



Employee Separation – Best Practices

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Objectives

- Common Pitfalls
- Termination Checklist
- Reduction in Force
- Voluntary and Involuntary Terminations
- Litigation Risks and Retaliation
- Separation Agreements

Overarching Concepts

- **CLARITY:** You should be able to clearly explain the reason for firing in one or two sentences. Do not include minor gripes that did not motivate the termination.
- **CONSISTENCY:** Have you fired others in similar situations? If not, can you articulate why their case was different? If this is a new situation, will you fire anyone in similar future situations?
- **DOCUMENTATION:** Make sure your decision, the events preceding the decision, and the reasons are documented.
- **HONESTY:** Firing is never pleasant. Do not try to soften the blow. You will not make the situation better and can put the company in harm's way.

Alternatives to Termination

- Are there any alternative forms of discipline?
 - Discipline overall should be a flexible concept, and employers should not needlessly promise progressive discipline in all cases
- Reassignment – useful where a workplace conflict is less a result of misconduct and more a personality clash
- Demotion – maybe a strong performer was promoted into a position they are not suited for, and demotion is more appropriate than termination
- Final warning/Last chance agreement
- Written discipline /Verbal counseling

Reduction in Force – Is there really a Business Necessity?

- Can you freeze hiring or wages?
- Are there other cuts you can make?
- Can you cut hours?
- Can you simply fire those who deserve it?
- What about attrition or transfers?
- Can you cut temps, part-timers, new hires?

Reduction in Force

- Establish your business necessity through memoranda and analysis
- Identify the goals of the staff reduction
- Identify the functions and skills which will be essential after the reduction
- Examine what locations and positions
- See what the organization needs to look like and set a timetable
- Design a public narrative
- Will the company ask for volunteers? Early retirement or voluntary separation plan?
- Develop a budget
- Consult legal counsel for review

Reduction in Force

- Choose a selection process carefully. Document that process
- Set up a committee
- Seniority? If all things are equal in terms of skill
- Skill-set? If combining positions
- Performance? If there is an objective difference, then of course it may be part of the selection process

Post-Selection Issues

- Conduct a disparate impact analysis and re-visit decisions, if necessary
- Consider a package and a release, with OWBPA compliance
- Consider WARN
- Outplacement, coordination for assistance
- Decide what the severance package will contain

RIF – Factors in Lawsuits

- Additional circumstantial, statistical, or direct evidence may be required to establish a prima facie case
 - The law favors you
- But inappropriate comments are a problem
- Discharges disguised as RIFs are a problem
- Inconsistent explanations are a problem
- Subjectivity which unduly affects minorities is a problem
- Flawed performance evaluations
- Hiring someone shortly after the RIF
- Poor documentation

Voluntary and Involuntary Terminations

- To bring a claim, must have an adverse action – not necessarily involuntary termination
- Resignation does not insulate an employer from a lawsuit if the resignation was not truly “voluntary”
- Constructive Discharge – where an employer requests a resignation, pressures an employee into resignation or retirement, or takes negative actions against an employee in order to induce resignation
- Pushing an employee into retirement (as opposed to offering voluntary early retirement to a group of employees) may similarly be viewed as truly a termination

Termination Checklist

- Do you have every relevant fact?
- Do you have firsthand facts rather than hearsay, embellishment or speculation?
- Have you heard the offending employee's full side of the story? Has the employee raised any loose ends you have not pursued?
- Have you looked beyond the facts surrounding the precipitating incident (e.g., performance history of offender, clarity or uniform enforcement of policy)?
- Have you exhausted sources of information, including people and documents?
- Have you taken steps to preserve the evidence on which you are relying?
- Can you establish that the employee had notice of the consequences of their action/inaction? How?
- Can you establish either previous counseling or a solid reason why immediate termination is appropriate?

Termination Checklist

- Is your decision consistent with written disciplinary policies and past practice?
- Does the punishment fit the crime?
- Would you make a better decision if you took more time?
- Are there any special circumstances that make this case high risk (e.g., pending charge, previous work-related injury, protected status)?
- Have you involved/consulted all relevant decision makers?
- Are there any sensible, legitimate alternatives to discharge?
- Would an outsider view the decision as fair? If not, why not? Is that something you can improve?
- Has your at-will status been preserved? If not, is your decision consistent with the altered relationship?
- Have you prepared your part of the termination interview? Have you picked words that are neutral and professional but also clear and honest?

Termination Checklist

- Have you anticipated the employee's questions and prepared answers?
- Have you selected and reserved a private, quiet professional site for the exit interview?
- Have you allowed enough time for the interview?
- Have you chosen a time for the termination that minimizes to the extent possible the emotional impact of the termination?
- Do you have a plan and message about the retrieval of the employee's personal belongings?
- Do you have a plan and message about the transition of corporate property back to the company?
- Do you have a prepared packet of all transitional documentation (final pay, benefits, COBRA notice, etc.)?
- Do you intend to pay for a release of claims? Have you thought through the mechanics of raising the issue of a release and is your proposed release document legally valid?

Termination Checklist

- Is the terminating employee over 40?
- Have you considered the effect of the employee's revocation of the release on the entire agreement?
- Does the release say everything you want it to (e.g., nonsolicitation of employees)?
- Do you have a plan about what you say to other employees and prospective employers about the termination?
- Are security precautions advisable? If so, have you balanced as well as possible the employee's interests in being free from humiliation and offense against safety concerns?
- Have you reminded the employee of any ongoing obligations (e.g., noncompetes, trade secrets)?
- Is a witness advisable? If so, have you picked a person that makes sense? Have you adequately **prepared** the witness as to his role?

Why “at will” doesn’t protect you – and the dangers of thinking it does...

...absent an agreement to the contrary, employees may be discharged for a good reason, bad reason, or no reason at all, as long as it is not an **illegal reason**.

Litigation Risk List

- If any of your answers to the following are yes, then you should be prepared to prove that the employee received fair treatment from any separation from employment
 - Is the employee over 40?
 - Is the employee a minority?
 - Was the employee born in a different country?
 - Is the employee female?
 - And more.....

Litigation Risk List

- Does the employee have a disability?
- Has the employee ever asked for a religious accommodation?
- Has the employee recently taken FMLA leave?
- Has the employee recently received Workers' Compensation benefits?
- Could the employee be a whistleblower?
- Has the employee complained about harassment or discrimination (himself or others)?

Rise in Retaliation

Retaliation Charges:

2017: 41,097 (48.8%)

2016: 42,018 (45.9%)

2015: 39,757 (44.5%)

Rise in Retaliation

- Bigger recoveries
- Resonates with juries
- Linkage to other claims

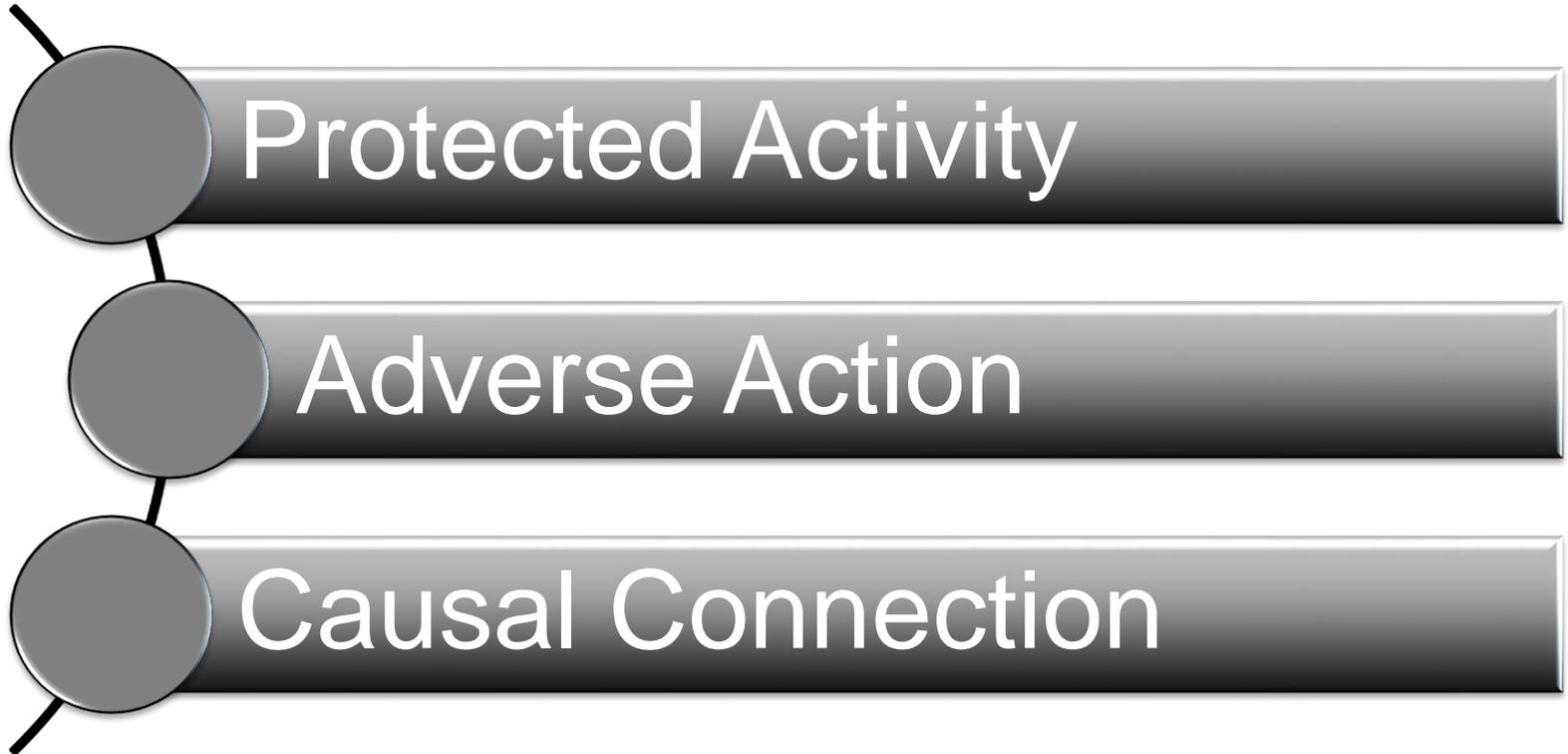
Discrimination v. Retaliation

- Discrimination: firing because of membership in a protected class
- Retaliation: firing because the employee took some action protected by law

Sources of Retaliation Claims

- Federal Whistleblower laws
- State Whistleblower laws
- Federal Employment laws
- State Employment laws
- Qui Tam

Elements of Retaliation Claims



Interference with Rights

- Less common cause of action
- Firing an employee to prevent them from taking advantage of protected rights
 - ERISA – firing an employee before they can incur large healthcare costs that impact an employer-sponsored plan
 - FMLA – firing an employee because they intend to take FMLA leave
 - Public Policy – many states have laws prohibiting firing employees for taking actions or exercising rights the state wants to protect, for example firing an employee for consulting an attorney about potentially suing the employer

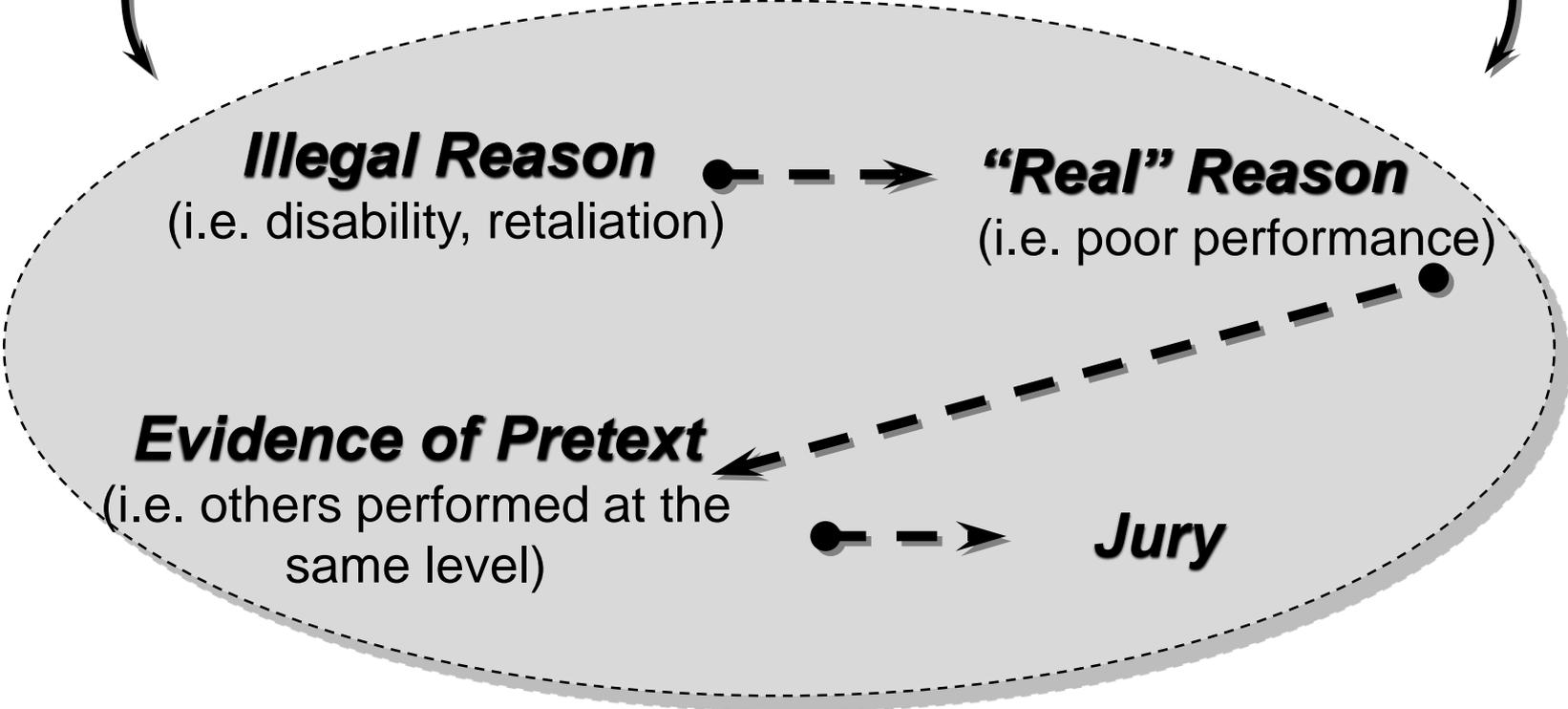
The Path to a Jury

Employee

(Plaintiff)

Employer

(Defendant)



How to avoid a lawsuit

- Impact Plaintiff's Lawyer's "Investment Decision"
 - Lawyers sue for financial reasons
 - "Is this case worth my time and effort?"
- Show that the ex-employee is a "poor investment"
 - Write an "exit letter" – addressed to employee, but intended for his/her lawyer, the EEOC, judge, jury, etc.
 - Explain the reason you fired the employee
 - Give "cold hard facts" of misconduct, not opinions
 - Be specific – details, examples, quotes
 - Show how misconduct impacts co-workers

Think Like a Jury!

- Made up of employees, not employers
- Focus on impact on OTHER EMPLOYEES, NOT The Business!
 1. Who does the work when the bad employee is absent?
 2. Who falls behind when the bad co-worker is lazy – just the lazy worker?
 3. Is bad worker's misconduct fair to those who FOLLOW the rules?

How to Create Defenses

- **Same Category Replacement:** Replace dischargee with an employee from same “protected” category (e.g. replace minority employee with a minority employee)
- **Same Actor Defense:** When the individual who hires a person is the same person who fires an employee, there’s a strong inference that discrimination did not motivate employment decision
- **Manager in Protected Category:** Examples: minority, age, disability...
- **Manager with no knowledge of dischargee’s “protected” status:** Examples: Union support, disability, workers compensation dispute
- **Tip:** Involve multiple managers/employees in discharge decisions. You are choosing your litigation witnesses

What to do about managers who want to fire employees “right now”

- Reminder: personal liability under some discrimination laws
- Review the litigation risk factors with them – any present?
- Have them review the employee’s personnel file – does it support their stated reason for the termination?
- Have them review the disciplinary/discharge decisions with other employees – consistency?

How to respond to anger, threats, and tears

- Conduct Termination With Witness
 - Two Employer participants help keep calm
 - Do not have instigator co-employee or supervisor at termination meeting
 - One person talks
 - Have script for meeting planned out
- Memorialize Meeting Right Away
- Do not try to soften the blow i.e., “you really are a great employee...”
- Do not engage in small talk
- Clearly state your reasons
- Let the employee vent
- Be clear that the decision has been made

How to respond to anger, threats, and tears

- Defuse
 - Take person's plight seriously
 - Obtain constructive feedback
- Tissues
 - Offer tissues for any type of outburst
- Take threats seriously
 - If threat is anticipated, have security on hand
 - If threat is made, document it with law enforcement
 - Consider TRO/Injunction

What to do if a departing employee announces plans to sue you...

- Gather Information
 - Ask them why and for all details
 - Identify witnesses/potential witnesses
 - Gather and protect writings
 - Investigate workplace/environment/computer information (both email, deletions and personal accounts)
- Wish them well and contact your counsel

Separation Agreements

- Separation agreements are contracts entered into between the employer and employee, where the employer gives something to the employee that the employee is not otherwise entitled to (usually a severance payment), and the employee waives the right to sue the company
- Some employers use these for every terminated employee; others just where they are specifically worried about a lawsuit
- Separation agreements can be tricky and it is usually recommended to get attorneys involved in drafting

Separation Agreements

- Pros/Cons
 - Freedom to contract v. protecting the employee/victim
 - An easy exit
 - Reduced likelihood of litigation
 - Protecting the accused
- Think about the objective of the Agreement

Separation Agreements

- Document
- Cannot be in direct conflict with policies
- Oversee implementation
- Must be consistent in whom severance pay is awarded
- OWBPA and payment timing
- Protected activity under the NLRA, Title VII, ADAA, ADEA, and SEC

Remember...

- Termination should always be grounded in business-related reasons, as objective as possible, and generally based on poor performance, misconduct, or business reasons like layoffs or restructuring
- Subjective, whimsical, or irrational reasons for firing are extremely risky
- DOCUMENT
- Does it seem fair?

Questions?

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