Rule #1 For Terminating The Employment Relationship: Document, Document, Document

It cannot be emphasized enough how important it is for employers in any context, besides termination, to document significant moments in an employment relationship. This documentation usually commences with an employment offer, application, company policies and procedures, changes in job status, promotions, performance reviews, disciplinary actions, evidence of participating in mandated training, medical and financial documents, and ends at the time the employee either voluntarily resigns or is terminated. Most of these documents are contained in the employee's "personnel file," which is usually held by the Human Resources Department, or sometimes the manager and/or owner of the business. In California, the employee has a legal right to review his or her personnel file upon request, and the employer must oblige within a reasonable time.

When an employer is contemplating terminating an employee, part of the evaluation process should be for the employer (or its legal counsel) to review any and all disciplinary records, written warnings, descriptions of incidents, and investigation documents. Having such written evidence over a period of time to show a pattern of inappropriate workplace conduct or failure to improve job performance despite counseling sessions is extremely important to support the employer's justification for termination.

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Rule #2 For Terminating the Employment Relationship: No Surprises

An employee should never be surprised by his or her termination. The best situation is when the employer's representative walks into the room to advise of the termination and the employee already knows that he or she is going to be terminated. When employees are surprised by their termination, they are much more likely to file a lawsuit. Surprised employees are often driven to sue by shock, anger and a general feeling that they were not treated fairly or given an opportunity to correct their behavior.

If concerns arise regarding an employee's job performance, it is important to address those issues immediately, rather than hoping that things will improve on their own. For most people, even most supervisors, conflict is unpleasant. Often, people try to avoid conflict. But in the employment context, avoiding conflict now usually leads to greater conflict later in the form of a lawsuit. Giving an employee advanced warning of the problems will make for a better termination.

Another benefit of avoiding surprises with proper counseling is that this may cause the employee to evaluate whether his or her employment should continue. Employees who realize they are coming up short will prefer to find another job or resign their employment to avoid being fired. This minimizes the chances of a lawsuit significantly.

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Rule #3 For Terminating the Employment Relationship: The Real Reason

In the case of poorly performing employees, employers sometimes look for reasons to get rid of the employee, rather than taking the time to go through the steps of progressive discipline. A poorly performing employee requires a lot of attention and time from management. Time is spent catching mistakes. Time is spent counseling the employee. Time is spent documenting the performance deficiencies. And time is often spent having others fix the work that is not being done properly by the poorly performing employee. All of this can be very frustrating. Sometimes an employer might try to short circuit the disciplinary process by latching on to a reason that is not the real reason for the termination. For example, if an employee is late to work a few times, the employer may decide that this provides an opportunity to terminate the poorly performing employee. Problems arise, however, when other employees who are late are not terminated, or even disciplined, and the reason for the termination appears concocted.

Anytime an employer reaches for a reason to terminate an employee, it can start to look like a pretext. This is what fuels lawsuits. If the reason for the termination does not appear to be the real reason, the employee may try to claim that it was for an unlawful reason and sue the employer. Therefore, it is important to remember that a termination should always be made for the real reason, not some convenient reason that might arise at the moment.

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Rule #4 For Terminating the Employment Relationship: Investigate Thoroughly

Before making a decision to terminate the employment relationship, it is important to investigate any misconduct thoroughly and carefully. This includes giving the employee an opportunity to explain any misconduct or actions that could give rise to a termination decision. It should also include all persons with knowledge of the misconduct or actions. And, it should include whatever documentation may exist that relates to the employee's conduct.

Failure to investigate thoroughly can lead an employer to overlook and misunderstand the true facts. It can lead to an employer being accused of desiring the employee's termination rather than making a bona fide employment decision based upon the facts. The time to analyze and discover the true facts is before a decision to terminate is made, not after a wrongful termination lawsuit is filed.

Therefore, the principle to remember is always investigate employee misconduct thoroughly. Make sure you take the time to get your facts straight. Make sure you are not making a mistake. And give the employee an opportunity to explain himself. Juries expect employers to act reasonably and fairly.

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Rule #5 For Terminating the Employment Relationship: Strive For Consistency

A termination for employee misconduct should be handled with consistency, especially within the same department and by the same manager. This means that company policies and procedures should be applied the same way to employees who engage in the same conduct. For example, if one employee is terminated for being excessively late to work, another employee who engages in the same conduct should generally also be subject to termination.

Accordingly, when an employer makes a decision to terminate an employee for misconduct, the employer should realize that it is making a decision, and setting a precedent, for all employees. While there may be reasons to treat people differently, such as the hard working employee who has a hard time getting to work on time versus the lazy employee who is late and sits at his or her desk and sleeps, consistency tends to avoid allegations of favoritism. The moment an employer makes an exception for one employee, the employer opens itself up to the allegation that certain employees are being given preferential treatment.

Therefore, as much as possible, it is important to try to be consistent when making employment decisions, particularly decisions to terminate the employment relationship.

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Rule #6 For Terminating the Employment Relationship: Two's Company

The employment relationship is generally terminated by meeting with the employee to explain the reasons for the termination. This is an important meeting, and therefore, it is important that an accurate account of this meeting be preserved. When terminating an employee, it is advisable to have at least two employer representatives participate in the termination meeting so that the employer will have at least two witnesses to testify regarding exactly what was stated during the meeting. Any such meetings should also be documented by the those in attendance.

If a wrongful lawsuit filed, it is likely that there may be a dispute as to the reasons for the termination and what was discussed at the termination meeting. Often, people hear what they want to hear. For example, the supervisor or human resources representative might try to cushion the discussion by saying, "You know there are things that you do that are very good, but your performance just is not up to par and we have to terminate you." The employee may only hear the things that she did were very good and claim the person who fired her said that she was doing a good job. To avoid these types of miscommunications, it is always good to have a witness so that at least someone else is in the room to hear and be able to recount what was said.

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Rule #7 For Terminating the Employment Relationship: Need To Know Basis

Terminating an employee is unpleasant for the employee and the employer. It can lead an employee feeling embarrassed and concerned about his or her reputation and ability to get another job. Generally, information regarding the reasons for an employee's termination should not be shared with other employees at the company or those outside the company, except on a need to know basis.

An employer cannot control what others may say regarding a terminated employee or the reasons for the termination. Consequently, if statements are made about the employee that turn out to be false, the employee may try to sue the employer for defamation. For this reason, limiting discussions about the employee's termination is preferable. It is also a good idea to advise other employees that they should not speculate or discuss anything concerning the employee once they are no longer employed.

Further, if the employer receives inquiries from third parties, such as prospective employers, it is often best to adopt a policy of only providing limited information to such third parties. Confirmation of the dates of employment, position held and that it is the employer's policy not to release any other information is often the best response to such inquiries.

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Rule #8 For Terminating the Employment Relationship: Sensitize Supervisors

It is important when making a decision to terminate the employment relationship that the manager making this decision understand and be sensitized to the employment laws that exist. If not, mistakes can be made and terminations can violate the law. Therefore, supervisors should be periodically trained and advised regarding employment laws. It is also important to document this training to demonstrate that the employer took appropriate steps to comply with the employment laws.

Many states, including California, require supervisors to receive certain training on a regular basis. It is often a good idea to make this training a regular part of the agenda at staff meetings and to document the training in staff meeting agendas and have attendees sign acknowledgment forms that they have received the training. These agendas and forms will serve as useful confirmation that the employer provided appropriate training to all supervisors and other appropriate personnel.

Finally, because the employment laws can be complex and change frequently, it is preferable for supervisors to consult with the Human Resources Department or legal counsel before making a termination decision. This will often involve a review of the facts and documentation relating to the decision to terminate the employee.

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Rule #9 For Terminating the Employment Relationship: Consider Adopting Arbitration Procedures

Wrongful termination lawsuits can be time consuming and expensive for an employer to defend in court. As an alternative to litigating in court, arbitration provides a form of private dispute resolution in which a neutral third party, usually a retired judge or attorney, renders a decision after a hearing at which both parties have been heard. Arbitration is designed to avoid the formalities, delays, and expenses of filing a lawsuit in court.

Some advantages to arbitration are that:

1. Cases usually get resolved sooner than the average 18-24 months it takes for a case to go through the judicial system and the decisions are final and binding;
2. Total costs of conducting an arbitration versus judicial litigation are usually less;
3. Arbitrators are often selected for their expertise in the relevant area of law;
4. Arbitrators are less likely to award the types of damages that juries sometimes award to wrongfully terminated employees.
5. Arbitrations are generally confidential.

In any sort of alternative dispute resolution, however, legal counsel should be involved in drafting the arbitration procedure to ensure that it complies with applicable state and federal law.

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Rule #10 For Terminating the Employment Relationship: If It Does Not Fit, You Must Acquit

"If It Does Not Fit, You Must Acquit." These were the words of the late Johnnie Cochran in the O.J. Simpson trial. What do they have to do with an employer terminating the employment relationship? Not much, except they should remind every employer that terminating the employment relationship can have serious consequences, so when doing so, it is often wise to remember that the sound advice and words of an attorney can save the employer a lot of time and expense.

Employers sometimes avoid discussing a termination decision with their legal counsel until after the termination has occurred. Most likely, the discussion takes place when the employer receives a demand letter from the former employer's attorney, or worse, a lawsuit is served on the employer. By this time, the facts have already been established and the decision to terminate has already been made.

There is no better time to consult legal counsel than before the termination decision has been made. This allows the attorney to review the decision with a fresh and objective perspective. More importantly, it allows someone experienced in employment law matters to make sure that the employer is in full compliance with the laws and also to assess the risks of the termination.

Therefore, before an employer makes the decision to terminate the employment relationship, it is best to think about and call legal counsel.

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