



This May Not Be the End, My Friend: Employee Termination Pitfalls

Are you contemplating terminating an employee due to poor performance or for economic reasons? Carelessly terminating your employee may cost your business time and money long after the employee is gone. However, if you handle the termination well before, during and after the separation, you may decrease the likelihood your terminated employee will file a wrongful discharge claim against you.

Consider the following:

Professionalism. Compliance with the law when terminating an employee is a significant factor. How you convey the termination is another matter. Handling the employment relationship from beginning to end with professionalism reduces the risk of a claim.

Tell The Truth. Terminations can be tense and emotional. Employers may tell a white lie to soften the blow. The white lie could backfire if the employee makes a claim and it comes out that there were other reasons for the termination. The employee will try to use the discrepancy to undermine the employer's credibility and to support an unlawful termination argument. Telling the employee the truth in a professional manner is the better option.

Accurate Employee Evaluations. Accurate records are always a good business idea. This is never truer than with employee performance reviews if you use them. Many employers soft-pedal their evaluations, e.g., giving underperforming employees "adequate" ratings. This can backfire. An employee, terminated for poor performance, will point to the "adequate" performance reviews when making an unlawful termination claim. You may need to restore your credibility that you acted reasonably. Judges and juries take notice of employers who demonstrate professionalism, honesty and fairness.

Progressive Disciplinary Procedures. Employers should follow any mandatory, progressive disciplinary procedure put in place. A regular review of any such system is a good idea. A system put in place in the past may not fit today. An employer also should review its policies and procedures to make sure it has not bound itself to an unwanted progressive disciplinary system.

Severance Packages. A severance package can be a way to end the relationship while eliminating many, but not all, claims the employee could raise. A poorly worded or thought out release can have unintended consequences, however. Specific requirements exist for the agreement to release certain types of claims. The failure to follow the requirements can leave those claims open. A poorly worded release also could expose you to

an unlawful retaliation claim. For these and other reasons, it is wise to review a release each time before it is offered to an employee.

Final Pay. Colorado generally requires an employer firing an employee to tender to the employee the compensation due to the employee at the time of termination. There are limited exceptions and there are restrictions related to withholdings from the final paycheck.

Other State Laws. An employer that has employees in more than one state has to keep abreast of the laws in each state. Compliance with federal law may not be enough. Federal law usually sets a minimum standard of employee rights. States often expand on those rights.

This article contains but a brief review of the pitfalls you may face when terminating an employee. There are likely more obligations by both employer and employee than described here. Be sure to consult with your employment attorney to assist you with your employment issues.

About the author: Matthew D. Macy is an Associate in the firm. He received his J.D. from Emory University School of Law and brings special civil litigation expertise to us in the areas of Employment Issues, Trade Secrets, Officer and Director Liability, as well as Unfair Competition.

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stewart
shortridge
& fitzke, p.c.
Attorneys at Law

4 INVERNESS COURT EAST
SUITE 100
ENGLEWOOD, CO 80112

“Till Death - or Other Unplanned Events - Do Us Part” And the Need for Marital Agreements

Marital agreements, whether prenuptial or postnuptial, are governed in Colorado by the Colorado Marital Agreement Act (CRS 14-2-301 et.seq.). Under the Act, parties may enter into a contract concerning:

- Their rights and responsibilities,
- Their property - whenever and wherever acquired,
- The disposition of the property in the event of divorce,
- The determination or elimination of spousal maintenance,
- The making of a will or trust,
- The ownership and disposition of life insurance,
- The rights and obligations in retirement plans (except when prohibited by federal law), and
- Any other matter not in violation of public policy or criminal laws.

While wielding broad power, a marital agreement is relatively simple to create. In Colorado, the agreement should be in writing and the party against whom it is to be enforced must be provided a fair and reasonable disclosure of the property and financial obligations of the other party. Though not specifically required by law, it is advisable for the parties to be represented (or have the opportunity to be represented) by separate counsel to help ensure the agreement is not unconscionable and that both parties understand what each is doing.

“So, why don’t more people have a marital agreement?” There can be a number of answers, but it typically comes down to the fact that contracts are not very romantic. They smack of a business arrangement. Nevertheless, in the event of divorce or death, a marital agreement creates certainty as to what belongs to each party. As an extended benefit, well crafted agreements can serve to foster and strengthen relationships between spouses and in-laws or step-families who, in the absence of the agreement, might be concerned about protecting inheritances.

The courts continually chip away at the asset protections offered by trusts. Under estate laws, an asset directed to a party, other than the spouse, in trust might be redirected by the court to the surviving spouse in an amount up to fifty percent of its value. But, if the spouse is excluded from receiving that same asset under a marital agreement, then the full distribution of the trust to the intended recipient can be certain.

If you have particular assets that require special care, we recommend that you evaluate the benefit of a marital agreement with your estate planning attorney. It could provide significant protection to you and your family.

About the author: Bob Stewart specializes in estate planning, trusts and probate as well as business law and taxation and is a frequent guest lecturer among industry, professional and civic groups.