



## Wrongful Terminations

### The Top Five Errors an Employer Can Make

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After “dodging the self-insured association health plan landmine” discussed in the November 2002 PEO Insider, Paul E. Ogletorp (still known as PEO to his clients and friends) believes that Acme PEO<sup>1</sup> is in for smooth sailing. His steadied blood pressure spikes again, however, as he opens the day’s mail to find a summons and complaint naming Acme PEO and one of its clients, QuickBucks Recycling, as defendants in a lawsuit. As he reads the complaint brought by Sally Suit, a former co-employee of Acme PEO and QuickBucks, he learns that Sally, the only female employee at QuickBucks, is alleging wrongful termination, discrimination, and sexual harassment.

PEO angrily orders his HR supervisor to bring Sally’s personnel file to his office. The supervisor tells him that several months ago, QuickBucks called and requested that Acme PEO remove Sally from its payroll. Together, PEO and the supervisor call QuickBucks to get the full story and learn that Sally’s worksite supervisor claims he fired Sally for excessive absenteeism but admits that he has no documentation to support unexcused absences or that she was warned her absenteeism was a problem. Moreover, he acknowl-

edges that similarly situated male employees have missed far more time than Sally and have not been disciplined or terminated. Sally’s worksite supervisor also admits he previously had a personal relationship with Sally but no longer felt comfortable working with her after he had terminated that relationship.

Unfortunately, PEO is experiencing first-hand the trend in wrongful termination lawsuits being brought against employers. While no employer can prevent wrongful termination suits from being filed after terminating employees, many can be successfully defended if the employer is diligent in establishing and following certain policies and systems. If you read a sufficient number of cases involving allegations of wrongful termination, you recognize that the types of claims that may be made against an employer are virtually limitless. However, in the decisions resulting in liability for the employer, certain reoccurring patterns of action or inaction on the part of the employer usually explain the finding of liability.

The goal of every PEO is to reduce the threat of such liability for itself and its client companies. To achieve this goal, PEOs must proactively examine their policies and systems, as well as those of their client companies, to eliminate the common employer errors that can result in liability.

Because PEOs often do not have direct access to the day-to-day activities at client company worksites, the task of maintaining policies and systems to avoid liability is doubly difficult. Nevertheless, by recognizing this pattern of common errors, PEOs can proactively work to avoid liability. The following is a decidedly unscientific listing of the top five employer errors that can lead to lawsuits and potential liability for wrongful termination.

#### #1: The Unchecked Supervisor

It is amazing how many errors can be avoided by ensuring some level of review of the personnel-related decisions made by immediate supervisors. It is commonly the unilateral decision of an immediate supervisor that has management (and management lawyers) scratching their heads in a collective effort to figure out how and why such a decision was made.

Immediate supervisors have two things working against them. First, there is often a personal or emotional attachment to the personnel decisions they make. These decisions usually involve employees with whom the supervisor must interact with daily. This can result in frictions or bonds that cloud the supervisor’s objectivity. Second, the supervisor often fails to comprehend that his personnel decisions have implications throughout the company. For example, problems are likely to arise if a supervisor terminates the employment of a female employee when several male employees have committed the same offense and have not been discharged. Such is the case with Sally Suit and her immediate supervisor at QuickBucks and

the claim of excessive absenteeism. (Of course, there is the added problem of the male supervisor having a personal relationship with Sally and then terminating her after the relationship ends, but that is beyond the scope of this article.) For obvious reasons, such decentralized decision-making can lead to problems.

Employers need to take the time to train their supervisors on the significance of the personnel decisions they make. Before a termination decision is made, a company official with human resources responsibilities should carefully evaluate all circumstances of the proposed termination. In a PEO relationship, it is of utmost importance that the PEO work with its client before any action is taken with respect to a co-employee to avoid being blindsided by a lawsuit after the client makes a unilateral employment decision.

## #2: Lack of Documentation

There is perhaps nothing more distressing to a management defense lawyer than to review a file and realize there is not one shred of paper that mentions the performance problem that supposedly warranted the drastic step of termination. This distress often turns to depression when a more careful review of the employee's personnel file reveals rather glowing comments about the employee's performance. Commonly, there are performance evaluations containing numerical codes indicating that the employee has been meeting or exceeding the employer's expectations for years. When the lack of criticism and the positive evaluations are combined with a history of regular compensation increases, the case can become very difficult to successfully defend.

Problems must be documented. There is no better tool in the defense of a wrongful termination case than a file containing multiple documents memorializing the employee's performance deficiencies and the employer's efforts to cure the problem. Managers and supervisors should be thoroughly trained in the importance of documenting problems in the workplace. This can be as simple as jotting down contemporaneous notes when problems arise. It

can also be as formal as drafting a performance improvement plan that sets forth the actions the employee must take to keep his job. The key point here is to maintain some documentation of the reasons supporting a termination of employment. Judges and jurors rightfully believe that if a performance problem was serious enough to warrant termination, a description of the problem should be written down somewhere.

Employers should also provide training to supervisors regarding the importance of a candid and accurate performance evaluation. This is a very important event in the employment relationship. Unfortunately, it is too often conducted by someone unaware of its significance. Some supervisors are reluctant to criticize the employees they have to supervise on a daily basis. Others simply want to avoid confrontation and therefore refrain from the type of constructive criticism that should appear on a candid evaluation. The result is often inaccurate evaluation indicating that the non-performing employee is meeting or exceeding the employer's expectations. Such evaluations are extremely useful evidence for plaintiffs, as they tend to cast doubt on the employer's explanation that there was some performance problem that necessitated the termination. Employers should ensure that supervisors understand the significance of all portions of the performance evaluation, particularly the meaning of terms such as "meets expectations" and "exceeds expectations." In a PEO relationship, it is important for the PEO to take an active role in providing this instruction to supervisors as well as keep an active hand in all human resource functions. This is especially true where the PEO, as is typically the case, has at least reserved a right to assist or consult with the client company in matters such as evaluation, discipline, and termination of co-employees.

## #3: Lack of Consistency

An employer's inconsistent treatment of similarly situated employees is the quickest route to liability for wrongful termination. For example, to establish a claim of unlaw-

ful discrimination, a plaintiff generally must show that the employer treated similarly situated employees outside the protected class unfavorably. This is the essence of a claim of discrimination.

An employer that acts in an inconsistent manner does so at its own risk. All terminations of employment should be carefully evaluated to ensure that the reason supporting the termination is one that has been evenly applied to other employees. For example, if an employer proposes to discharge a female employee, such as Sally at QuickBucks, for excessive absenteeism, it will want to ensure it has applied the same rule to male employees who have had similar incidents of absenteeism. If the female employee can show that similarly situated male employees had the same level of absenteeism and were only given a warning and not disciplined at all, there is an increased likelihood of liability for discrimination. Conversely, if the employer can show it has consistently terminated the employment of male employees with the same number of absences, it is more likely to avail.

Effective communication can help eliminate inconsistent treatment. Before terminations are made, an employer should carefully consider the actions it has taken when similar situations have arisen in the past. Such consideration should include communication among departments to ensure the proposed termination is in line with how the employer has treated other employees throughout the organization. When a client calls the PEO to request (or instructs the PEO) to terminate an employee, the PEO should not take the action without conducting a thorough investigation of the circumstances leading up to the employee's discharge.

## #4: Turning a Weak Discrimination Claim into a Strong Retaliation Claim

The mishandling of a discrimination claim is a frequent error with costly ramifications. It is amazing how often an employer's own actions can convert an otherwise defensible discrimination claim into a dangerous retaliation case.

The scenario usually goes something like this: Len has worked for the company for only six months. During that time, he has quickly alienated his coworkers and his supervisor, Karen, with his bad attitude and poor work habits. After Karen writes him up for poor performance, Len files a charge of discrimination with the EEOC alleging that Karen is discriminating against him on the basis of his race. There is absolutely no basis to Len's charge, and the lawyers are dispatched to quickly take care of the charge armed with numerous witness statements in the company's favor. Nevertheless, Karen is furious about the allegations made against her, and seizes upon Len's next mistake (a relatively minor one as Len's mistakes go) as the basis for her decision to fire Len.

Len's subsequent retaliation charge will not be as easy to defend. This is the type of error that employers must learn to avoid. Managers and supervisors must be trained to understand the rather delicate nature of the period immediately following any complaint of discrimination. While this does not mean that employees can never be disciplined after they make a complaint, it does mean any adverse action toward the employee should be carefully considered with an awareness of the potential ramifications.

#### **#5: Mistaken Reliance of the Employment-At-Will Doctrine**

Most states continue to recognize some version of the employment-at-will doctrine, which holds that an employer may terminate the employment of an employee for any reason or no reason at all. However, employers have witnessed an erosion of this doctrine in both the legislatures and the courts, which have carved out a pletho-

ra of exceptions to this general rule. Many employers have failed to keep up with these exceptions and mistakenly rely on a near-absolute version of the employment-at-will doctrine.

There are a number of state and federal statutory exceptions. For exceptions, the Federal Surface Transportation Assistance Act contains whistle-blower provisions that protect all employees of commercial motor carriers from discharge or discrimination for refusing to operate a motor vehicle when operation would violate a safety rule or because the employee reasonably believes it would result in serious injury to himself or others. Similarly, the Federal Occupational Safety & Health Act prohibits employers from discharging or in any manner discriminating against employees who raise safety concerns in the workplace or testify at a hearing on such issues.

There are also various judicial exceptions. Many state courts have recognized "public policy" exceptions that prohibit employers from discharging an employee based on the employee's exercise of a legal right (e.g., filing a workers' compensation claim), or the employee's refusal to perform an illegal act (e.g., refusing to provide fraudulent financial information to the Securities and Exchange Commission).

Employers must carefully determine all of the possible reasons for a proposed termination. Blind reliance on the operation of the employment-at-will doctrine could be very costly if it turns out that the reason for a termination implicates one of the exceptions to this doctrine. Moreover, despite the continued viability of the employment-at-will doctrine, it is rare that an employer exercises its right to discharge an employee for no reason at all. To reduce the potential for wrongful termination lia-

bility, employers are generally advised to assure they can articulate a legitimate, non-discriminatory reason for all termination decisions.

#### **Conclusion**

While there are many errors employers can make that can lead to wrongful termination lawsuits, the foregoing appear with such frequency that they are deserving of inclusion in the "top five" errors that should be avoided by all employers. This is especially true in the PEO relationship where there is an inherent level of insulation between the PEO and the worksite employees. Not only must the PEO be aware of and take steps to avoid these errors, it must be in a position to educate and monitor its clients to assure that the errors do not occur without the PEO's knowledge, resulting in potentially costly lawsuits. ■

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