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A Dozen Tips to Prevent Employment Litigation

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As a labor and employment lawyer representing employers for now over thirty years, I have always been focused on the proactive and preventative steps employers can and should take to avoid claims and liability. Despite these efforts it seems we lawyers end up doing more damage control. Through this damage control many lessons are learned. With each matter I've always made an effort with clients during the course of the case and certainly at the end to talk about lessons learned. While they are numerous, and could be the subject of a book on the topic, the following are a few of the key lessons learned:

1. So you say you are an "At-Will" employer. Then why does the proper disclaimer not exist in your employment application, employee handbook, work rules and other policies and procedures? I've heard many times over the years, He or she was At-Will and we didn't have to tell them why we fired them; or "My lawyer told me they were At-Will and I didn't need a reason to fire them." If you take the proper steps your employee will be At-Will and you will have a better defense in a wrongful discharge claim made against you. Employment At-Will doesn't relieve you of your obligations under State/Federal Discrimination laws. Also, if you don't give a reason for termination your former employee will file a charge or get an attorney to get that answer.

2. Exactly what rule or policy did they violate? With great regularity employees are terminated for violating company policies or procedures, but when pressed at a deposition or by their own lawyer to point to the language that they violated, many employer witnesses have difficulty finding the exact rule or policy. This is something plaintiff's lawyers, agencies investigating claims filed by employees and hearing officers handling unemployment compensation claims will want an answer.

3. What you say will get you into trouble. Learn to be judicious with your words and careful what you say. Nothing is confidential and a slip of the tongue or an inappropriate comment about someone's termination or other employment action may be enough and has been in some cases enough to ruin an otherwise good defense.

4. If it doesn't make sense to your lawyer, it's not likely to make sense to a judge or jury. It is important to be honest with yourself and recognize that your emotion or personal stake in a matter may be driving it more than logic or rational analysis of the circumstances. If you don't heed this lesson learned you will be your own worst enemy.

5. Everyone is brave a year before trial. Of course they were the worst employee you ever had, yes you gave them nothing but excellent evaluations, your documents are awful, but you're not paying them a dime and we are going to take this case all the way. This seems to be many people's perspective a year out from trial, but as depositions are taken, documents are requested and exchanged, witnesses do a poor job in their depositions, parties then get a reality check and the case that looked great a year before trial doesn't look so good two months before trial and it gets settled.

6. If you made a mistake - take ownership of it. Many claims of discrimination or wrongful discharge involve no malice, or intent intentional discrimination on the part of employers but mistakes are made. Maybe someone didn't understand a certain technical aspect of the Wage/Hour law, ERISA requirements or some Affirmative Action requirement. Maybe they didn't realize another employee engaged in the same conduct and was not fired. If that is the case, work with your counsel to create a win/win situation. Honesty and a quick resolution may be the best remedy.

7. We will never settle despite being told by our lawyer that we should. As an example, one case I was involved with could have settled three months into the case for $10,000 but "We did nothing wrong and we're not paying a dime." Six months into the case it could have settled for $25,000 but, "No we're not settling." Bad facts in depositions and summary judgment is lost, case could settle for $60,000. Still the response is "no". Judgment against the employer paid to plaintiff $150,000. Attorneys' fees spent on the case, $75,000. Lesson learned - have the courage to acknowledge we made a mistake and it's only money but money well spent. $10,000 is a lot less than $225,000. How many widgets do you need to sell to make $225,000.

8. Document everything - Well not really. Subjective written comments by management personnel in discrimination investigations like "This is the worst case of harassment I have seen" or disagreements by management personnel as to someone's performance, and layoff analysis without the protection of attorney/client privilege have all been examples of documentation getting employers into trouble. If you are willing to document something (especially e-mails), be sure it is thoroughly read, thought out, reviewed by counsel and ask yourself, "How would I feel if this was published in the newspaper or presented in front of a judge or jury?"

9. Timing is everything. If an employee has made a complaint of discrimination, did you really need to terminate them three days, two weeks, a month after their complaint. Particularly troublesome is when other individuals have engaged in similar conduct and not been terminated but the only unique thing about this employee is that they raised a complaint, called your hotline or filed a charge with some State or Federal agency. Retaliation claims are on the rise.

10. Do you understand the English language? The classic example is firing employees for insubordination when in fact, they have not been insubordinate. There are several cases that have supported employee claims of defamation (false statements against them) in which they were fired for insubordination. What the employer meant to say was they had engaged in poor work performance or didn't follow company policies or procedures. They didn't bother to look up the word insubordination, which means refusing to follow a direct order or refusing to submit to the authority of a supervisor.

11. No good deed goes unpunished. We've all heard this adage but when you have an employee who does not deserve a paycheck and should have been fired long ago, the longer you keep them the greater the likelihood that you will learn this lesson the hard way and be saying to yourself, "We should have fired them years ago."

12. Remember you hired the person you had to fire. The lesson to be learned from this one is did you do a background check? Did you have them do a drug screen? Did you have them fill out an employment application? Were they really qualified for the job? Did you have an evaluation system or even properly evaluate them? To the extent you do these things properly you may not have to learn this lesson the hard way.

In summary, every employer makes choices and decisions which have consequences. They can be good consequences or bad. If bad, you will have the opportunity to learn some of these lessons learned or new ones. Make the choice to be proactive and take the preventative cause of action.