The Eight Steps to an Effective Employee Termination Policy

by Lowell Pearson, JD

This is the first of two articles that describes essential and effective employee termination policies.

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As a Missouri physician, you operate in one of the most unfavorable employment law jurisdictions in the United States. Employment law is a mix of federal and state law, but most states follow federal law on issues of discrimination, harassment and retaliation. Three decisions this decade by the Missouri Supreme Court have changed Missouri into a plaintiffs' haven. Missouri departs from federal law in two critical ways.

First, in Missouri there are no specific caps on damages for discrimination, harassment and retaliation claims. Under federal law, caps exist, depending on the size of the employer, and range from $50,000 to $300,000 (with separate caps for compensatory and punitive damages). Missouri juries are not bound by those caps.

Second, a Missouri jury can find an employer liable for discrimination, harassment or retaliation if those acts are a "contributing factor" to the decision to fire the employee. Under federal law, those acts must be the "determining factor." The difference between a "contributing" factor and "determining" factor standard may seem more like lawyers bickering over words than a matter of significant public policy. But in lawsuits, it makes a big difference. In most discrimination lawsuits, there is at least some bit of evidence of discrimination. Often, this is nothing more than a stray remark (for example, "we need some new blood around here" in an age discrimination case). Under the "determining factor" standard, an employer can often obtain summary judgment (a victory before trial) in such cases. But under Missouri's "contributing factor" standard, the plaintiff can obtain a jury trial by showing that discrimination as evidenced by the stray remark was just one of many factors. Thus, in most states, the employer is spared the expense of trial and the risk of a jury verdict not limited by caps. In Missouri, the employer is faced with that expense and risk, or will have to settle the case. This is not true in every case, but is true in the many cases where there is conflicting evidence of the employer's intent, but the weight of the evidence supports the employer.

The risk to Missouri employers is real, because Missouri juries have started to award large verdicts. Two examples:

- A Jackson County jury awarded $50,000 in compensatory damages and $6.7 million in punitive

damages to a woman for sexual harassment where her supervisor commented on her body or sexual matters five times and slapped her on the buttocks once. On appeal, the punitive damages award was reduced to $3.75 million.

- A St. Louis County jury awarded $4 million in compensatory and punitive damages to a man who claimed he was fired in retaliation and in violation of public policy. It was upheld on appeal.

These verdicts are even more troublesome because punitive damages are not insurable at all, and other damages, such as back pay and emotional distress, are not covered by normal commercial liability and malpractice policies. Unless you have a special policy (an "employment practices liability" policy or rider), you are without coverage for lawsuits by current or former employees, and damage awards, settlements and attorneys' fees will be your liability. Regardless of your coverage, any punitive damages will not be insured.

What, then, should an employer do? This is the first of two articles that will address this question. This article describes the essential elements of an effective employee termination policy. The next article will address how to establish a sexual harassment prevention system to reduce exposure from such lawsuits.

1 Avoid Terminations by Hiring the Right People

Employers often fail to hire the right person for the job. Hiring someone into your organization who is not a good "fit," no matter how good they look on paper, will only lead to problems in the workplace. Paper qualifications are important, but should not be the only consideration. Employers should carefully interview and screen applicants to determine if their personality and outlook fit into the company's culture. Internet searches, social networking sites, background checks and thorough reference checking may reveal an applicant's character. Allowing current employees to meet and assess applicants, particularly if they will be working closely with that position, may reveal problems.

2 Document the Employment Relationship From the Very Start

Problems can also arise early in the employment relationship when the employer fails to document that orientation procedures have been followed. Policies should be explained at orientation, and new employees should sign a statement that they have read and understand all policies.

Additionally, if the employer's policy is to perform a background check or conduct drug testing at the time of hire, completion of those tasks should be clearly documented. Any such policies must be applied consistently. Discrimination claims are based on the idea that an employee was treated differently from others. Therefore, all hiring procedures should be followed consistently. Differentiating between employees at the time of hire sets the stage for a future discrimination claim.

3 Conduct Honest and Accurate Evaluations and Counseling, and Document Them

Most employers try to maintain a positive working environment and may hesitate to provide negative feedback on job performance. Managers may be uncomfortable discussing performance or disciplinary issues.

Looking the other way is counterproductive. Too often, employers fail to document minor performance or disciplinary issues, but then claim after terminating or disciplining an employee that the problems have been going on for some time. The worker can use the lack of documentation to argue that the adverse action was discrimination-based. Without documentation, the employer has a weak rebuttal.

Employers should be honest in performance evaluations. Supervisors should be trained to counsel employees constructively, so that they feel more comfortable discussing these issues at the time of evaluation. All disciplinary actions should be clearly documented in the employee's personnel file. Include the date, a description of the problem, all discussions with the employee, and the intended course of action, which should be clearly communicated to the worker.

4 Consider an Internal Grievance Procedure

Minor problems with employees can become major problems when they are not dealt with properly. One thing employers can do is develop a grievance policy that is comprehensive, clear, and known to all employees. It is not enough to put a grievance procedure in place; it must be fair, and it must be applied uniformly. There should be multiple channels for a worker to express a grievance; if his or her problem is with an immediate supervisor, the grievance procedure provides

little help if the worker is forced to go to that individual. A grievance policy may not be appropriate for every employer. Normally, smaller employers (under 15 employees) find it too cumbersome.

5 Investigate Before Terminating

Employers must thoroughly investigate all matters which are likely to result in job separation. Talk to all participants in the problem, but do not take sides. Document the personnel files of all involved. Before terminating an employee, ask yourself if firing is the appropriate response--could this problem be resolved in another way?

6 The $200,000 Decision

Some Missouri employers, faced with the legal challenges described above, have reacted by refusing to fire any employee. In my view, that is a counter-productive (though perhaps understandable) overreaction to the legal environment. Some situations – theft, poor treatment of patients, open insubordination – demand firing the employee. Other chronic problems – poor attitude, attendance issues, or consistently poor performance – have such a negative impact on the morale and productivity of the workplace that termination is warranted. In this regard, it is important to note that the large majority of employees who are fired never file an action of any type.

My normal advice to employers is to treat the decision to terminate an employee as they would any other $200,000 decision. Do the same kind of research, analysis, and consultation with counsel that you employ when making an investment, purchasing equipment or entering into any other transaction valued at $200,000. Treating the decision this way promotes a decision based on information and analysis, not on fear.

7 When You Do Decide to Terminate, Document the Reasons

Every employer should assume that every decision to terminate will be challenged in court or at an administrative agency (though, as noted above, most are not). Thus, the reasons should be documented at the time the decision is made. Draft a memo to file or a report that describes the reasons for the decision and references and has attached the key documents, such as performance reviews, witness statements, disciplinary warnings, and others. This document is not to be given to the employee. Its purpose is to create a credible, complete, and contemporaneous record of the reasons for termination that can be used in litigation. It may be advisable to have this critical document prepared by or under the supervision of counsel.

8 Conduct an Exit Interview

We advise that health care providers conduct exit interviews when employees leave, whether the departure is voluntary or involuntary. For smaller employers, we advise that all departing employees be interviewed. This may prove impractical for larger employers, but interviews should be conducted of high-level employees and lower level employees with access to legally-significant information such as billing to third-party payors.

The basic purpose of the interview is to provide an opportunity for the employer to learn if the department employee has observed activities that he or she believes violate the law. If the employee denies knowing of such problems, the employer has valuable evidence in any lawsuit based on a theory that the employee was unlawfully discharged for whistle blowing. Equally, such evidence is potentially helpful if the employee claims improper practices in billing third-party payors or in patient care. To obtain the full benefit, the person conducting the interview must be well-trained, and the documentation must be complete. Some employers have a form that every employee who departs is asked to sign, attesting that they know of no discrimination, improper billing practices, or other unlawful activity. On the other hand, some employers resist such a form, on the theory that it might plant seeds in the mind of the departing employee. This is one of many situations where employers are called upon to make judgment calls about what will work best for them. Whether a physician chooses to use an exit interview system or a form document, either should be developed in consultation with counsel who has experience with such systems.

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