

soundwaves

NAVIGATING THE FUTURE
Information and Risk Management Ideas for Not-for-Profit Organizations

Don't Let "You're Fired" Lead to a Lawsuit

Strategies for managing layoffs and other terminations of employment

Donald Trump has made a fortune telling wannabe millionaires "you're fired" on national television, but his former apprentices-in-waiting can't be too happy to be leaving the limelight on a sour note. Good thing they can't sue "the Donald" for wrongful termination.

While the Trump organization may have inoculated itself through the use of detailed casting contracts, the rest of us can't ask potential employees to sign away all their rights in exchange for a chance at a job. As a result, our organizations are more vulnerable to risk when things don't work out. So what happens when it's your job to deliver bad news to your employees? Is there a way to lay off workers that minimizes the shock and mitigates the risk that an unhappy ex-employee will turn around and sue your organization?

Yes, say the experts. "There's a common thread to all layoff situations," says Jeff Chasen, chief operating officer at The AGOS Group. "Whether the event is a large-scale reduction in force or an individualized dispute, the outcome of that matter will have been determined long ago."

Paul Siegel, a partner with the Long Island, NY, office of Jackson-Lewis, concurs. He advises companies not only to publish policies prohibiting discrimination and harassment, but also to establish a dispute resolution procedure and disseminate a code of conduct for their workplaces spelling out what's expected of every employee. "Organizations should reiterate these policies and procedures through the Intranet, home mailings and other communications vehicles so no one can say they didn't know what was expected of them," he told Soundwaves.

Equally important, says Siegel, "you have to put in place smart hiring processes, so that you hire people who have a decent chance of success. And when they do start work, every organization should have some sort of screening process in place for the first 90-day orientation period so that you can let go those people who are not succeeding."

Managing Layoffs

While Siegel stresses that a layoff is really just a euphemism for firing people,

both he and Chasen acknowledge that there is a difference in how the action is perceived. "When you're implementing a reduction in force, there's usually a business case for it, and people understand that," says Chasen. "It's often perceived as being a more objective action than firing someone for poor performance. This is a situation where you can defend your decision if done properly."

Jeff Chasen recommends running any layoff plan past an employment attorney before implementing it. Siegel concurs, and notes the need to make sure that your reduction in force doesn't have an adverse impact on a protected class of employee (i.e., age, sex, or race). He also stresses the need to comply with the Older Workers Benefit Protection Act, which sets down specific requirements for laying off workers over 40. In addition, Siegel advises that people not be promised severance pay unless they sign a release waiving potential claims.

Another key to mitigating risk, says Chasen, is adhering to the golden rule: treat others as you want to be treated. "It's useful to consider the psychological consequences of your termination decisions," he says. He cites a case of a couple, engaged to be married, who were fired on the same day from different departments in the same company. "I'm not saying that people should get to keep their jobs when they don't otherwise deserve to, but I am saying that sometimes looking at the big picture and applying the golden rule will help more than it will hurt."

"There is a lot of evidence that employees who know the reason for their termination are far less likely to file lawsuits because they don't feel they're in the dark," adds Chasen. "They may not agree with the reason for their termination, but if they have an understanding of the process then they are less likely to sue you."

Workers on Leave

What happens if you need to fire someone who is out on workers' compensation or disability? "As long as you're treating the person consistently with others, making well-documented decisions, and not using his unavailability as an

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A Checklist for Mitigating Risk

While there is no way to eliminate the risk of a former employee alleging wrongful termination, there are some steps you can take to mitigate your risk before you show people the door. Paul Siegel, a partner with the Long Island, NY, office of Jackson-Lewis, told Soundwaves that he favors a three-step analysis.

Risk Identification

"Every organization should undertake a vulnerability audit," says Siegel. He recommends that organizations ask some key questions. These include:

- Am I managing my workplace consistent with my policies and practices?
- Am I handling my layoffs in an appropriate manner?
- Are my layoff decisions backed up with credible documentation?
- Is there good timing to my decisions (in relationship to when the employee did something wrong)?
- Is there consistent treatment of individuals?

Risk Management

Once an organization has put smart employment practices in place, the next step is to manage risk. Siegel suggests that organizations might want to consider implementing alternative dispute resolution procedures, including mediation, mandatory arbitration, problem-solving procedures, an on-call ombudsman, and a toll-free phone number for reporting harassment or discrimination.

Risk Transfer

Finally, Siegel recommends that organizations consider obtaining an employment liability policy. "You should either have EPL insurance or have considered it and made a good business decision as to why not," he concludes. ♦

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excuse to get rid of him, you're on solid legal ground," says Paul Siegel.

"You had better make sure you've documented prior problems," stresses Chasen. After all, such workers often look a lot better to juries than the companies that terminated them when they were out on leave. In addition, because employees on workers' compensation and disability have special legal protections, Chasen generally advises that organizations bring them back to work. "Often the cost of the workers' compensation injury will be minor compared to the ultimate lawsuit that is filed for wrongful termination," he says.

Handling Whistleblowers

Federal law protects whistleblowers, but not bad employees. So perhaps you have someone working for you who is a whistleblower but also shows up late for work, performs poorly and has a track record of absenteeism. "You need a legitimate business reason to terminate an employee that is wholly unrelated to the supposed whistleblowing activity," says Siegel.

Still, whistleblower-related employment cases can be fraught with potential risk. Jeff Chasen notes that "the single biggest problem I've observed in the area of

whistleblowing is when the whistleblower hits a brick wall. When the underlying complaint is not taken seriously, the employee gets frustrated and escalates his or her behavior."

Take, for example, the case of an employee who was terminated for chronic absenteeism. It turns out that shortly before he was fired he had expressed concern about a piece of machinery that wasn't working properly. Soon after making that complaint, he argued with his manager about the equipment's repair. Frustrated when his concerns didn't go anywhere, the employee reported the deficiency to local regulatory authorities. As a result, the employee sued for wrongful termination.

There was no question that the employee had been routinely late or failed to come to work, but the company had neither documented the problem nor issued warnings about the consequences of an erratic attendance record. The company further ran into trouble when it discovered that the employee had medical problems. Heart problems had contributed to his absenteeism, but he hadn't wanted to tell anyone because his work involved physical labor and he was afraid of losing his job. Factoring in the potential exposure resulting

from having terminated a whistleblower, the dearth of documentation, and a sympathetic plaintiff with 15 years on the job and a bad heart, the company settled the case for \$110,000.

In this case, the company both didn't do its homework and faced some unintended consequences of its termination decision—and paid the price. Yet while this case offers a cautionary tale of what can go wrong, it's also a good reminder that if you do the right things up front, your risk of a lawsuit will be minimized.

"There's no way to prevent a lawsuit if someone is determined to file one," concludes Chasen. "But it's also not a risk-free approach to allow ineffective employees to remain in your workplace. They will make everyone else's job more difficult and, in theory, could even put you out of business."

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