Preventing Wrongful Termination Lawsuits
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Note: In an effort to provide you with the latest information regarding risk management and loss prevention, Risk Review will sometimes feature articles that discuss situations that are not covered by Princeton Insurance. This article offers details about how to prevent wrongful termination lawsuits – please be advised that Princeton Insurance DOES NOT offer this type of coverage. If you are interested in learning more about wrongful termination coverage, or would like to review the details of your policy, always contact your independent agent.

Employees are becoming more and more knowledgeable about their rights, resulting in an increase of wrongful termination claims, as well as an increase in the amount of damages and legal costs to defend them. There are several laws that employers need to be aware of when terminating an employee, including the Conscientious Employee Protection Act (CEPA) which protects employees from retaliation, the Age Discrimination in Employment Act, Americans with Disabilities Act, the Equal Pay Act, and the Civil Rights Act. These laws are constantly changing, and it is important that employers are knowledgeable and keep up with them.

Most employees are hired for an indefinite period of time and are considered employees “at will,” though an employee can be hired via express contract for a specific period of time or the “at will” provision may be overridden by an implied contract (i.e. employer assuring continued employment, salary increases, bonuses, commendations, etc.). Though the State of New Jersey recognizes the concept of employment “at will,” which means that an employer can terminate an employee at any time, for any reason or no reason, and without giving the employee prior notice, this will not prevent a lawsuit based upon violation of the above employment laws.

Handbooks and policies
Employers should have a written employee handbook and employee policies and procedures which include the types of conduct that are subject to disciplinary action, including termination. Employers should also make sure their employees are aware of the handbook and employee policies and procedures, whether they are posted in a conspicuous place and/or given to the employee and a written acknowledgement of receipt is obtained. The state recognizes that employee handbooks, etc. can be considered contracts, unless there is a prominently displayed disclaimer, so it is important to have your employee handbooks and other employee policies and procedures reviewed by an employment law attorney, not only initially, but after any changes or amendments.

Performance expectations should be outlined in a written job description and provided to the employee. Also, these expectations, specific examples of not meeting the expectations, ways to improve, and the consequences of continuing to not meet the expectations should be reviewed at least annually with the employee during a written performance evaluation and filed in the employee’s personnel file after the employee signs it acknowledging the meeting. Any additional follow-up meetings should be documented in the same fashion. Disciplinary action, including termination, should be based upon the employee’s performance and/or conduct, not on their age, race, color, national origin, religion, gender, prior complaints, etc. Employers have to be especially careful when an employee falls within a class protected by acts mentioned above.

Be mindful – don’t retaliate
It is also important to treat an employee who complains about discrimination or harassment with care. Retaliation is often subjective and can include actions that the employer takes with the best of intentions. Remember to focus on the wrongdoer, not the complaining employee when trying to resolve a situation. The employer needs to fix the problem, not remove the complaining employee from the situation. Even if the original complaint turns out to be unsubstantiated, as long as an employee can prove that there were negative effects as a result, the
employee can win a retaliation claim. Steps to take to prevent retaliation is to establish a policy against it, communicate with the complaining employee, keep the complaints received confidential, and document everything, consider sending the complaining employee a letter confirming your discussion. Remember, you can take actions against a complaining employee for other reasons, but be prepared to show that you have valid reasons unrelated to the complaint, including documentation of prior warnings.

**Stick to the rules**
When disciplining an employee it is very important to follow your company’s written policies and procedures. Make sure managers work with Human Resources and are trained properly on these policies. Follow a progressive disciplinary action approach, whenever appropriate, which includes the use of verbal and written warnings, probation, suspension, transfer and/or demotion. Make sure the disciplinary action is in proportion to the seriousness of the action/violation; be consistent with the type and severity of the corrective action imposed on other employees under similar circumstances, no matter who the employee is. This progressive approach will prove that the company’s policy was applied fairly and allow for the employee to be aware of their action/violation and an opportunity to correct their behavior. Ample time should be given to the employee to improve his/her performance as determined by your company’s policy, but be fair and consistent. In general, several warnings should be given to the employee before termination is considered, unless it’s related to extreme misconduct.

Every step of the process should be thoroughly documented in common sense language that can be easily followed, with specific corrective actions and, if possible, quantifiable performance measures. Verbal and written warnings, with specifics about the particular issue, details of the conversation, and the potential consequences, should be documented and signed by the employee acknowledging the discussion and placed in the employee’s personnel file. It is important that no evidence is destroyed, because, if this is discovered, the courts will more than likely assume it would have supported the plaintiff. Key personnel documents should be kept for at least a few years.

**Take time to investigate all sides**
Employers should carefully investigate the situation surrounding the disciplinary action/termination and make sure they have a specific, legitimate, non-discriminatory reason for terminating the employee. Obtain all sides of the story and be fair to everyone involved, obtain sufficient evidence to back-up your decision, and make sure you are not swayed by one individual’s version, especially if the person has their own agenda. Never terminate an employee on the spot. If the action/violation is extremely serious, consider suspending the employee (with or without pay) pending the outcome of the investigation to allow you sufficient time to confirm the circumstances surrounding the action in order to discipline appropriately. Make sure you keep the names of the individuals you spoke with confidential, especially from the person being terminated. Consider contacting your employment law attorney for guidance.

**Take the proper steps before termination**
Before terminating an employee, make sure your decision was well thought out and that you have reviewed and taken into consideration all prior disciplinary actions for the same type of action/violation, as well as the possible impact of the employment laws. Have at least one high-level management representative trained in employment-related matters review the situation, making sure there is solid evidence and the reason would be considered fair and reasonable by an unbiased third party hearing both sides of the story (i.e. jury) prior to approving the termination. Discuss your termination decision with only those that need to know (i.e. supervisor, legal counsel). If you have already had several discussions with the employee via verbal and written warnings, termination should not be a surprise.

Once you have decided to terminate the employee, schedule a meeting; don’t wait any longer than you have to. Make sure you are prepared. Include Human Resource representatives, the employee’s supervisor, and one other person who can serve as a credible witness, if needed. Have the final paycheck available at the meeting, if possible. Allow the employee to briefly discuss the decision with you and/or vent, but don’t make promises you can’t keep and don’t argue. Tell the employee the truth and be sure not to candy coat it to spare their feelings because it may have repercussions. Treat the employee with respect and dignity; do not embarrass the employee and do not badmouth them after they leave. If the employee needs to be escorted out immediately, monitor their exit, but do not get security involved unless absolutely necessary.

**In summary**
To prevent wrongful termination lawsuits, consider the following:

- Do not make promises you can’t keep;
- Establish policies and procedures and make sure all employees are familiar with them;
- Be fair and consistent;
- Tell the truth;
- Use a progressive discipline approach, where possible, except in cases of extreme misconduct;
- Consider other disciplinary actions, other than termination;
- Treat employees with dignity and respect;
- Do not discuss the termination of an employee with others, unless they need to know; and
- Consider evaluating your termination process on a regular basis, comparing the policy and the actions taken, looking for strengths and weaknesses and revising as necessary.

**References:**
Questions and/or suggestions are welcome.
Call the Risk Management Department at 1-866-RX4-RISK