
Terminating Employees

Must Know Strategies to Protect Your Business

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Agenda

- Just Cause or Without Cause
- Employment Contracts
- The Termination Package
- Termination Meetings
- Reference Letters

Terminations

- With cause vs. without cause
 - Only avoid notice requirements where termination 'for cause'
 - May include violation of professional obligations, theft, patient abuse
 - Must always look at context: position, length of service, level of position, previous record, *etc.*

Terminations

- With cause vs. without cause
 - Assess costs of terminating without cause
 - Notice entitlements
 - Employment counseling
 - Benefits
 - Can easily be limited through well drafted employment contracts!

Employment Contracts

- One of the best 'security blankets' for your business
- Contains liabilities, makes them predictable
- Maximizes flexibility
 - Personnel decisions need not turn on cost
- Form of business insurance with highest ROI

Employment Contracts

- In the absence of a written contract, the relationship is governed by the 'common law'
- Employment agreement like any other contract must have 3 elements:
 - Offer, acceptance, consideration
 - If one of these elements is missing, the relationship is governed by the common law

Employment Contracts

Enforceability of a contract:

- The requisite 'consideration' is the job itself
- The key is that the offer must be 'accepted' (evidenced through employee's signature) *before* starting employment.
- If the employee signs off after employment starts (even at end of first day), enforceability is jeopardized.

Employment Contracts

Other Considerations:

- Amendments made during the employment relationship require new 'consideration' to be enforceable
- Employers often give 'notice' of a change to the employment contract
 - Advanced notice of a change to a fundamental term of the employment relationship may not be sufficient without something more

Employment Contracts

■ Termination Provisions

- ❑ Absent clear, enforceable termination clause, employee entitled to 'reasonable' notice of termination
 - Considers age, length of employment, remuneration, difficulty finding similar job, *etc.*
- ❑ Can be limited by termination clause
- ❑ Clause must be clear, equal to or greater than statutory minimum

Terminations

- Assess costs of terminating without cause where no enforceable employment agreement:
 - Case study: 58 year old Vice President, 4 year employee, earns \$180k
 - Common law notice: 8-12 months (\$120k)
 - ESA entitlement: 4 weeks (\$14k)
- *Why let cost limit your options?*

Terminations

- Terminating with cause
 - Assess costs of 'building cause case'
 - Lost production
 - Paperwork
 - Morale
 - Accidents
 - Litigation costs
 - Inability to promote/replace
 - Patient or staff losses while pending

Termination Offers

- Applicable employment contract?
 - If yes, consider notice requirement
 - If not, consider ESA/common law
- ESA minimum:
 - Wages and benefits for notice period
 - Courts say same for 'common law' period
- Consider Salary Continuance vs. Lump Sum

Termination Offers – Salary Continuance

- Can be subject to duty to mitigate
 - Anything > ESA, require full release
 - Full end of payments/benefits upon new employment or partial payout
 - 50% of outstanding amount
 - flexible
- As long as > ESA minimum, whatever parties agree

Termination Offers – Lump Sum

- Typically shorter notice period than salary continuance
 - No mitigation required
- Consider job prospects and employee's perceptions
- Continue benefits for lump sum period
- May offer employee option of S.C. or L.S.
- Payment over ESA requires release

Termination Offers

- Either way:
 - ❑ Provide offer in writing and release for review
 - ❑ Provide opportunity for legal advice
 - ❑ Provide information re: benefits conversion
 - Name and contact number for benefits provider
 - ❑ Where appropriate, offer employment or reference letter
 - ❑ Remind of obligations re: confidential information
 - ❑ Address return of Company property

Termination Meetings

- ☐ The where, how and who is all about treating employee fairly and avoiding damages for bad faith conduct
 - ☐ Private
 - ☐ Off site?
 - ☐ After hours?
 - ☐ Mid-week
 - ☐ Avoid holidays, birthdays
 - ☐ Civil, concise, compassionate

Termination Meetings

- ☐ Resources available
 - ☐ Counseling?
 - ☐ Outplacement?
- ☐ No more than 2 management members, one taking notes
- ☐ To the point, don't open for debating merits of decision
- ☐ Deal with personal/company property

Reference Letters

- Employers concerned about potential liability:
 - ❑ Potential for suit in libel or slander
 - ❑ Suit by new employer in negligence if reference exaggerated or was misleading
 - ❑ Failure to provide a reference letter may be evidence of bad faith, extending notice period

Ashby v. EPI Environmental Products Inc

- Senior executive, terminated after 1 year
- Asked for a signed reference letter (which he prepared) and an undertaking for a positive reference if employer contacted directly
- Company provided a reference letter
 - Mentioned salary and benefits but did not positively reference his skills or abilities
- Alleged bad faith, prejudiced job search
- Claimed additional 3 months for notice period

Reference Letters

■ Court:

- ☐ No obligation for employer to provide *positive* reference letter
- ☐ Valid reasons not to do so
- ☐ Recognized that giving reference due to fear of damages would lead to misleading references

Reference Letters

- No absolute *obligation* to do so, but providing reference letter has an advantage:
 - May assist employee in securing new employment and mitigating losses stemming from dismissal
- *VERSUS* liability to new employer for negligent non-disclosure
 - If the employee terminated for cause, a glowing reference letter will discredit its author on the witness stand

Reference Letters

■ Keys:

- ☐ Be clear with departing employee regarding type of information the letter will contain
- ☐ Content of letter should be accurate without understating or overstating performance
- ☐ Employee should “sign off”
- ☐ Make part of package offer

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