SUCCESSFUL TERMINATIONS - PART 1

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PRACTICE AREAS

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In light of the labyrinth of federal and California state laws that regulate employment today, the successful termination of an employment relationship poses quite a challenge. A "successful termination" is one that is amply supported by documentation, that is not a complete surprise to a reasonable employee, and that minimizes the employer's exposure to legal liability arising out of the termination. Although volumes can be written on the subject, what follows are the key substantive and procedural issues to consider for mastering the art of "successful terminations."

I. Termination As The Final Disciplinary Measure

A. At-Will Employment

Most employers are familiar with and implement the system of at-will employment in California. At-will employment means that either the employer or the employee can terminate the employment relationship with or without notice and with or without cause. The reality, of course, is that an employee is rarely if ever terminated for no reason whatsoever. Usually, an employee is terminated either because internal company reasons (such as a downturn in business) require letting that person go or because some act or performance issue has caused the company to want to terminate him/her. Since the majority of employees are terminated for some type of cause, the following discussion focuses on successful for cause terminations.

B.Termination For Cause

1. Periodic Reviews

A termination is the ultimate disciplinary measure an employer can take to address poor performance or other employment problems. If the employee is surprised by his or her dismissal, however, the employer probably has not done its job correctly. Periodic and accurate reviews of an employee's performance can be compared to periodic medical examinations–they represent a rare opportunity to monitor and possibly improve the vitality of both the employer and the employee. Reviews should be a two-way dialogue. In addition to informing the employee about his or her job performance, areas requiring improvement, etc., employers should use a review to learn more about the workplace environment. In this manner, employers can discover and address problem situations and improve workplace efficiency.

It is recommended that, where possible, an employee's review be attended by the employee, his or her supervisor and someone from the employer's human resources department. Prior to the review, input should be sought from other management-level personnel who work directly with the employee. The review should be entirely candid; rosy reviews that do not accurately reflect the employee's job performance only serve to give the employee a false sense of security and can be used against the employer in subsequent litigation. To further encourage candor, the review should not be directly tied to a raise or bonus. The review should be memorialized in writing and should be signed by each person present.

2. Disciplinary Actions

Employee disciplinary problems can undermine an organization's efficiency and morale. Employers must, therefore, be prepared to confront such problems in an appropriate manner. However, the rapidly expanding employment law field has made employers understandably apprehensive about terminating employees. Employers should not be dissuaded from taking such action when it is necessary.

Employers should attempt to comply with at least four general guidelines before administering disciplinary action. Adherence to these guidelines may help an employer defend against charges that the actions were improper or illegal.

(a) The Action Should Be Reasonable. The employer should consider whether it is fair to impose termination as a disciplinary measure based upon the misconduct or performance problem of the employee. For example, if an employee were misusing confidential information or stealing trade secrets, immediate termination is certainly warranted. On the other hand, if the employee were misusing his/her phone privileges, a series of warnings would be the appropriate course to follow before terminating the employee.

(b) Similar Offenses Should Be Treated Alike. In order to avoid charges of arbitrary or discriminatory conduct, employers should strive to treat similar problems uniformly. If an employer terminates an employee for an infraction for which others were not terminated, the action may facilitate a claim for improper discrimination or retaliation, especially if the individual is a member of a protected group.

(c) Develop Guidelines And Adhere To Them. Written guidelines in the form of policy manuals will provide employees with notice that certain misconduct/performance problems may/will result in termination. These guidelines will help avert claims that the treatment was unfair or administered arbitrarily. It is imperative, however, that the employer adhere to the written policies. For this reason, the policies should be drafted in a manner that will provide the employer with flexibility to deal with individual situations and at the same time help ensure consistent treatment of similar cases.

(d) Document All Disciplinary Actions Leading Up To The Termination. The importance of properly documenting personnel problems and disciplinary action cannot be overemphasized, particularly when a pattern of conduct is what led to the termination. Nonetheless, supervisors are often reluctant to properly document disciplinary actions, thinking that placing such documentation in the employee's personnel file may be detrimental to the employee. Supervisors, however, should be aware that if the employee challenges the termination, either internally or before an administrative agency or court, proper documentation is often the most crucial evidence

an employer can present in its defense to prove that the termination was not based on an improper motive.

C. Termination vs. Layoff

Employers often use the term "layoff" interchangeably with the term "termination" to describe the end of the employment relationship. Indeed, because it sounds less confrontational, many employers characterize terminations for poor performance or other reasons as a "layoff" to avoid confronting the employee and to find an "easy way" to resolve a difficult situation. A true layoff, however, is a temporary or indefinite reduction in force and is decidedly different from a typical termination. Moreover, confusing the two terms can lead to litigation and claims of wrongful termination. Accordingly, properly defining the nature of the termination and taking steps to ensure that the termination or layoff complies with all applicable laws can avoid a variety of employment predicaments.

II. Special Considerations For Potentially Sensitive Terminations

Some terminations are so fraught with potential for litigation and liability that they require particular consideration and attention. The following terminations, while subject to the same guidelines as set forth herein for all terminations are very likely to require the advice of experienced legal counsel on a case-by-case basis to minimize the company's risk of exposure to a lawsuit.

A. Terminating An Employee On Leave

Generally, employee leaves fall into two categories: discretionary and mandatory. Discretionary leaves are those that the employer allows employees to take within its own discretion. With respect to discretionary leaves, an employer may terminate an employee on leave so long as the employer is in compliance with its own established policies for the leave and the employer does not enforce the policies in an unlawful, discriminatory way.

Mandatory leaves are those that an employer is required by law to provide to its eligible employees. These leaves include, but are not limited to, Family Medical Leave ("FMLA"), California Family Rights Act Leave ("CFRA"), California Paid Family Leave ("PFL"), Pregnancy Disability Leave ("PDL"), Military Leave and Worker's Compensation Leave. While the provisions of each leave vary somewhat, the common denominator among them is that each leave prohibits retaliatory terminations and requires employment reinstatement for employees returning from the leaves. Accordingly, successfully terminating an employee out on a mandatory leave is a particularly difficult task.

Having said this, an employee on a mandatory leave has no greater right to reinstatement to the same position than if the employee had been continuously employed in this position during the leave. An employer may terminate and refuse to reinstate an employee on leave when (1) the employer is implementing a bona fide layoff or plant closing; and/or (2) preserving the job or duties for the employee (such as leaving it unfilled or filling it with a temporary employee) would substantially undermine the employer's ability to operate the business safely and efficiently. Furthermore, with respect to employees on a CFRA/FMLA leave, reinstatement may be denied if the employee is a "key employee" that falls into the following categories: the employee requesting the leave is a salaried employee; the employee requesting the leave is among the highest paid 10% of the workforce within 75 miles of his/her worksite; the refusal to reinstate the employee is necessary because the employee's

reinstatement will cause the company substantial and grievous economic injury; the employer notified the employee of its intent to refuse reinstatement when it determined the refusal was necessary due to economic injury; and the employer first gave the employee a reasonable opportunity to return to work following the notice of intent to deny reinstatement.

Proving that an employee would have been laid off regardless of whether he/she was on leave can be tricky. It is even more difficult to prove that preserving the job would substantially undermine the employer's ability to operate the business safely and efficiently. The termination will not be justified merely because the employer believes that holding the job is inconvenient, costly or causes more work for other employees. Moreover, even if an employer is excused from returning an employee to the same position, there may be an obligation to return the employee to a comparable position. Regardless, it is clear that the following scenarios are examples of insufficient cause for an employer's termination of an employee on leave or refusal to reinstate an employee after a leave: the employer distributes the duties of an employee on leave to several other employees and finds they can handle the additional work; the employer hires a temporary employee to do the duties of the employee on family leave and discovers the temporary employee performs the better job; the employer finds it necessary to lay off one person from the department, and since the employee on leave was already out of the workplace, the employer selects him/her for the layoff; or the employer hears through others (or even the employee on leave) that the employee is considering not returning to work at the end of the leave.

In sum, if an employer is considering terminating an employee on leave or refusing to reinstate an employee after a leave, it should consult with experienced employment counsel to determine whether the stated reasons meet the burden of proof required.

B. Terminating An Employee In A Protected Class

Both state and federal statutes prohibit termination on the basis of certain characteristics. Such characteristics include race, religion, national origin/ancestry, sex (including sexual harassment), age (for persons 40 and older), marital status, disability (physical or mental), veteran status, pregnancy, sexual orientation, medical condition (including genetic characteristics) and union activity. Although many employers know that they cannot discriminate against people who are traditionally thought of as "minorities," the law protects everyone from unlawful discrimination, since everyone is of one sex or the other, is of some race, is either married or unmarried, etc. For example, it is just as unlawful to terminate a woman because the employer prefers a man for a tough, physical job as it is to terminate a man because the employer prefers a "woman's touch."

An employee can establish a case of employment discrimination if he/she can show that (1) he/she was a member of a protected class; (2) that he/she was performing competently in the job; (3) that he/she suffered an adverse employment action, such as termination; and (4) the evidence shows a discriminatory motive for the adverse employment action. Guz v. Bechtel National, Inc. (2000), 24 Cal. 4th 317, 353. 353. If the employee establishes this prima facie case, a rebuttable presumption of discrimination arises and the burden then shifts to the employer to show its legitimate nondiscriminatory reason for the adverse employment action. Accordingly, an employer who plans on terminating an employee within one of the above protected classes should think with a view toward the potential discrimination case the employee may bring and ensure that it has a legitimate, demonstrable, nondiscriminatory reason for terminating the employee.

C. Termination As Unlawful Retaliation

An employer may not terminate an employee in retaliation for that employee's exercise of a right granted by a state or federal statute or by certain administrative regulations. Generally, retaliation claims may be brought against an employer when an employee refuses to violate the law (such as refusing to accept less than the minimum wage or refusing to cover up a supervisor's sexual harassment), or when an employee "blows the whistle" on the employer to a government agency, when the employee believes the employer is violating the law. In many cases, when a termination is very close in time to an employee's engagement in a protected activity, a court will allow conclusions to be drawn that such termination was likely to have been related to the protected activity.

The statutes that provide protected rights for employees on the basis of which an employer cannot retaliate include, but are not limited to, the National Labor Relations Act (NLRA), Title VII, of the Civil Rights Act of 1964, Fair Labor Standards Act of 1938, Employee Retirement Income Security of 1974, and Occupational Safety and Health Act of 1970. Some of the activities that are considered protected under these and other statutes, and that cannot be the basis of a termination decision, include: disclosing or refusing to disclose wages; voluntary participation in an alcohol or drug rehabilitation program; refusing to authorize disclosure of medical information; participating in jury duty or serving as an election officer; political activity; military service; acting as a volunteer firefighter; refusing to purchase the employer's products or services; refusing to commit an illegal act; taking time off to appear at his/her child's school regarding a suspension; taking time off for a child's school or day care activities; taking time off as a victim of domestic violence to obtain a restraining order, to receive care/counseling, or to relocate; maintaining privacy of arrest records that do not lead to convictions; and refusing to take a polygraph test.

An employee who has invoked any of these rights or any other right afforded by the above-mentioned statutes may not be terminated for doing so. Furthermore, even if the employer has a different, legitimate reason for terminating such an employee, it must be cautious to ensure that the legitimate reason is well documented and supported by objective evidence.

D. Wrongful Termination In Violation Of Public

Wrongful termination in violation of public policy occurs when an employee – even one who is at-will – is terminated for an unlawful reason in violation of an express public policy of the state or federal government. Some examples of cases where terminated employees have been successful in proving wrongful termination in violation of public policy include: termination for reporting to employer that other employees are engaged in bribery, kickbacks or tax evasion; termination for refusing to submit to drug testing which violated the privacy right embodied in the California Constitution; termination for refusing to perjure oneself at an hearing despite the employer's insistence that he/she do so to protect the organization; termination by forcing the resignation of an employee who refused to enter into a sexual relationship with the employee's supervisor; termination of an employee who reported adulterated milk to health officials; and termination for the exercise of the constitutionally protected right of self-defense when attacked by a co-worker.

These claims often arise when an employee refuses the sexual advances of a supervisor, reports the employer to

health and safety officials, or makes a wage claim to the Labor Commissioner. Even if the subsequent termination is in fact unrelated to these actions, a claim for wrongful termination in violation of public policy may follow and prove extremely costly to defend. Accordingly, employers must ensure that their reasons for terminating an employee who may have invoked a fundamental right are very well documented and supported by objective evidence.

The most important case in this area of law has been Foley v. Interactive Data Corp., 47 Cal. 3d 654 (1988). The California Supreme Court in that case held that an employee must show that the public policy that was violated was fundamental and of benefit to the general public, rather than just to that employee or employer.

Following Foley, the Supreme Court added another requirement for plaintiffs attempting to prove wrongful termination in violation of public policy. In Gantt v. Sentry Insurance, 1 Cal. 4th 1083 (1992), the Court held that a plaintiff must show that the particular public policy involved is derived from the state or federal Constitution or a statute. For example, in the Gantt case, an employee claimed that he was terminated for supporting and testifying in his coworker's claim of sexual harassment. Since the California Constitution and the state Fair Employment and Housing Act ("FEHA") provided a basis for his claim, he was successful. In addition, a recent decision of the California Supreme Court has ruled that even administrative regulations may serve as a source of fundamental public policy limiting an employer's right to discharge an at-will employee. Green v. Ralee Eng'g Co., 19 Cal. 4th 66 (1998).

E. Terminating An Employee Who Was The Subject Of A Complaint

The California Supreme Court has held that when an employer terminates an employee based on a good faith determination that employee misconduct occurred, there is no wrongful discharge claim, even if the employee later proves no misconduct actually occurred. See, Cotran v. Rollins Hudig Hall Int., Inc., 17 Cal. 4th 93 (1998). In the Cotran case, an employee was terminated for sexually harassing another employee, but only after an extensive and well-documented investigation of the complaint was completed. At trial, the employee accused of harassment testified that the acts labeled sexual harassment were in fact consensual sexual relationships, not unlawful harassment. The California Supreme Court granted a review of the case to determine the proper standard juries should use in evaluating an employer's "good faith" defense. According to the Supreme Court, a jury must determine whether the employer's decision to terminate an employee was reached honestly, after an appropriate investigation and for reasons that were not arbitrary or designed to hide the real reason for the termination. If so, the employer has not wrongfully terminated the employee, even if the alleged misconduct never actually occurred