminated upon minimal notice — is arguably no longer an employee "at-will."



Fox Rothschild LLP
ATTORNEYS AT LAW

Successful Employment Termination Strategies: How To Get Rid of the Troublesome Employee

- Introduction
- Litigation Avoidance
From the Outset:
Effective Recruitment
and Hiring
- Building the Record:
Effective Performance
Appraisals
- Practical Concerns
With Discipline and
Termination
- Conclusion

Several junctures in the hiring process require scrutiny:

Advertising and Recruitment

The fact that courts do not presently recognize vague promises concerning “permanent employment” and the like to be contractually enforceable is no reason to invite future courts to do so. While most courts clearly recognize that advertising carries with it almost an expectation of “puffery,” such that reliance on the specific wording of an employment advertisement or generalized recruiting speech is almost per se unreasonable, such advertising should be carefully thought out.

Of much greater importance, however, is recruitment directed to individuals, rather than to the public at large. Where the employer affirmatively solicits an individual applicant and, in a situation fraught with even greater danger, induces that individual to leave or forego other employment, the likelihood increases that promises made to the individual will be held to be contractually enforceable. This danger is particularly acute when dealing with sales, management and other “white-collar” positions for which line management, rather than human resources personnel, engage in individualized recruiting for specific positions. At a minimum, line managers involved in such recruiting should be trained to avoid “off-the-cuff” discussions of potential terms and conditions of employment. At best, line management should focus upon the substance of the job in question, leaving the discussion of and agreement to specific terms to designated individuals — whether in human resources or higher line positions — with a more thorough grounding in employment law principles.



The Application Form

The “don’ts” of the application form — principally inquiries that are explicitly or implicitly prohibited on EEO grounds — are important and of immediate concern to most employers but beyond the scope of this paper. The “dos,” however, are equally important, but, unfortunately, not something to which most employers devote much attention. Not only can the application provide valuable information in a convenient format, it can provide important protection from later claims. Therefore, it is important to utilize the application form at the outset of the interviewing/selection process and not simply as an



Fox Rothschild LLP
ATTORNEYS AT LAW

Successful Employment Termination Strategies: How To Get Rid of the Troublesome Employee

- **Introduction**
- **Litigation Avoidance From the Outset: Effective Recruitment and Hiring**
- **Building the Record: Effective Performance Appraisals**
- **Practical Concerns With Discipline and Termination**
- **Conclusion**

administrative afterthought following a hiring decision or the assumption of employment.

The protection to be gained from the application form comes in three areas: (1) an acknowledgment of the “at-will” nature of employment; (2) a disclaimer of the authority or intent to modify “at-will” employment either by word or writing; and (3) an undertaking that the information supplied is accurate, will be investigated by the employer and may provide the basis for rejection of the application or discharge from employment if found to be false. Even in the face of predictable arguments that such application form acknowledgments are no more than “boilerplate,” seldom read or understood by applicants, their importance cannot be underestimated.

There is no “magic language” for this purpose and it is generally best to tailor the acknowledgment to the particular industry and employer and to ensure that it complements other employer documents and policies. Further, the strength and detail of the language used may also depend upon an evaluation of its “down-side.” For example, an employer that perceives itself as vulnerable to a union-organizing campaign may conclude that a somewhat increased risk of an individual claim of an implied contract is justified by a desire to downplay the perception that wholly “at-will” employees lack the job security of unionized workers. As in most other areas of employment law, this is a question deserving of the fact-specific advice of your employment attorney.

The Offer and Acceptance of Employment

Depending upon the nature of the position at issue and company culture, the offer of employment can take one of three broad options vis-a-vis establishing the terms of the employment relationship. It may (1) do nothing but offer a job upon unspecified terms, subject, of course, to the “at-will” presumption; (2) offer the position, outline the general terms (such as, for example, salary, medical benefits and vacation entitlement) and explicitly disclaim the existence of an employment contract; or (3) explicitly affirm the existence of a contract, the terms of which are limited to those set forth in the offer. In any case, future difficulty is best avoided if the offer is made, or at least formally confirmed, in writing.

If the employer’s intent is to preserve “at-will” employment, the offer should avoid language that could imply a durational term and should quote salary figures in weekly or monthly, rather than annual, terms. Again, depending upon the company culture, the offer may set forth a contractual disclaimer similar to that appearing on the employment



Fox Rothschild LLP
ATTORNEYS AT LAW

Successful Employment Termination Strategies: How To Get Rid of the Troublesome Employee

- **Introduction**
- **Litigation Avoidance From the Outset: Effective Recruitment and Hiring**
- **Building the Record: Effective Performance Appraisals**
- **Practical Concerns With Discipline and Termination**
- **Conclusion**

application. If, on the other hand, the employer's intent is to enter into a contract, the offer language should be much clearer and more specific.

Avoiding Troublesome Pre-Employment Inquiries

Good business practice dictates that the hiring process focus upon the background and skills necessary to perform effectively in the job at issue. Conversely, there is no good business reason for asking a question during the hiring process if an employment decision cannot be based lawfully on the answer. Beyond that, the act of asking the question or, for that matter, having knowledge of the answer regardless of who asked the question, may be enough to raise an issue of fact — that is, an issue for trial — on the existence of an intent to discriminate.

Persons in the hiring and recruitment process should be educated to avoid and documents utilized in the recruitment and hiring process should be scrutinized for references to protected characteristics.

Building the Record: Effective Performance Appraisals

As with any other aspect of the employment relationship, the best approach to performance appraisals from a litigation risk-reduction perspective is also that which makes the most business sense: utilize regular, careful and candid evaluations that reflect, using the most objective measures possible, actual performance of concrete tasks and goals. Obviously, such a system requires time, training and commitment and, as a result, many performance systems are haphazard, subjective and, often, inflated.

Aside from the fact that inadequate performance evaluations are largely useless as an effective management tool, such evaluations represent a litigation "time bomb." At best, they fail to help the employer prepare and present a case of poor performance. More often, they waste valuable time and credibility in the effort to "explain them away." At worst, they cause direct and serious credibility problems for the manager involved ("So, Mr. Jones, what you're telling the jury is that you were perfectly willing to "fudge" an official performance appraisal, but you would never "fudge" your version of this incident to justify my client's discharge?"). It is precisely this sort of credibility issue that can defeat an attempt to have a plaintiff's claim dismissed.



Fox Rothschild LLP
ATTORNEYS AT LAW

Successful Employment Termination Strategies: How To Get Rid of the Troublesome Employee

- **Introduction**
- **Litigation Avoidance From the Onset: Effective Recruitment and Hiring**
- **Building the Record: Effective Performance Appraisals**
- **Practical Concerns With Discipline and Termination**
- **Conclusion**

On the other hand, performance evaluations stand out as the most obvious opportunity to put a deficient employee on notice of his or her inadequacies. While some courts have even gone so far as to recognize a cause of action for negligently performed performance appraisals, many courts, and most juries, are receptive to a claim that an employee never had “fair warning” either of what was expected of him or her or of the manner in which his or her performance was inadequate.

While the detailed structuring of a job evaluation system is more the bailiwick of personnel consultants and industrial psychologists, the experienced employment attorney sees a number of recurring themes.

Management Must Demonstrate a Commitment to the System

1. Make effective evaluation and follow-up part of the management job description. Managers naturally place greater emphasis on tasks upon which they themselves will be evaluated and that will affect their own progress and compensation. Conversely, managers naturally give short shrift to tasks they view as routine or pro forma paperwork. Thus, each manager or supervisor should be evaluated on the manner in which he or she effectively evaluate subordinates and top management should be as careful and candid in performing evaluations as they expect others to be.
2. Provide managers and supervisors with the training needed to do the job right. Having skilled human resources personnel is important but is no substitute for trained line management with a thorough understanding of both the requirements of the job at issue and the elements of a thorough performance evaluation. Further, as noted above, those managers, once trained, should have that training reinforced by the manner in which they themselves are evaluated.
3. Ensure that the results of the performance evaluation mean something. Substantial difference of opinion exists on the degree to which performance evaluations should be linked to salary review. The better view is that the link should not be direct either in time or in the sense that the “score” on the evaluation directly influences the amount of salary increase. Such direct linkage has an inevitable tendency to reduce objectivity and inflate the evaluation given the understandable hesitancy of most managers to impose a direct financial penalty on a subordinate. Nevertheless, the processes should at least be coordinated to ensure that an employee rated as deficient does not get a “merit” increase or that an employee rated as average does not get an above-average raise. Further, an unsatisfactory evaluation (whatever terminology may be employed



Fox Rothschild LLP
ATTORNEYS AT LAW

Successful Employment Termination Strategies: How To Get Rid of the Troublesome Employee

- Introduction
- Litigation Avoidance From the Outset: Effective Recruitment and Hiring
- Building the Record: Effective Performance Appraisals
- Practical Concerns With Discipline and Termination
- Conclusion

to denominate it) should be coupled with a specific “action plan” and timetable for improvement such that follow-up is not simply deferred until the next annual review.

Structure the Evaluation Around Job Content

1. Tailor the evaluation to the position or class of positions in question. Use of a uniform, general form normally results in the generation of uniform, general evaluations. This is particularly true where the form calls not for the evaluation of skill and performance but rather for the rating of various personal or character traits (e.g., “cooperation” or “ability to get along with others”). While employees in similar jobs should be evaluated under the same criteria, it is virtually impossible to meaningfully apply identical criteria across the company.
2. Specify the tasks or goals expected to be performed or accomplished. Vague and subjective evaluations are dangerous enough without compounding the problem with vague and subjective criteria to be evaluated. From the perspective of good management, clarity of presentation in litigation as well as simple fairness, the first step in any individual evaluation is to ensure that “everybody is talking about the same thing.” Many effective evaluation systems start with the employee’s self-analysis of his or her own job content, goals and priorities. Such a system not only heads off misunderstandings, it provides a powerful piece of evidence to the employer later faced with a former employee telling a jury that “I thought I was doing what they wanted me to do.”
3. Structure the review with reference to the past and the future. In the ideal system, the tasks, goals and other criteria upon which an employee is evaluated will have been identified in the prior year’s evaluation. Changes in goals and, particularly, priorities, will be documented in the review itself and the agenda for the next year (or shorter period) will be set. Aside from the obvious management benefits and value as evidence of “fair warning,” this exercise forces the manager to create something of a “running record,” rather than simply a series of “snapshots,” of the employee’s performance. This “running record” can be an invaluable tool in litigation when memories fade, supervisors become unavailable or uncooperative or similar problems arise.



Fox Rothschild LLP
ATTORNEYS AT LAW

Successful Employment Termination Strategies: How To Get Rid of the Troublesome Employee

- Introduction
- Litigation Avoidance From the Outset: Effective Recruitment and Hiring
- Building the Record: Effective Performance Appraisals
- Practical Concerns With Discipline and Termination
- Conclusion

Be Specific and Objective

1. Indicate whether the employee did what was expected. Whether structured numerically or in terms of descriptive phrases, the touchstone of the evaluation ought to be whether the employee did what was expected, exceeded expectations or fell short. Generalized, descriptive phrases such as “satisfactory,” “good,” “above average,” “superior” or “outstanding” are not only difficult to tie directly to job content, they are in many instances difficult to distinguish meaningfully from each other. Further, just as in the hiring context it is often better to specify the terms of employment than to later be held bound to someone else’s determination of what management “intended,” there is no good reason to leave any doubt about whether “good” is the same as “above average” or whether “satisfactory” really means “on thin ice.”
2. Provide concrete examples. While it is obviously impossible to review each specific task performed by the employee during the year, specific, illustrative examples of situations in which the employee met, failed to meet or exceeded job requirements serve to “put flesh on the bones” of the criteria used and evaluations made. Further, as with other aspects of the evaluation, such examples serve to preserve important evidence that might otherwise be left to fragile recollection.
3. Avoid purely subjective and/or gratuitous comments and observations. Even the most apparently innocuous, off-the-cuff observation can turn out to be the “smoking gun” in subsequent litigation. Further, particularly in light of the Supreme Court’s extension of the disparate impact theory to subjective evaluation practices, it is critical to stick to the facts. In short, since the possibility always exists that a manager will later be required to “explain what he meant” by a particular evaluation or comment, it is worth the effort to be clear and precise in the first instance rather than be forced to reconstruct thought processes years later.



Fox Rothschild LLP
ATTORNEYS AT LAW

Successful Employment Termination Strategies: How To Get Rid of the Troublesome Employee

- Introduction
- Litigation Avoidance From the Outset: Effective Recruitment and Hiring
- Building the Record: Effective Performance Appraisals
- Practical Concerns With Discipline and Termination
- Conclusion

Give the Employee His or Her Say

1. Permit the employee to register disagreement. At a minimum, the opportunity to make comments on the evaluation helps lock the employee into a position before litigation begins or an attorney becomes involved. Further, hearing the employee's side of the story may expose potential employee claims or weaknesses in the employer's position such as a claim of inadequate training or biased supervision. Not surprisingly, this is where allegations of sexual harassment often surface for the first time. If such claims turn out to be bona fide, they can be remedied before further damage is done. If not legitimate — or, even if legitimate, if they fail to overcome, justify or explain the deficiency — the employer will not be surprised at seeing them in litigation and has the tactical benefit of having made a good faith investigation of them.
2. Require the employee to review and sign the completed evaluation. The simple fact that the employee has seen the evaluation is of sufficient importance that it should be documented. To the extent that the employee will also indicate by signing that he or she agrees with the evaluation (or disagrees only to the extent indicated), the employer's position is substantially strengthened.

Ensure More Than One Level of Review

1. The evaluation should be reviewed before it is disclosed to the employee. Even though mistakes can always be corrected, it is important from both an effective management and litigation prevention perspective that the employee see the best evaluation possible and not see any potentially embarrassing comments or observations.
2. The evaluation should be reviewed both by higher-line management and by the human resources or personnel function for procedure, consistency and “smoking guns.” Additional review provides not only protection from mistakes but also valuable input and perspective. Of particular importance in this respect is the role of higher-line management in ensuring that managers below them are applying consistent criteria and not either inflating evaluations or applying overly stringent standards.



Fox Rothschild LLP
ATTORNEYS AT LAW

Successful Employment Termination Strategies: How To Get Rid of the Troublesome Employee

- Introduction
- Litigation Avoidance From the Outset: Effective Recruitment and Hiring
- Building the Record: Effective Performance Appraisals
- Practical Concerns With Discipline and Termination
- Conclusion

Practical Concerns With Discipline and Termination

Discipline

Regardless of its nature or extent, the threshold question in any consideration of workplace discipline is whether the action contemplated would, if involving some other issue, make good business sense. A useful shorthand analysis is to ask whether the decision is supported by FACTS. That is, if the proposed action is Fair; Accurate; Consistent with law, company policy and the treatment of others; Timely; and Supported by investigation and documentation.

Consistent with all of the issues and employment actions already discussed, several general principles are also applicable to all disciplinary actions, including terminations. Obviously, many of these principles will, in the unionized workplace, be influenced or controlled by contract, past practice or statutory obligations.

1. Make clear what is expected. Making appropriate disclaimers of contract and accommodation for the views of the relevant state courts, employers are well served to promulgate an explicitly nonexclusive set of rules and standards for the violation of which discipline may occur.
2. Distinguish between routine and grave matters. Many employers find it useful to articulate a distinction between “major” and “minor” offenses and then to provide illustrative examples. Some additional considerations present in termination cases are discussed below. Because of the potential for defamation, emotional distress and invasion of privacy claims, the imposition of progressive discipline for certain “high profile” offenses — e.g., theft, drug use or sexual harassment — should nevertheless be treated as if it was a discharge case.
3. Be certain that the incident is fully investigated and documented. In routine cases, this can be as simple as preparing a memorandum to the file documenting an oral warning. In more complex cases, and in all discharge cases, this should involve careful interviews of all witnesses, reduction of those interviews to writing and some analysis of the decision making process. The position of the employee should be noted as should steps taken to confirm or rebut facts or arguments presented by the employee. In all but the most routine matters, it is sound practice to have the employee acknowledge receipt of the warning in writing.



Fox Rothschild LLP
ATTORNEYS AT LAW

Successful Employment Termination Strategies: How To Get Rid of the Troublesome Employee

- **Introduction**
- **Litigation Avoidance From the Outset: Effective Recruitment and Hiring**
- **Building the Record: Effective Performance Appraisals**
- **Practical Concerns With Discipline and Termination**
- **Conclusion**

4. Impose the discipline in a private and positive manner. The standard maxim of “commend in public, criticize in private” makes sense both from an employee relations and litigation prevention viewpoint. It is the manner and tone with which discipline is imposed that most often gives rise to claims of defamation and intentional infliction of emotional distress. Further, nontermination discipline should proceed from the assumption that the employee is a valuable company asset entitled to every opportunity to succeed. Nevertheless, the employee should always be told, and the written record should reflect, the “whole truth;” efforts to “go easy” on the employee or to “finesse” the real reason for the discipline can backfire badly.
5. Provide an opportunity for review. Internal review mechanisms can be as formal as a union-type grievance procedure or as informal as an “Open Door Policy.” Regardless of the format, employees should feel free to register dissatisfaction with higher management without fear of retribution. As with review of performance evaluations, this provides a check on consistency, presents a chance to head off retaliation and sexual harassment claims before they go “outside” and helps to identify problem supervisors.

Termination

Conceptually, a termination should be viewed no differently than any other disciplinary decision. Practically, however, the severity of the penalty and the increased likelihood of litigation call for additional care.

1. The responsible employer should not permit “on-the-spot” terminations. The consequences of an improper, or improperly handled, termination — in terms of employee morale, the cost of successfully defending a challenge or the liability attaching to unsuccessful litigation — are simply too great not to take the time for detached, pre-termination review by higher management. From the perspective of the employment litigator, this step presents an incomparable opportunity to control the facts that will underlie subsequent litigation.
2. Review the proposed termination for statutory or public policy considerations. If the answer to any of the following questions is yes, close analysis of the decision is in order, particularly to determine whether there exists any person, otherwise similarly situated, who was treated differently:
 - a. Is the employee a member of a protected EEO class or possessed of some protected characteristic?



Fox Rothschild LLP
ATTORNEYS AT LAW

Successful Employment Termination Strategies: How To Get Rid of the Troublesome Employee

- **Introduction**
- **Litigation Avoidance From the Outset: Effective Recruitment and Hiring**
- **Building the Record: Effective Performance Appraisals**
- **Practical Concerns With Discipline and Termination**
- **Conclusion**

- b. Does the factual situation involve or impact on some factor, characteristic or stereotype of a protected class (e.g., scheduling problems due to religious observance, physical limitations or perceived lack of aggressiveness reflecting age bias)?
 - c. Has the employee been involved in protected activity (e.g., been involved in a union campaign, filed an OSHA complaint, made a workers' compensation claim)?
 - d. Is the employee close to vesting or attaining a significantly higher entitlement in any employee benefit plan, stock option program or the like?
 3. Review the proposed termination for consistency with company procedures, records and past practice.
 - a. Regardless of whether they are contractually binding, have all internal disciplinary procedures been followed or, if not, has the need for an exception to them been demonstrated and documented?
 - b. If the proposed termination is based upon misconduct, does the record reflect fair warning that the offense is dischargeable or document progressive discipline sufficient to put the employee in danger of discharge? If warnings exist, is their import clear to a disinterested observer?
 - c. If the proposed termination is based upon poor performance, is that judgment consistent with past performance evaluations? If not, is the explanation for the inconsistencies credible to a disinterested observer? If no performance evaluations exist, are the facts offered in support of termination so specific, concrete and job-related that they would represent the prototypical performance evaluation?
 - d. Viewed in the context of the business as a whole, is the decision consistent with the treatment afforded employees in the past and is it one that the company would be comfortable citing as precedent for future actions?
 4. Reductions-in-force require special care and analysis. Structuring a large scale reduction-in-force is a complex matter that requires fact-specific analysis and legal advice. There are, however, some general considerations.
 - a. A reduction-in-force can be a proper response to business conditions but should not be used to avoid confronting individual performance problems. Characterizing what is really a discharge



Fox Rothschild LLP
ATTORNEYS AT LAW

Successful Employment Termination Strategies: How To Get Rid of the Troublesome Employee

- **Introduction**
- **Litigation Avoidance From the Outset: Effective Recruitment and Hiring**
- **Building the Record: Effective Performance Appraisals**
- **Practical Concerns With Discipline and Termination**
- **Conclusion**

for cause as a “layoff” when the facts do not support the need for such action and the “layoff” is really targeted to individuals raises difficult credibility problems in subsequent litigation.

- b. Utilize a consistent system for identifying employees to be laid off. Any legitimate, nondiscriminatory system is proper, so long as it is consistent and its application to specific cases makes business sense. For example, if employees are selected by seniority, be certain that seniority rules are applied consistently across consistent groupings of employees.
 - c. In cases where a reduction-in-force is an economic necessity, performance can always be a legitimate means of selection, but the mere existence of financial exigency does not eliminate the need to document performance inadequacies. That is, an economic reduction-in-force should not be viewed as an opportunity to “clean up” inadequately managed performance problems.
 - d. Employees selected for layoff should be treated consistently vis-a-vis opportunities for transfer, demotion, relocation or rehire.
 - e. Once the scope of the layoff and means of selection are determined, it is best to conduct a “dry run” and review the results with counsel for impact upon protected classes of employees or other likely plaintiffs.
 - f. Large scale reductions may also implicate collective bargaining, ERISA and plant closing/worker notification issues, all of which are beyond the scope of this document.
5. Consider whether less drastic alternatives to termination exist. Particularly in situations in which it appears that the employee is simply ill-suited to the position or to some other people with whom he or she must interact, is there some retraining, reassignment, realignment of duties or other action that can alleviate the problem?
 6. If termination is unavoidable, attempt to structure the separation in as humane a way as possible, in a manner that minimizes possible defamation claims and maximizes the employee’s opportunity to mitigate his or her damages.
 - a. So long as the written record is clear on the actual reason for the termination and the facts supporting it, offer the employee the



Fox Rothschild LLP
ATTORNEYS AT LAW

Successful Employment Termination Strategies: How To Get Rid of the Troublesome Employee

- **Introduction**
- **Litigation Avoidance From the Outset: Effective Recruitment and Hiring**
- **Building the Record: Effective Performance Appraisals**
- **Practical Concerns With Discipline and Termination**
- **Conclusion**

opportunity to resign or accept layoff. That is, tell the employee, and document, the unvarnished truth, but offer to recharacterize the situation for public consumption. However, it is the height of employer folly to conceal the true reasons for the action from the employee. Note that the public characterization may affect eligibility for unemployment compensation.

- b. Particularly where some severance pay (which should generally only be provided in exchange for a properly drafted separation agreement and general release) is to be provided anyway, offer to extend the effective date of the resignation or termination through the end of that period, with the employee immediately relieved of further duties, so that the employee may truthfully represent to prospective employers that he or she is presently employed.
 - c. Make clear to the employee how inquiries from prospective employers will be handled and, if possible, agree upon a mutually acceptable statement of reasons for the separation.
 - d. Avoid terminations immediately prior to holidays or at any time reasonably close either to some protected activity engaged in by the employee or some crisis in the employee's personal life. On this point, it should be the affirmative duty either of the line manager or a human resources official to look for potential problems in the timing of a termination.
7. In appropriate circumstances, consider a negotiated termination agreement accompanied by a release of all potential claims. Several elements are critical to the enforceability of releases such as these, with the most important being that the release must be knowing and voluntary and supported by consideration. The consideration requirement is generally met if the employee is receiving something to which he or she is not otherwise entitled. While the question of whether the release was knowing and voluntary is almost always entirely fact specific, there are some common evidentiary considerations:
- a. Did the employee have a reasonable period of time to consider the release before signing it?
 - b. Are the terms of the release the result of meaningful negotiation or simply a "take it or leave it" proposition?
 - c. Did the employee have the opportunity to consult with counsel before signing the release?
 - d. Does the release language specifically waive statutory rights?

In light of these considerations, many employers will meet with the employee, explain that an irreversible termination decision has been made,



Fox Rothschild LLP
ATTORNEYS AT LAW

Successful Employment Termination Strategies: How To Get Rid of the Troublesome Employee

- **Introduction**
- **Litigation Avoidance From the Outset: Effective Recruitment and Hiring**
- **Building the Record: Effective Performance Appraisals**
- **Practical Concerns With Discipline and Termination**
- **Conclusion**

profess a desire to make the process as comfortable as possible for all concerned, make an offer of an opportunity to resign with a level of severance pay and benefit continuation somewhat short of the final position, disclose the release language expected and suggest that the employee think it over. A final agreement, reflecting, if possible, changes of position on both sides, can then be reduced to writing. Since the issues involved in drafting an effective agreement and release are complex, a savvy employer should seek the assistance of employment counsel in drafting the appropriate release document.

Beyond the general, common law requirements, the Age Discrimination in Employment Act (the ADEA), as amended by the Older Workers' Benefit Protection Act of 1990 (the OWBPA), establishes certain minimum requirements for enforceable waivers of federal age discrimination claims. Briefly, they are:

- a. The document must mention the ADEA by name and specifically waive all claims under it;
- b. The employee must receive a benefit in exchange for the waiver in addition to anything of value that he or she was otherwise entitled to receive;
- c. The employee must be informed in writing of his or her right to consult with an attorney and be permitted no less than 21 days in which to do so; and
- d. The employee must be given 7 days in which to rescind the waiver after signing it.

There are additional requirements applicable to group-based early retirement incentive programs, notably the extension of the "window" period to 45 days as well as additional information disclosures by the employer.

8. An opportunity for internal review or appeal is of critical importance in a discharge case.
 - a. All of the considerations outlined above in the general discipline context apply with even greater force in termination cases.
 - b. At least one court has suggested that the fact that an employee's termination was reviewed through a noncontractual "Open Door" appeals procedure precludes as a matter of law an allegation "that the dismissal was beyond the bounds of decency" and requires judgment for the employer on a claim of intentional infliction of emotional distress.



Fox Rothschild LLP
ATTORNEYS AT LAW

Successful Employment Termination Strategies: How To Get Rid of the Troublesome Employee

- Introduction
- Litigation Avoidance From the Outset: Effective Recruitment and Hiring
- Building the Record: Effective Performance Appraisals
- Practical Concerns With Discipline and Termination
- Conclusion

Exit Interviews

Exit interviews with a human resources staff person can be viewed as a proactive adjunct to an internal complaint process activated by the employee and are a valuable management and litigation prevention tool in a number of different respects. In general terms, they should be utilized to discover why the employee is leaving, where the employee is going, what could have kept the employee from leaving, whether the company is likely to hear from the employee by way of a charge or litigation and, finally, whether there is potential litigation involving others brewing in the workplace. Specific issues that exit interviews tend to disclose include:

1. Is there any hint that what appears to be a voluntary resignation is really a constructive discharge, particularly one resulting from sexual or other harassment? Even if nothing comes out in the interview, such as the existence of an appeals procedure, the fact that the opportunity to complain was there detracts from the credibility of a later claim.
2. Even if this employee's termination is purely voluntary, are his or her complaints about a particular supervisor consistent with those of a potential claimant? Conversely, if the departing employee is otherwise similarly situated to a complaining employee and did not encounter similar treatment, he or she may be a potential defense witness.
3. Are the employee's reasons for leaving consistent with those of other employees (whether economic or personal) so as to disclose a potential union organizing issue?

External Inquiries and Reference Checks

Not surprisingly, the questions of what (or how much) to say about an employee or former employee and to whom, raise perhaps the greatest potential for defamation liability and the greatest area of concern to most employers. As in so many other areas, the employer's legal position is easily stated in the abstract: its obligation to disclose information is governed by its relationship with and, therefore, duty toward the party making the inquiry and its actions are legally protected so long as it is acting with proper motive and either pursuant to legal obligation or in furtherance of a legally protected interest. Naturally, applying this abstract statement of principle to specific fact situations can become terribly difficult.



Fox Rothschild LLP
ATTORNEYS AT LAW

Successful Employment Termination Strategies: How To Get Rid of the Troublesome Employee

- **Introduction**
- **Litigation Avoidance From the Outset: Effective Recruitment and Hiring**
- **Building the Record: Effective Performance Appraisals**
- **Practical Concerns With Discipline and Termination**
- **Conclusion**

Dealing first with the most common scenario of responding to inquiries from a prospective employer, all employers can take several, general steps to protect themselves from potential defamation claims:

1. Restrict those with authority to respond. Ideally, there should be a single person within the company authorized to respond to inquiries concerning former employees and who has been thoroughly trained in the proper method of responding. In a larger organization, it may be necessary to provide for more than one person, but the number should be limited to the greatest extent possible. Further, company policy should provide that no other employee or manager is authorized to respond to an inquiry, formal or informal, concerning a former employee without the explicit permission of a designated, senior manager.
2. Say as little as possible in as neutral a way as possible. Many employers will respond to inquiries concerning former employees simply by confirming the fact and dates of employment, position held and final salary. Others will disclose whether the employee is “eligible for rehire.” Still others will indicate whether the nature of the termination was voluntary or involuntary. The question of “how much to say” is very much a client-specific business decision informed by the nature of the business, the needs of the employer and the potential for liability for failing to disclose information concerning the employee.
3. Keep records. In the overwhelming majority of cases, there is a hotly disputed issue of fact concerning precisely who said what to whom about the former employee. Consequently, the designated “reference giver” at the employer should record each inquiry from a prospective employer (including the name and position of the person making the inquiry), the date, time and nature of the inquiry and the substance, if any, of the response.

Beyond the question of reference checks, there are several common situations faced by the employer involving efforts by third parties to obtain information concerning employees or former employees for other purposes:

1. Former employees (or disappointed applicants) and their counsel will often request (or demand) access to or a copy of the employer’s personnel file or documents relating to an adverse employment action. Often, such a request precedes or accompanies a “demand letter” from counsel giving notice of an intent to sue and offering to settle. Some states provide a statutory right of an employee (or the



Fox Rothschild LLP
ATTORNEYS AT LAW

Successful Employment Termination Strategies: How To Get Rid of the Troublesome Employee

- **Introduction**
- **Litigation Avoidance From the Onset: Effective Recruitment and Hiring**
- **Building the Record: Effective Performance Appraisals**
- **Practical Concerns With Discipline and Termination**
- **Conclusion**

employee's designee) to inspect (but not to copy) the personnel file upon reasonable notice and during reasonable business hours. Obviously, such a request should "raise a red flag" and trigger a call to counsel. Before permitting or denying access to a personnel file, the employer should confer with their legal counsel.

2. Persons suing an employee (or former employee), including the employee's spouse in a divorce or support action, may seek information regarding an employee. Absent a properly issued and served subpoena, the employer has no obligation to provide the information and is best advised not to do so. If a proper subpoena is served, the employer is legally obligated either to comply or to challenge the subpoena as unduly burdensome or otherwise objectionable. A quick review by inside or outside counsel is generally sufficient to determine the validity of the document purporting to be a subpoena. Further, many employers will, upon receipt of such a subpoena, notify the employee or former employee (either by telephone or letter and either directly or through counsel) so that the employee may choose to contest the subpoena, leaving the employer in a much more desirable, neutral position. Guards, gate attendants, receptionists and other "out front" personnel are the most likely to be approached by a process server and should be instructed not to accept or sign for such a document, but to refer the server to a designated manager.
3. Law enforcement personnel and agencies (including agencies such as the IRS) investigating present and former employees will often seek the informal cooperation of the employer in supplying documents. In addition to being polite with such persons, an employer should, at a minimum, decline to respond to a telephone request and insist upon either a written request or a visit from an officer or agent, the validity of which or identity of whom can then be verified. Further, it is generally in the best interest of all concerned to display a desire to cooperate, but to request that the officer or agent obtain the individual's consent (as in an FBI background investigation of a candidate for government position or security clearance), a subpoena or search warrant before permitting access to the employee records.



Fox Rothschild LLP
ATTORNEYS AT LAW

Successful Employment Termination Strategies: How To Get Rid of the Troublesome Employee

- Introduction
- Litigation Avoidance From the Outset: Effective Recruitment and Hiring
- Building the Record: Effective Performance Appraisals
- Practical Concerns With Discipline and Termination
- Conclusion

Conclusion

As stated at the outset of this publication, all employment litigation involves an allegation that the employer did not make a sensible and reasonable business decision – that the employer broke a promise, acted for a reason the law defines as improper or illegal or acted in a manner intended to cause harm. As a result, employers are well served to spend time, energy and resources in making sure processes are in place to ensure that it (1) recruits the best qualified and most company-oriented employee, (2) establishes the terms and conditions of the employment relationship so as to avoid misunderstandings and/or express or implied contract claims and (3) avoids statements and actions that open the door to legal challenge. As with many issues that arise in the employment context, “the best defense is a good offense.”

Ian D. Meklinsky, Esq.

609.895.6756 | imeklinsky@foxrothschild.com
Princeton Pike Corporate Center
997 Lenox Drive, Building 3
Lawrenceville, NJ 08648-2311



Fox Rothschild LLP
ATTORNEYS AT LAW

© 2011 Fox Rothschild LLP. All rights reserved. All content of this publication is the property and copyright of Fox Rothschild LLP and may not be reproduced in any format without prior express permission. Contact marketing@foxrothschild.com for more information or to seek permission to reproduce content.

The images portrayed in this brochure do not depict actual Fox Rothschild clients.

This publication is intended for general information purposes only. It does not constitute legal advice. The reader should consult with knowledgeable legal counsel to determine how applicable laws apply to specific facts and situations. This publication is based on the most current information at the time it was written. Since it is possible that the laws or other circumstances may have changed since publication, please call us to discuss any action you may be considering as a result of reading this publication.

Attorney Advertisement