DarrowEverett LLP
Attorneys & Business Advisors

CLIENT UPDATE:

"AN OUNCE OF PREVENTION IS WORTH A POUND OF CURE"

Benjamin Franklin originated this phrase in the context of advocating for the creation of the first firefighting organization in colonial Philadelphia. If you are an employer considering terminating an employee on a less-than-cordial basis or in a situation in which you think the employee may react negatively or file a lawsuit against you, you might be wise to consider Franklin's words and do what you can in advance to prevent a potentially costly problem. The cost of being proactive and informed with respect to the issues that can arise from employee terminations is often less than the cost of responding to a lawsuit filed by a disgruntled former employee.

TERMINATION: First, let's consider what kind of employee you are terminating.

Contract Employee: An employee who works pursuant to an express written employment contract can only be terminated pursuant to the terms of the contract. If you terminate the employee in breach of the terms of the contract, the employee can bring a claim against you for breach of contract.

At Will Employee: The vast majority of workers in the United States, however, are at "will employees." At-will employees work without the benefit of any express written or implied unwritten contract with the employer.

As a general rule, employers can terminate at-will employees for any reason, at any time. But, there are some exceptions to this general rule and you better know what they are because there are a myriad of potential claims that a former employee can bring against you. Some of the more popular ones are listed below:

- Discrimination – Federal and some state laws prohibit employers from terminating an employee solely on the basis of the employee's race, color, national origin, gender, religion, age, disability, pregnancy or genetic information.
- Retaliation - Federal and some state laws prohibit employers from terminating an employee in retaliation for the employee filing a charge of discrimination, participating in a discrimination investigation, opposing discriminatory practices of the employer or refusing to commit an illegal act.

- Termination in Violation of Public Policy - An employee may be entitled to legal remedies against an employer if the employer terminated the employee in violation of public policy. Examples include:
    - Terminating an employee for exercising his or her legal rights (e.g., the right to vote);
    - Terminating an employee for refusing to commit an illegal act (e.g., falsifying reports or submitting fraudulent tax returns);
    - Terminating an employee for reporting illegal conduct by the employer (also known as "whistleblowing").
- Implied Covenant of Good Faith and Fair Dealing - Certain courts in the United States, including courts in Massachusetts, have held that an implied covenant of good faith and fair dealing applies to at will employment contracts, thus allowing a terminated employee to bring a claim against the employer if the employee can prove that the employer terminated the employee in bad faith, without good cause, or in violation of public policy (e.g., employer terminates an employee to avoid paying sales commissions to the employee).

A desperate or disgruntled employee who feels that he or she has been terminated unfairly could find solace in the arms of a creative plaintiffs' attorney, which could lead to a lawsuit. That sounds like a dream, doesn't it? Maybe if you are plaintiff attorney.

THAT OUNCE OF PREVENTION

So what ounce of prevention can you muster in order to prevent or minimize the damage and cost that an employee lawsuit would entail?

Know the Law. First and foremost, employers should make sure they are aware of and comply with all relevant federal and state employment laws. Here's a non-exhaustive list of federal labor and employment laws that you should commit to memory:

- Title VII of the Civil Rights Act
- Equal Pay Act
- Age Discrimination in Employment Act
- Occupational Health and Safety Act
- Americans with Disabilities Act
- Health Insurance Portability and Accountability Act
- Older Workers Benefits Protection Act
- Genetic Information Non-Discrimination Act
- Family and Medical Leave Act

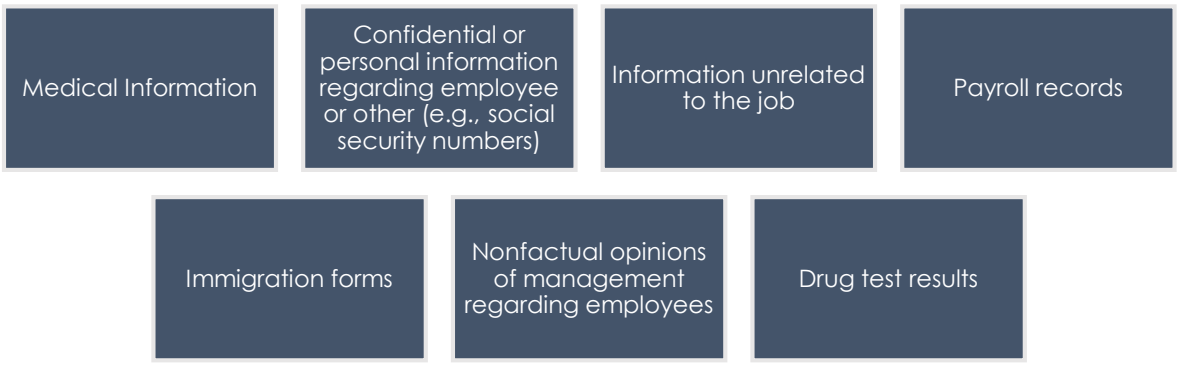
Not interested in memorizing this list? Then you should probably consider befriending an attorney or outside consultant that specializes in human resources and employment law. They can periodically audit your business and HR protocols and provide a written report of any deficiencies. Knowing where the dry tinder is located and the sparks are likely to occur is the first step to preventing a potential fire, whether in colonial Philadelphia or your workplace.

Maintain Appropriate Personnel Files. We all do this right? They are filed in alphabetical order and color coded too. If you are like most small to medium sized companies, your employee files are in a place we like to call the "black hole." The fact is, employers must maintain, secure and retain all appropriate personnel files required by law and make sure the files do not contain any inappropriate items that could create employer liability. Most states, including Massachusetts and Rhode Island, provide an employee the right to inspect the employee's personnel file. If you are not careful, **a poorly maintained personnel file - or worse, a file containing inappropriate items - could become evidence in a lawsuit by a disgruntled former employee.** Employers must be diligent in maintaining personnel and other files, limiting access to only those with a need to know and protecting applicants and employees from discrimination, identity theft, breach of privacy, and other violations of law.

Personnel files should contain only the most important job-related items for each employee, including:

- Job Description
- Application or Resume
- Offer Letter
- Employment Contract, if any.
- Other written agreements with employee including Noncompetition agreements
- Employee Benefit forms
- IRS Form W-4
- Performance Evaluations
- Raises
- Commendations
- Records of Attendance
- Evidence of Warnings or Disciplinary Action
- Documents relating to employees departure

Personnel files should not contain any of the following items (although some of these items should be appropriately maintained in separate files):



When in doubt – Call your attorney!

Employee Handbooks. Here is the proverbial "cover your behind" or "CMA" section. Employers often think that employee handbooks provide safeguards with respect to their dealings with employees, and in many cases that is true. A well drafted employee handbook that sets out explicit standards and procedures with respect to the employer/employee relationship can serve to limit potential employer liability.

However, if an employee handbook is not drafted carefully or, more importantly, if the employer does not uniformly adhere to the standards and procedures set out in an employee handbook with respect to all employees, then the employee handbook can create potential liabilities for the employer rather than reduce them. In certain situations, at will employees, who have no written contract with the employer, **can use the employee handbook as a weapon of mass destruction against the employer**, especially if the employer has not been diligent in adhering to its own policies and procedures.

Therefore, it is important that all employee handbooks and other written materials provided to employees be drafted by experienced human resource professionals, reviewed by a competent labor and employment law attorney, and adhered to uniformly by the employer.

WHEN IT ALL CRASHES AND BURNS.

How can you defend yourself now that the fire has spread beyond your control? All is not lost and there are options you can consider.

Severance Packages and Waivers and Releases. Your last best chance to stave off a lawsuit by a disgruntled former at will employee whom you have terminated may be to have the departing employee sign a waiver and release agreement, pursuant to which the employee waives any claims that he or she may have against you and agrees not to sue you.

Because the employee is under no obligation to sign such a document, in order for such a waiver and release to be enforceable in the first instance, it must be supported by consideration – e.g., **you must give something of value to the employee** (typically, cold hard cash) in exchange for the employee signing the waiver and release. An employer will find it difficult to convince a court to enforce a "naked" release that is not supported by any consideration given to the employee.

The most common form of consideration is a severance package pursuant to which the employer provides the employee a payoff to soften the blow of being fired. Unless the employee has an employment contract that requires payment of severance, employers are generally under no obligation to offer severance (except pursuant to certain plant closure laws). The waiver and release is made enforceable by both parties doing something they were not previously obligated to do. Other forms of consideration could include paid insurance benefits for a certain period of time, or agreeing not to contest the employee's request for unemployment benefits.

There is a rub. Employers need to be wary of a few things when offering severance packages to discharged at-will employees in exchange for waivers and releases.

- If the employer regularly offers severance to discharged employees but does not regularly require discharged employees to sign waivers and releases, then the employer will have to offer something above and beyond its customary severance package to an employee from whom the employer requires a waiver and release.
- Employers also need to be careful not to engage in a pattern with regard to the types of employees to whom severance is offered (e.g., only offering severance to male employees). Inappropriate patterns could fuel a discrimination lawsuit. (Remember we covered this topic earlier)
- Finally, employers should make sure that their form of waiver and release has been reviewed by an employment and labor attorney in their state, as some state laws actually prescribe the types of claims that can be waived in such documents (e.g., the laws state that certain claims cannot be waived and attempts by the employer to do so can actually create additional employer liability). An overly broad waiver and release, even if supported by consideration, may be thrown out or revised by a court if it is not drafted properly.

Final Thoughts.

No one wants to be sued. Who has time for that? So if you are planning on firing a particularly troublesome employee whom you know may be litigious or with respect to whom you acknowledge that you might not have followed the letter of the law to the T or been as diligent as you could have been, it is always wise to consult with an experienced labor and employment lawyer in advance.

Negotiating an appropriate severance package and a properly drafted waiver and release may be your last best chance to prevent an unwanted and costly lawsuit by your former employee.

And remember, when in doubt – Call your Attorney!