

Under fire

Don't get caught off guard by a wrongful termination claim **Interviewed by Heather Tunstall**

Wrongful termination claims are far and away the number one lawsuit against employers. Even if you feel that you are justified in firing an employee, you may find yourself on trial.

"In California, it often seems like it's open season on employers," says Andy Wolfe, partner at Ropers Majeski Kohn & Bentley PC. "It's not only the most frequent source of litigation, but it's also the kind of litigation that causes the greatest potential exposure to liability."

So how can you protect yourself when you are warranted in terminating an employee?

Wolfe explained to *Smart Business* how to ensure a smooth separation when a worker is released from employment.

What types of claims can be made against an employer for wrongful termination?

Basically, there are two kinds of claims. The first and the most common is a claim that firing a worker violates an established public policy. Good examples are discrimination claims and claims of retaliation – where an employee is claiming he or she was fired for exercising an employment right. In addition to violation of public policy claims, employees can also assert that they were fired in violation of a contract or agreement that they had with their employer.

How can employers best protect themselves from these types of lawsuits?

There are a number of things that can be done to reduce the risk of a costly lawsuit. The first is to be very clear about the rationale for the termination. Was this termination a layoff? Was this person terminated for unsatisfactory performance or misconduct? Once you have clearly thought through the rationale for the termination, the next question is whether or not the employee's personnel record supports that rationale. Are there clear performance standards? Have there been performance evaluations that are timely and consistent with the rationale? Have similar employees been treated in a similar way? Another thing to consider is the length of service: the longer the employee has been working for your company, the more you will have a duty of loyalty to the employee in the eyes of a jury. And the longer an employee has been around,



Andy Wolfe
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the stronger the rationale must be for terminating that employee.

After that, you should do a very careful risk assessment. In litigation, the truth is not enough. In a court room, the real question is, 'What can the decision to fire this employee be made to look like in the eyes of a jury?' Look for warning signs from the employee. Has the employee recently requested to take leave, or made reference to health issues? Has he or she made work-related complaints? Is this a team player or a person who is always looking out for number one? As a general rule of thumb, you should be aware that the higher the level of compensation the employee has, the greater the risk that the employee will bring suit if fired.

It is always a good idea to get a second opinion on the decision to fire an employee, particularly if the decision-maker is the employee's immediate supervisor. If you decide to fire the employee, it's smart to have a well-planned termination meeting attended by two or more employer representatives, who present a clear and succinct statement of the reason for the termination, and follow a checklist that includes final pay, written notice of the change of employee's status, information about unemployment insurance benefits, and a plan for the return of company property.

What should an employer do if the risk of a lawsuit is too high?

In the great majority of cases, the best course of action is to enter into a separation agreement with the employee rather than just firing that employee. It might take a little more time and cost a little more to reach such an agreement, but what the employer gets in return is finality. The reason is that in exchange for whatever you offer to the employee, you get back a comprehensive release of claims. Then you can sleep at night knowing that once the agreement is reached, this separation is not going to come back and haunt you later.

What are some forms of compensation an employer can offer in a separation agreement?

One of the good things about doing a separation agreement is that a number of things you can offer are not monetary, such as a letter of reference or putting the employee on unpaid leave status. Sometimes, at little or no cost to you, there can be negotiations allowing the employee to keep company property, such as laptops, cell phones, or even automobiles. Sometimes offering the employee post-employment work as an independent contractor is in your best interest. An agreement not to contest unemployment insurance may also be helpful. And, of course, there are also opportunities to negotiate regarding continued benefits and severance.

Separation agreements are usually a genuine win-win. You avoid the risk of being socked with a wrongful termination lawsuit, and the employee gets to leave with dignity and the opportunity to focus on the future in a constructive way. Not only is it good business economically for an employer to do this, but it's also an opportunity to the employer to deal with a difficult situation in a way that is much more comfortable and dignified. Most employers hate to fire people. But negotiating a separation agreement, they find, gives them an opportunity to implement a termination in a cooperative and considerate manner, one that works better for everyone. <<

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