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Six Steps To Protect Against Claims By Employees

In today's business world, all employers are susceptible to claims brought by their employees and former employees. Lifetime employment and job loyalty no longer exist, and family-owned businesses are not immune from lawsuits by their employees. There is never a guarantee that a company will not be hit with these types of lawsuits. Implementing the following steps, however, will certainly reduce the risk of one.

1. Employee Handbook

All employers, regardless of size, should have an Employee Handbook that is given to all employees upon their start date. The Employee Handbook should contain an at-will employment disclaimer, which is a statement that their employment is for an unspecified duration and can be terminated with or without cause and with or without advance notice. The personnel file of every employee should contain the signed handbook acknowledgement form, which should also contain the at-will disclaimer. The Employee Handbook should also generally describe the policies of the company. For small businesses, lengthy handbooks are not required.

2. Anti-Harassment Policy

Every employer, regardless of size, must have an anti-harassment policy. The U.S. Supreme Court has mandated that all employers have such a policy. The policy must communicate to employees the procedure for complaining about illegal harassment in the workplace i.e., sexual harassment, or other harassment based on race, disability, ethnic origin, etc. The policy must contain at least two company representatives to whom to complain about harassment, so that if one of the representatives is the alleged harasser, the employee can still lodge his/her complaint with someone else. The Employee Handbook should include this important policy, and again, it is important to ensure the signed handbook acknowledgment form shows the employee received the policy.

3. Thorough Investigation of Harassment Complaint

If an employee complains about illegal harassment in the workplace, the law requires employers to immediately conduct a thorough investigation of the complaint. Contacting a qualified employment attorney or Human Resources professional when this arises is important for limiting exposure. Employers should document their investigation to ensure there is proof that it took the complaint seriously and conducted a thorough investigation. If the investigation results in a determination that the alleged harasser engaged in inappropriate conduct in the workplace, the company must take prompt remedial action against the alleged harasser. Depending on the seriousness of the offense, either a written warning letter or termination would be appropriate. Regardless

of the results of the investigation, the company cannot retaliate against the employee who complained.

4. Documenting Performance/Conduct Issues

Employers should document performance and conduct issues of their employees. When the time comes to terminate an employee, it is important to have documents that show the employer has already put the employee on notice of his/her deficiencies and the employee has failed to improve. Juries always determine employment termination cases based on fairness. If there are documents showing an employee has already been put on notice of his or her deficiencies, and the employee failed to improve, there is a much greater chance the employer would be viewed as fair in carrying out the termination. Most importantly, having the documentation in the file will diminish the likelihood of a serious claim. One form of documentation is an employee evaluation. If written employee evaluations are used, they must be an accurate depiction of that person's performance, and not create a "false positive" picture of the employee's performance. In other words, if the employee is performing poorly, the evaluation must show that.

5. Consistency In Disciplining Employees

Employers must be consistent in the way they discipline and terminate employees. If one employee is terminated for certain misconduct or a record of performance deficiencies, any other employee who engages in the same misconduct or who has the same record of performance deficiencies, should also be discharged. If not, the inconsistency may allow the former employee to claim discrimination based on his/her gender, race, disability, or any other protected category that may apply. Employers should have a mechanism to ensure their managers are treating everyone the same.

6. Effective Termination Procedures

Finally, when the time comes to terminate an employee, it is important to do it in the right way. Hopefully, the stage has been set by previous documentation and counseling of the employee, so that when the moment of termination arrives, it does not come as a complete surprise. Employers should be honest and open in their communication with the employee, and should not hesitate to articulate the performance/conduct issues that led to the termination. If an employee is not provided a reason for his/her discharge, and one that makes sense, the employee may believe that the protected categories that may apply to them (age, gender, race, disability, etc.) are the reason(s) for their discharge. It is also important to be professional and respectful to the employee at the point of termination. And above all, document the termination so there is a record of the reason(s) articulated to the employee for the termination.

Conclusion

No company is immune from employment lawsuits. Implementing these procedures, however, will go a long way toward reducing your company's exposure to claims brought by your employees.

Six Steps To Protect Against Claims By Employees was written by Marty LaPointe, chair of the Labor & Employment practice at Burke, Warren, MacKay & Serritella, P.C. Marty was a panelist at the FBC's "Hire the Best, Fire the Rest" event that took place on October 7. Marty is happy to answer any labor & employment questions you may have. He can be reached at (312) 840-7012 or mlapointe@burkelaw.com.

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