

Managing Risks In Employment Terminations

The Issue Of Pretext In Employment Litigation

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Common Risks

- Employer's legitimate reasons for termination may be disregarded by judge or jury
- Unlawful discrimination lawsuits are frequently decided upon litigation that the employer's articulated reasons were pretext for unlawful discrimination

Risk Management

- Employer actions determine whether employer can overcome pretext claim
 - Before termination process
 - During termination process
 - After termination process

What Mistakes By Employers Lay A Foundation For Claims Of Pretext?

- Articulating implausible reasons for termination
- Articulating inconsistent reasons for termination
- Articulating contradictory reasons for termination
- Inadequately documenting performance history so that the written record fails to support the articulated reasons for termination

Before Termination: What Can Be Done To Avoid The Most Common Pitfalls?

- Train managers to perform meaningful and accurate performance appraisals

Before Termination: What Can Be Done To Avoid The Most Common Pitfalls?

- Managers must be realistic
 - No employee should receive all “excellent” or “very good” ratings
 - Shortcomings should be described with specificity in a narrative portion of the review
 - Reviews should include specific goals for improvement
 - There should be quarterly or mid-year follow up reviews

Improve Your Review Process

- Pre-rank like employees in the same department before completing reviews
- If review doesn't match preview ranking, examine:
 - The ranking
 - The review
 - The approach taken by the person performing the review
- Do it over

Improve Your Review Process

- Document every review and every incident report
- Discuss all reviews and reports with the employee
- Solicit the employee's comments on the review or report form

Improve Your Review Process

- The employee and the person completing the review or incident report should date and sign the document
- Give a copy of the review or incident report to the employee and note that fact on the document

The Termination Conference

- Attended by the company spokesperson and one company witness
- One spokesperson will speak for the employer
 - Solely responsible for articulating the employer's reasons for the termination
 - Selected for credibility as a witness
 - Witness notes what is said by employee subject to termination

The Termination

- Spokesperson uses and follows a prepared script
- Script must be consistent with performance reviews and incident reports
- Use performance reviews to support
- Escort the employee from the building immediately after

Post Termination

- No one other than the spokesperson is authorized to speak for the company
- All questions referred to the spokesperson, or to counsel

Conclusion

- Managing pre-termination, termination and post termination processes reduce risk of loss

Questions



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Thank You

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