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TEN RULES ON HOW TO FIRE AN EMPLOYEE—AND NOT GET SUED

1. Document the employee's personnel file.

In most employment lawsuits, the fundamental claim of a discharged employee is that he or she was treated unfairly. Most often, this involves an allegation by the ex-employee that he or she had no warning that the discharge was coming.

To prevent this claim, employers need to increase the amount of pre-termination notice that employees receive. For example, employees need to be given accurate performance appraisals. If an employee's performance is not satisfactory, he or she should not be given a neutral or positive performance appraisal.

Rather, the appraisal should accurately reflect the employee's level of performance. Employers need to make sure that employees receive appropriate discipline, such as verbal warnings, written warnings, and final warnings. Even verbal warnings should be documented in the employee's personnel file.

2. Employers should be consistent in discharging employees.

For example, if one employee is given only a written warning for lying to the company, another employee who commits the same offense should not be discharged. Treating employees inconsistently opens the company up to discrimination claims.

3. If possible, employers should discharge employees during their introductory or probationary period.

Of course, as a legal matter, employers do not have any greater rights to discharge an employee during a probationary period than thereafter.

4. *Inform the employee of the true reason he or she is let go.*

If an employer gives the employee a false reason for the discharge and the employee sues, a jury will likely conclude that the real reason for the discharge must have been discrimination on the part of the employer.

Often, rather than confront an employee with the real reason for her discharge, an employer will tell the employee that her job is eliminated. If the employee sues, and proves that her job was not eliminated, a jury will view the employer as being untrustworthy, and may conclude that the real reason for the discharge was discrimination.

5. *Employers should hold supervisors accountable for how they supervise.*

Employers should hold supervisors accountable for failing to terminate an employee who deserves it. They also should be held accountable if they fail to give employees accurate performance appraisals.

6. *Employers should consider offering severance pay to discharged employees in exchange for the employees' complete release of all potential claims against the company.*

Such releases are enforceable, and can virtually eliminate the possibility of future litigation involving a discharged employee. The severance pay offered need not be a large sum of money. One or two weeks' worth of pay would be sufficient.

7. *Employers should establish an internal procedure for employees to challenge terminations that they perceive as unfair.*

Employees typically sue only when they believe they have no other option available. Giving an employee an internal procedure to challenge a discharge provides them with such an option. Thus, they may be less likely to sue.

"Peer Review" is one internal appeals process that is successfully used by many companies. In the peer review process, a discharged employee appeals his or her discharge to a panel of his or her peers, usually consisting of three rank-and-file employees and two supervisors.

A hearing is held during which both the employee and the company present their cases to the panel. The panel then votes on whether to uphold the discharge. A majority vote determines the case.

Experience shows that most employees who lose during the peer review process do not subsequently file lawsuits against the company. Apparently, the employees who lose in the peer review process believe that they are also likely to lose any subsequent lawsuit, and are deterred from filing one.

8. *If an employee does sue over his or her discharge, the employer should not be too quick to settle the lawsuit.*

This sends a message to the company's work force that an easy way to get money out of the company is to file a lawsuit against it. Instead, once a lawsuit has been filed, play hardball with the

ex-employee for a while. Force the employee to expend time, effort and money to pursue the lawsuit before settling it.

9. *Prior to discharging an employee, make sure that he or she has not recently exercised any "protected rights."*

For example, make sure that the employee has not filed a workers' compensation claim or EEOC charge in the recent past. If so, and the employee is discharged, the employee likely will sue the company claiming that he or she was unlawfully discharged in retaliation for engaging in the protected conduct.

10. *At the time an employee is discharged, reach an agreement with the employee about how the employer should respond to requests for a reference regarding the employee.*

This reduces the risk that an ex-employee will sue his or her former employer for defamation based on an unfavorable reference. Most likely, in a discharge situation, an agreement to give the ex-employee a neutral reference will be appropriate. In a neutral reference, the employer merely confirms the dates of employment, the position held and, where the ex-employee agrees, the employee's former salary.

Although nothing can completely eliminate the risks involved in terminating employees, employers can minimize the risks by following these rules.

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