

EMPLOYMENT LAW**AVOIDING ILLEGAL TERMINATION OF EMPLOYEES IN NEVADA***by Kenneth K. Ching*

One of the many challenges for employers is that, occasionally, employees must be terminated. Unfortunately, sometimes those former employees claim to have been terminated illegally, giving rise to the risk of legal and financial liability. Fortunately, employers can take steps proactively to minimize the risk of liability for wrongful termination.

There are many legitimate reasons for terminating employees. Financial necessity, poor job performance, insubordination, absenteeism, breaching company policies, theft: sometimes an employer has no choice but to terminate an employee. But regardless of the legitimate reasons for terminating an employee, there is always a risk that a termination will lead to lawsuit. Sometimes employees are angry that they have been terminated and are motivated to retaliate against their former employer. Sometimes aggressive plaintiff's attorneys, using advertising and marketing, encourage former employees to file legal claims against their former employers. Thus, the risk of a former employee claiming that a termination was illegal is simply the cost of doing business.

At-will employees

A starting point for avoiding wrongful termination is to make sure that most of a company's employees are "at-will." An at-will employee can be terminated for any reason (except an illegal reason, like unlawful discrimination). Unless an employee has an explicit employment contract, he is an at-will employee; employers should be careful to state and reiterate that their employees are at-will. This is usually done through documents such as employee manuals or hiring letters. Employers must be careful about unintentionally altering an employee's at-will status. For example, an at-will employee who is later promised that her "future with the company is secure" or who is told that her position is "permanent" might be able to claim that she is no longer an at-will employee because of that promise. However, as long as the at-will status of an employee is maintained, an employer has great discretion whether to retain or terminate the employee. (Of course, if an employee has an employment contract, she can only be terminated in accordance with that contract).

However, even an at-will employee cannot be terminated for an illegal reason. In the Nevada, the primary illegal reasons for termination are: race, color, national origin, religion, sex, pregnancy, age, disability, sexual orientation, gender, and public policy. The following sections will discuss some scenarios that implicate illegal termination and also provide tips for avoiding liability. It is also important to keep in mind that discrimination can apply to employment situations beyond termination such as hiring, raises, promotions, demotions, discipline, transfers, and benefits.

Illegal reasons for terminating an employee

Religion. It may seem obvious that a person cannot be fired because of his religion. However, sometimes a person's religion may affect his job in a way that raises legal issues. For example, one employee had to miss work to attend his wife's conversion ceremony to Judaism. His employer refused to give him the time off to do so, and when the employee missed work anyway, the employer fired him. The employee sued, and the court found that he had been wrongfully terminated because his employer was required to "reasonably accommodate" the employee's religious practices. The employee was awarded monetary damages and attorney's fees. Thus, employers must be very careful about how they respond to an employee's religious practices, and legal counsel should be consulted before an employer considers taking any adverse action against an employee in relation to the employee's religious practices. *Tip: consider disparate impacts. For example, requiring all employees to work on Sunday may affect religious employees differently than non-religious employees.*

National Origin. Another employer fired one of its janitors. The employer said that it was to save money, but the employee claimed it was because she was Mexican. Through litigation, the employee showed that no other janitors received the same treatment that she did, and the court was persuaded that she had been terminated because she was Mexican. *Tip: employment decisions must be consistent. Inconsistent actions can be seen as evidence of discrimination.*

Disability. Employers must provide reasonable accommodations that would allow a disabled employee to enjoy equal work opportunities. Once an employee requests an accommodation for a disability, the employer must enter into an "interactive process" with the employee to determine how to provide an accommodation. The interactive process is an informal dialogue between the employer and the employee where they exchange information and ideas about how the disabled employee can be accommodated. An employer does not necessarily have to provide the accommodation the employee prefers or requests, but the employer does have to provide a reasonable accommodation. There are a few exceptions to having to provide a reasonable accommodation, such as when the accommodation would impose an undue burden on the employer (i.e., too expensive or too disruptive); or when the disability poses a direct threat to others (i.e., an employee who has unpredictable seizures whose job is to operate heavy machinery). *Tip: document everything. Providing a reasonable accommodation through the interactive process is highly fact-specific – make sure to document things like doctor's notes, job duties, reasons for choosing one accommodation over another, and the final result of the interactive process.*

Sex/gender/sexual orientation. A wide variety of conduct can give rise to liability for discrimination based on sex, gender or sexual orientation. Derogatory remarks, teasing, harassment, pinching, grabbing, lecturing about a person's "life style." An employer is not

necessarily liable if such things happen in the workplace; however, an employer is liable if it fails to take reasonable actions to prevent or remedy such problems. *Tip: take prompt corrective action.*

Pregnancy. One restaurant made any waitresses who became pregnant transfer to be cashiers after their fifth month of pregnancy. One of the restaurant's managers said, "They're too fat to be working." The employees sued and won \$300,000 in punitive damages. *Tip: train employees not to engage in illegal discrimination, especially managers and supervisors, whose actions are especially likely to expose the employer to liability.*

Whistleblowing. An employee who reports his employer's illegal activities to the authorities cannot be terminated for that reason. *Tip: be careful about timing. If an employee has recently reported his employer to the authorities, it is very risky to terminate that employee shortly thereafter. Even if the termination is not retaliatory, the timing may make it appear to be retaliatory.*

The topics in this article are not exhaustive of every illegal reason for terminating an employee. Every situation is unique, and employers should be careful and deliberate before terminating employees. Proactive steps can be taken to minimize the risk of liability for illegal terminations.

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FOR MORE INFORMATION CONTACT:



Kenneth K. Ching is Of Counsel in Dickinson Wright's Reno office. He can be reached at 775.343.7502 or kching@dickinsonwright.com.