

Are My T's Crossed?

One of the most common questions from employers is "Can I terminate the employment of this employee?" With the increase in employment litigation, employers are wise to do an analysis of each potential termination to ensure that the case is defensible.

The first step of any pre-termination analysis should be whether the employee is under a written contract or is an at-will employee. Most employees today are at-will employees and the employer is not limited by written contractual provisions for termination. Ideally, employers should have employees acknowledge their at-will status in an employment handbook acknowledgment card. If the employee is under a written contract, the employer can only terminate in conjunction with the contractual termination provisions.

The second area of inquiry is whether the employee is in some protected class, i.e. sex, age (40 and over), race, disability, religion and national origin. If the employee falls within one of these protected classes, termination remains an option for the employer. However, in such instances, the employer must ensure that there is a legitimate, non-discriminatory business reason that can be articulated for the termination.

The third step involves an examination of the employee's personnel file. Documentation is the key to supporting a termination of employment. The employer should review the employee's personnel file to make sure that all prior problems have been appropriately documented. Ideally, prior documentation sets out the reason for the counseling as well as the employer's expectation for future performance by the employee. If documentation is unsatisfactory, the employer may choose to delay termination.

The final step in the analysis is to have an objective third person review the potential termination. Many times an employer or supervisor is so closely involved with an employee that they cannot objectively determine whether termination is appropriate. Each termination should be reviewed by someone who has not been involved in the employee's disciplinary process. Many times this person is either the attorney for the employer or the HR Director in conjunction with corporate counsel.

Once the foregoing analysis is completed and the decision is to go forward with the termination, the employee should be notified of the termination in person with at least two company representatives present. Be straightforward, compassionate and sincere during the termination process. Saying no more than is necessary during the termination is always the best practice. Any reaction or response by the employee during termination should be documented for the employee's file. Many employers today consider offering a severance agreement to the employee in return for a release from any and all liability.

Through a multi-step self analysis, many employers are able to limit their exposure in employment litigation. Ensuring that your i's are dotted and t's are crossed prior to a termination will not prevent all employment claims but will put the employer in a better position to defend such claims when brought.