

With wrongful termination, charges can come from anywhere

Employers think they can hire and fire anyone for any reason or no reason. After all, that is the definition of 'at-will' employment. But wrongful termination lawyers have been compiling a list of exceptions to the 'at-will' doctrine for years. The attorney your fired employee speaks with will have a list of possible ways to sue you for unlawful termination. Unless your policies and procedures comply with federal, state, and local laws, you may be sued.

What is wrongful termination?

Wrongful termination occurs when an employer violates a federal, state or local law during the termination process. There are also potential lawsuit grounds in the so-called "common law" – a set of rules passed down through the years. These go back to English legal rules regulating the master-servant (modern-day employer-employee) relationship.

Employers can be sued under a number of federal, state, and local wrongful termination laws. Primarily these laws bar employer discrimination based on the employee's membership in a protected group. For example, Title VII of the Civil Rights Act protects employees from discrimination based on race, color, religion, sex, or national origin. The Age in Discrimination in Employment Act (ADEA) protects workers 40 and older. The Americans With Disabilities Act (ADA) provides qualified employees with disabilities job protections.

Another class of federal laws protects employees' rights to take time off work under specific conditions. The Family and Medical Leave Act provides employees with 12 or 26 weeks unpaid leave, depending on the reason. The Uniformed Services Employment and Reemployment Rights Act (USERRA) provides protections for employees with military service obligations. Employers who penalize employees for using leave guaranteed by these laws often land in court.

More broadly, employers who are perceived to be retaliating against workers for exercise their legally protected rights risk expensive litigation. The National Labor Relations Act (NLRA) protects employees who discuss workplace conditions or unionization. The Occupational Safety and Health Administration (OSHA) enforces more than 20 different whistleblower laws. Often retaliation claims are easier to prove than discrimination.

Next term, the Supreme Court will decide whether Title VII protects workers from discrimination based on sexual orientation or gender stereotyping. Many states and municipalities have decided not to wait for federal action. Twenty-one states, the District of Columbia, Guam and Puerto Rico have laws barring sexual orientation and gender identity discrimination.

Additionally, employees have common law rights. Employees can successfully sue if they can show the employer has:

- violated a written or oral employment contract;
- committed fraud;

- intentionally inflicted emotional distress; or
- violated public policy.

This is just the tip of the iceberg of what wrongful termination lawyers know and you probably don't. But employers can take steps to protect themselves from the wrongful termination lawsuit.

The decision to terminate

Employers may terminate an employee for many different legitimate reasons. Generally, terminations fall into two categories: performance-based and business-based. Performance-based terminations are justified by the employee's poor performance. Employers should have performance metrics demonstrating the employee's deficient performance. The metrics should be as objective as possible. They should also measure the employee's ability to perform the job's essential functions. Those essential functions should be listed on the position's job description.

Employees can also be fired for misconduct. Employers should allow themselves flexibility here. Not all misconduct is the same. For example, poor attendance is not the same as stealing from the company or harming a co-worker. Employer policies should allow employers to fire immediately for egregious violations.

If the case goes to litigation, the employer must show that it treated all similarly situation employees the same way. In other words, the employer must apply the same metrics to each employee in the same job classification.

Business-based terminations are generally based on economic conditions. The company maybe reducing the overall workforce to cut costs in an economic downturn. Possibly, the employer realigns or eliminates organizational units in response to market forces. Even in these cases, the employer must demonstrate objective reasons for who it selected for termination.

How to terminate an employee

Firing an employee is never easy. The fired employee will go through many emotions - grief, sadness, anger - and if all goes well, ultimately acceptance. Employers who leave the employee with some dignity and a path forward are less likely to be sued. They also tend to avoid violent confrontations.

Employers should discharge the employee shortly after making the decision. This gives the employee less time to brood or plan sabotage or violence. The meeting should be in a private location away from prying eyes. One neutral witness should attend the meeting. The employee should be paid all money due even if it is not yet pay day.

Avoid giving specific reasons for the termination. Reasons become the tinder of the wrongful termination suit. If the employer gives different reasons at different times it appears the employer is lying.

Avoiding the discrimination charge

After making an initial determination to terminate an employee take one more step. Examine your pattern of firings to determine if they seem to impact a protected group more than another.

Secondly, examine how employees who recorded similar poor performance were treated. Is the contemplated action in line with those decisions? Some companies present the employee's performance without any identifying information to a knowledgeable third party. If the third party disagrees with the termination, something called unconscious bias may be at work.

Tech giant Google made news a few years ago by providing unconscious bias training to its workers. Many

workers found it enlightening, but one published a manifesto on social media claiming it was “infected with political correctness.” Still, employers must assume plaintiff attorneys will allege bias if it looks like race, gender, age or other characteristics influence discipline. Employers who address potential bias generally fare better than those who don’t.

Another approach to combatting bias is to have several people evaluate each worker. The hope is that one observer’s bias will cancel out the bias of others. Some employers use an approach called 360-degree feedback. In this scenario, employees are evaluated by those above, below, and equal to them on the organizational chart. All evaluators must use the same criteria.

Avoiding age discrimination complaints

Current day employees are working longer than their parents did. As a result, workforces are more likely to have workers over 40 than ever before. Numerous ADEA complaints feature a snide remark or pattern of remarks denigrating workers based on age. Employers need to train supervisors to avoid such remarks.

The Older Workers Benefit Protection Act

When terminating older workers, employers may wish to offer a severance package that modifies retirement plans or offers a payment. The Older Workers Benefit Protection Act (OWBPA) requires employers to allow the furloughed worker time to evaluate the severance offer. Specifically, the employee must have 21 days to evaluate the offer. The offer must reference the ADEA and advise the employee to take the offer to an attorney. Even if the worker accepts the severance package, the worker can rescind the agreement within 7 days. Any severance package should be drafted by an attorney.

The retaliation candidate

Any employee who has engaged in “protected activity” has a potential retaliation claim. For example, firing a woman who recently became pregnant may violate the Pregnancy Discrimination Act. Think twice before terminating a worker who has contacted a union about representation. Similarly, anyone who has contacted any state or federal agency with a complaint already has the basis of a retaliation complaint.

This does not mean employers cannot terminate these employees. It means employers must have legitimate objective business-related reasons for terminating the employee. The reasons must not be related to the employee’s membership in a protected class.

Employers should also have more than one person approve any termination. Consult with an attorney before terminating a protected class member or someone who has engaged in “protected activity.”