FOX, WANG & MORGAN P.C.

160 West Santa Clara St., Suite 700
San Jose, CA 95113
Tel: (408) 844-2350
Fax: (408) 844-2351
www.foxwangmorgan.com

John C. Fox, Esq.*
Jay J. Wang, Esq.**
Alexa L. Morgan, Esq.***

HANDLING THE PROBLEM EMPLOYEE - POINTS AND PITFALLS

* **John C. Fox, Esq.** is the President and a founder of Fox, Wang & Morgan P.C., headquartered in San Jose, California in the heart of the Silicon Valley. Mr. Fox is an across-the-board employment lawyer representing employers nationwide. He leads large and complex litigation matters in state and federal courts, in cases involving trade secrets, wage-hour and discrimination class actions, wrongful termination, corporate investigations, and the use of statistics in employment matters. He also provides strategic advice for a wide range of companies nationwide relating to their employment policies and practices and helps build employment systems in a way designed to minimize legal risk. Mr. Fox was previously Executive Assistant to the Director of OFCCP, where he was in charge of all policy and enforcement matters. Mr. Fox has a broad-based view of the many legal issues involved in discrimination law and Affirmative Action compliance.

****Jay J. Wang, Esq.** is a founder of Fox, Wang & Morgan P.C. Mr. Wang is a 1999 graduate of the Georgetown University Law Center. Mr. Wang's practice focuses on employment counseling and litigation, including civil claims involving wrongful termination, harassment, wage-hour issues, and trade secret misappropriation. Mr. Wang is a frequent lecturer on employment law matters with the Santa Clara County Bar Association, and provides seminar training for clients. Mr. Wang served on the Santa Clara County Bar Association's Board of Trustees from 2005 through 2011. Mr. Wang has served as Chairman of the Santa Clara County Bar Association's Labor & Employment Executive Committee, as well as Chairman of the Santa Clara County Bar Association's Professionalism Committee.

*****Alexa L. Morgan, Esq**. is a founder and Partner of Fox, Wang & Morgan P.C Her practice focuses on virtually all areas of employment law before both state and federal courts, as well as administrative agencies. She regularly handles employment litigation matters involving complex class action issues, workplace discrimination, sexual harassment, wrongful termination, and wage claims. Ms. Morgan also regularly counsels employers on various preventative measures in order to decrease their exposure to employment litigation. She is also active in the pro bono community, having successfully represented clients in employment, guardianship, unlawful detainer, and education-related matters. Prior to founding Fox, Wang & Morgan, Ms. Morgan was an Associate at Manatt, Phelps & Phillips, LLP and at Gibson, Dunn & Crutcher LLP.

TABLE OF CONTENTS

Terminating employees has increasingly become risky business. Before one can effectively reduce these risks to an acceptable level, employers may wish to take the following P.E.S.T. actions.

P = PLAN and implement institutional policies and procedures to reduce the risk of litigation costs and litigation loss.

E = EDUCATE management concerning the basic legal theories from which the risks flow.

S = STRATEGIZE each termination, before the fact, to anticipate litigation, to document the record and to further build a record projecting fairness.

T = TERMINATE with sensitivity.

Introduction

PLAN: Part I, below, includes a listing of institutional policies to consider putting in place to help reduce termination risks.

EDUCATE: Part II includes a listing of major causes of action now popular among complainant employees. Depending upon local conditions and need, training seminars educating management concerning these causes of action may be warranted.

STRATEGIZE: Part III includes strategy options management may wish to consider in the context of a specific termination the institution contemplates.

TERMINATION: Part IV includes materials identifying the benefits of terminating employees in a sensitive manner.

Background Considerations

(1) Identify the Corporate Objectives.

Before any termination occurs, an employer should identify its corporate interests and priorities. For example, is the corporate objective to avoid loss at trial only, or is avoidance of a charge filing or litigation avoidance the corporate objective? Is financial cost avoidance an objective? And, if so, what is the financial limit?

(2) Identify the Corporate Culture.

What is the company's "corporate culture" as to terminations? Is the company squeamish, for example, about terminating employees, either because of concerns for employee morale, adverse publicity in news media or trade journals, litigation, or for other reasons? It may be that the company would prefer to take a Lord Chamberlain approach to the termination rather

than a more aggressive General George S. Patton approach. Once the corporate culture is identified, it is thereafter much easier to fashion termination strategies and procedures to harmonize with the corporate culture.

(3) Identify the Corporate Separation Priority.

The next foundation strategy decision which must be made is the corporate separation priority. Typically, most major corporations in the United States prefer to adopt the following priority:

a. Loss of employee(s) through attrition;

b. Voluntary termination of employee;

c. Voluntary early retirement of employee; and

d. Forced termination.

If this is indeed the corporate priority, you will need to develop corresponding procedures. If a different or additional corporate priority is identified, separation procedures necessary to implement those priorities must then be additionally developed.

(4) Identify the Employee's Interests.

Each termination presents a company with different possibilities to effect a separation or "leverage" a settlement, where necessary. The most satisfactory terminations are "win/win" resolutions. These occur when the company obtains its objectives of separating the employee in accord with its interests and expectations and the employee is satisfied his or her interests and expectations have been satisfied. Knowing the interest(s) and expectations of the employee to be separated is thus often critical to a successful separation.

Should feelings harden and hostilities ensue, however, the company may find it necessary to identify and catalog the employee's interests and "soft spots" to effectively persuade the employee to leave in a manner acceptable to the company. Because a problem employee may have changed employers many times, for example, the company may identify a particular need in a departing employee to obtain a good reference. The company must also know the employee's sensitivities lest it inadvertently bruise an employee's fragile sensitivity and inflame matters, rather than lessening hostilities and assisting a less tumultuous employee exit.

(5) Creative Thought and Flexibility Counts. There is no "cookbook" approach to the separation of a difficult employee. Rather, creativity and flexibility help as the termination strategy must be adapted to the special sensitivities of the employee and the circumstances of the company. Every such termination is a "custom job." Every termination comes laden with certain corporate problems, whether internal (perhaps political) to the company, perhaps involving publicity concerns external to the company, perhaps relative to other similar pending or threatened lawsuits or other external events such as purchase or sale of

the business, stock issuances, new product pronouncements, etc. Moreover, timing the separation is often critical to successfully handling a difficult employee.

I. INSTITUTIONAL POLICIES, PROCEDURES AND PREVENTATIVE MEASURES TO REDUCE TERMINATION RISKS.

Handling a difficult termination begins long before an individual "problem" employee has been identified. To effectively terminate employees and to maintain the efficiency and morale of an enterprise, the organization should eliminate obvious barriers to termination and explore policies, procedures and institutional practices which can facilitate, or at least not complicate, the termination process.

What follows is a menu of possibilities to consider. Not all of these considerations will be applicable or appropriate for particular organizations, but each deserves consideration.

A. Review Personnel Manuals, Handbooks and Practices

1. While some of the following are "optional" recommendations, this preventative step is MANDATORY!

2. Courts will look to personnel manuals, handbooks, evaluations, policies and recruiting materials when determining the content of the employee's contract of employment. The courts most frequently do so when trying to determine whether a discharged employee had a contract to be terminated only for cause, or whether the employer denied any other contractual rights the employee claims.

3. In one case, for example, the Supreme Court of New Jersey had no difficulty finding that a personnel policy manual created a valid, binding and enforceable contract of employment.

It noted that its opinion could "make employers reluctant to prepare and distribute company policy manuals," but hoped that it would not, since:

> "All that this opinion requires of an employer is that it be fair. It would be unfair to allow an employer to distribute a policy manual that makes the workforce believe that certain promises have been made and then to allow the employer to renege on those promises. What is sought here is basic honesty: if the employer, for whatever reason, does not want the manual to be capable to being construed by the court as a binding contract, there are simple ways to attain that goal. All that need be done is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual; that regardless of what the manual says or provides, the employer promises nothing and remains free to change wages and all other working conditions without having to consult anyone and without

anyone's agreement; and that the employer continues to have the absolute power to fire anyone with or without good cause" (*Wooly v. Hoffman-LaRoche, Inc.* (3 Cir. 1985) 491 F.2d 1257).

4. Tips on What to Look for and How to Perform Such a Review:

a. Role-playing: Pretend you are the employee. You have just been fired. You are mad and have no immediate prospects of employment. Your teenage daughter has just been accepted at Stanford. Your attorney tells you to go over all the personnel policies and documents you can to find any promises which the company has broken, or any representations they made. Remember, you are desperate! Now, start reading the policies.

b. Particular attention should be paid to the words "shall" and "will" when referring to the company's conduct. You should underline the word "FAIR" whenever you find it. Is there any mention of termination for no cause? Is there a discipline procedure? Was it followed to the letter? Does it say specifically that you can be laid off simply because the company's business drops by 80%? Why you? Do you have seniority rights? Do longer-term employees have any seniority rights? If not, and if they were retained, why were you let go? etc., etc.

c. Recruiting materials and newspaper ads should be looked at--do they talk of "career" or "permanent" positions--"advancement," "growth opportunities," "life-long benefits"?

d. Take a look at your performance evaluations. Are they all "superior"? "Good"? (You may know full well that "Good" in your company means you are the worst performer ever, and that "Superior" ratings are reserved for only acceptable performance, a system and storyline the jury will have difficulty believing.)

e. When you have completed this exercise, you will have spotted most of the company's vulnerable areas.

5. Don't Forget Old Personnel Manuals,

Practices and Handbooks.

a. Many employers have out-dated practices, policies manuals, directives and other employment-related documents in their files. Many policies have not been used for years, but have never been canceled or superseded. These must be located and specifically superseded, amended, canceled or continued. Employees who may have arguably relied upon them should be given, and sign for, the replacement policies which explicitly revoke and supersede any previous policies.

b. Arguments may surface concerning the employer's right to modify, amend or cancel prior policies. These claims can be addressed. Failure to clean house, however, may result in a multitude of overlapping and conflicting policies which arguably apply to employees. This result is clearly unacceptable.

c. The first document request plaintiff's counsel will file is one which will require you to search your personnel records for all documents outlining personnel policies and practices, wage and salary practices, and termination procedures, etc. Prudence suggests that all employers should conduct the search first and take appropriate action to defuse what could be powerful time-bombs in the files.

6. "At-Will" Employment Disclaimers--

New Employees.

a. Some courts, as noted above, have held that employment "at-will" statements on employment applications, stock option agreements, confidentiality or trade secret agreements, and the like, foreclose an employee from arguing that there was a contract for termination only for "cause," which can be implied (*Shapiro v. Wells Fargo Bank*; *Gianculas v. TWA*; *Baker v. Kaiser Aluminum and Chemical; Accord, Camp v. Jeffer, Mangels, Butler & Marmaro,* 35 Cal.App.4th 620, as modified, 36 Cal.App.4th 454h (1995); *Haggard v. Kimberly Quality Care*, 39 Cal.App.4th 508 (1995)).

b. While we caution against too heavy reliance upon "quick fix" solutions, we urge all clients to consider use of documents, to be signed by all new employees, acknowledging the "at-will" nature of their employment.

c. We provide below five different standardized clauses employers often find useful to include in various employment documents.

These clauses include four describing the employment relationship (including three at-will clauses and one "for good cause only" clause), and a so-called "integration clause". The at-will clauses run the gamut from a no-holds barred "at-will" statement most protective of managements' rights to a clause limiting managements' rights to terminate "for good cause only".

These clauses are examples only and employers may want to customize the language to their specific needs.

(i) Employment Application:

> "I understand that if I am employed, my employment will be for no specified term and will be terminable at the will of either party upon notice [in California, for example, pursuant to California Labor Code section 2922]. No contrary representations of any kind have been made concerning the length of employment or grounds for termination."

(ii) Blunt "At-Will" Clause:

> "Employee agrees that employer has, and expressly reserves, the right to discharge the employee at any time for any

reason whatsoever, with or without cause. Nothing in this employment contract or employer's policies, practices or procedures shall confer upon the employee any right to continued employment."

(iii) Diplomatically Couched "At-Will" Clause:

"Employee may be terminated at the sole discretion of management, and may resign his/her employment, at any time. Termination will generally fall into the following categories: (However, this list is not exhaustive. Management reserves the right to change this list at any time.)

"(a) resignation or retirement of employee;

"(b) termination due to lack of work, where, in the discretion of management the services of the employee are no longer required;

"(c) termination due to performance which is deemed not up to the high standards expected by the company;

"(d) termination for violation of company rules, policies or procedures;

"(e) No Fault Terminations: employee may be released on a 'no fault' basis at any time, in the sole discretion of management. Where management designates the termination to be 'no fault,' and the employee has more than two years service with the company, the company shall provide the employee with two weeks notice of termination, or at the option of either party, two weeks pay in lieu of notice. Upon mutual agreement of the employee and the company, such termination may be characterized as a 'voluntary resignation.'

"Where appropriate and requested by the employee, the company will provide assistance to the employee in securing other employment. Such assistance may include the provision of office, telephone and secretarial assistance, and an appropriate letter of recommendation.

"Employees who are terminated for any reason may seek and obtain a review of the termination decision by submitting a written request for review within ten days of termination to the Vice President, Human Resources. Such request must include any and all reasons why the employee believes the decision was unlawful or otherwise should be reversed."

(iv) Termination for "Good Cause Only" Clause:

"Once employee has attained one year or more service with the company, he/she will be terminated only for a fair and honest business reason. 'Fair and honest business reason' shall include, but is not limited to the following:

"(a) lack of work for which the employee is qualified;

"(b) failure to meet the employer's standards of competence and job performance;

"(c) violation of company rules and policies;

"(d) any other fair and honest business reason."

(v) Integration Clause:

Written employment agreements containing express "at-will" language may be modified by subsequent conduct, practice or oral representations in many jurisdictions. Use of an "integration" clause in conjunction with an "at-will" disclaimer clause will strengthen adherence to a written employment agreement. An "integration clause" example follows.

"Employer and employee agree that the foregoing represents and expresses their complete agreement regarding the terms and conditions of employment, and further agree that this written contract may not be modified or changed except in a writing signed by the employee and a competent official of the company."

7. "At-Will" Employment--Current Employees:

You may anticipate that there will be some resistance, from several fronts, to attempts to secure a signed acknowledgment of "at-will" employment from current employees.

a. It probably will not boost morale;

b. It could be viewed as an admission that employees have some right to continued employment which they are being asked or required to waive;

c. If such rights do exist, attorneys for employees will argue that it is invalid because no consideration was given for this release of a substantial right.

There are no easy answers, nor many court cases for guidance on this issue. Nonetheless, we identify the following options to consider. Each comes with varying degrees of legal risk depending upon the jurisdiction involved.

OPTION 1. In "mutual employment contract" jurisdictions, coordinate any program to secure employee signatures to an at-will statement with implementation of some additional benefit (e.g., severance pay plan, as discussed infra); or

OPTION 2. In "mutual employment contract" jurisdictions, time the program to coincide with individual salary reviews or with the grant of an increase made conditional upon signing the "at-will" acknowledgment.

OPTION 3. In "unilateral employment contract/reasonable notice" jurisdictions like California, implement the changes with “reasonable notice.” No additional “consideration” is needed.

OPTION 4. Where it is not clear whether the jurisdiction is a "unilateral" or "mutual employment contract" jurisdiction, consider providing at least reasonable written notice to employees of the change in employment terms and conditions.

B. Consider Express, Written Employment Contracts.

1. Courts will certainly find that a contract of employment exists between employer and employees: the only question is what are the terms of that agreement. The employer can accept this fact and draw a contract, identified as such, containing terms it is satisfied it can live with, or it can continue to run the risk that a court or jury will imply the terms of that agreement.

2. Our view is that there should indeed be a clearly identified "contract" of employment, drafted by the employer--not the court or jury.

a. Where there is a specific agreement between the parties, contrary terms cannot be "implied." The failure to specifically identify an express contract of employment leaves an employer at the mercy of the jury which can "imply" a contract from the most casual comments of supervisors.

b. The contract should be drafted to protect the interests of the employer. Without overreaching, it should clearly set forth the obligations of the employee as well as the obligations of the employer. Receipt should be acknowledged by each employee disavowing all previous oral representations and acknowledging that any modification or separate agreements must be in writing and signed by an officer of the company.

c. The contract can take several possible forms:

(1) Individually negotiated formal contracts of employment, with or without a specified term. Appropriate for executive-level management employees and recommended as noted above.

(2) Simple form letter agreements, without specified term, for "as long as mutually agreeable," at "will of either party, upon notice," or similar "terminable at- will" language.

(3) Employee handbooks, as noted above, will often be found by the courts to presumptively set forth the terms of the employee's contract of employment. Even if the

employer determines that it wants no stated contract of employment, and even if proper disclaimers are contained in them, all handbooks should be drafted as if they were contracts.

(4) Supervisor manuals. A true supervisor's manual is designed to provide guidance to supervisors to assist them to apply personnel policies to specific situations, as well as provide direction regarding compliance with employment laws and regulations. A true supervisor's manual should not be a "contract" of employment, and every effort should be made to ensure that it does not become a contract. These efforts should include:

- A disclaimer:

"The manual does not create a contract of employment. It is intended solely to provide guidance for supervisors with personnel responsibilities and for their use to comply with the laws and regulations governing employment and the Company's current employment policies. The manual is subject to change at any time by the Company, without notice. Access to this manual is strictly limited to supervisors who need access to fulfill their responsibilities."

- The name of the manual should probably not contain the words "policy" or "policies." These words alone, given the current status of the law, often imply contractual obligations of the employer.

- As noted in the "disclaimer" above, access to the supervisor's manual should be carefully restricted to those who need to use it in the performance of their duties. This limits the ability of employees to claim they relied upon the policies as part of their contract. But note: some courts have held that actual reliance on statements in manuals and policies is not necessary to create a binding contract.

- This does not mean a company should believe its policies should be ignored. Failure to follow policies (even clearly non-contractual policies) can be used as evidence of "bad faith" in a particular instance. ("They did not even follow their own policies in terminating my client!") Policies should, therefore, leave the employer wide latitude, particularly where there is reason to believe line managers will not follow them.

C. Employee Handbooks as Contracts.

1. The advantages of having a contract of employment for all employees have been outlined above. With the exception, perhaps, of executives, the employee handbook provides an excellent vehicle to set down, in writing, what the terms of that contract shall be.

2. In drafting such a contract, some high-level executive decisions will be necessary with respect to the extent to which the company is prepared to assume the risk of some court litigation over terminations, rather than sacrifice employee morale, recruiting difficulties, or, as will be discussed, the potential costs of arbitration of discharges for some or all employees.

3. Essential Elements of Handbook/Contract.

a. Acknowledgment of receipt. The employer should have a signed receipt for the "contract." It should disavow any other representations and recognize that the handbook is subject to change.

Example:

"I have been given a copy of the Employee Handbook and I have reviewed and understand its contents. I understand that this handbook supersedes any and all previous policies, handbooks and promises, express or implied, that it lists all of the Company's obligations to me as an employee, and that I cannot rely upon any other promises or representations made to me by anyone concerning the terms and conditions of my employment.

"I understand also that the policies contained in the handbook are subject to change at any time by the Company and that the Company will post changes from time to time on the Company's [**bulletin boards? Intranet?]** which I agree will be notice to me of any such changes."

b. Introduction.

"This Handbook describes the rights and obligations of our employees, and is the contract of employment for non-management employees of _____. It is the complete and entire agreement between the Company and its covered employees and takes the place of any prior understandings, representations, promises or agreements. This contract can only be amended or modified in writing signed by the Vice President, Personnel. The Company may change the policies contained herein at any time with notice [or without notice] to its employees."

c. Obligations of employees. As a contract, the employer should state the obligations of employees as clearly, prominently and broadly as possible. Thus, work rules, attendance expectations of the employer, as well as "the high standards of performance" which will be demanded by this company, should be set forth. As noted by several courts, what the "covenant of good faith" provides will often be determined by the "reasonable expectations of the parties." If the employer expects more than merely "satisfactory" performance, it should communicate that fact. Further, when "misconduct" is defined and stated to result in termination, employees can hardly claim to have had contrary "expectations."

d. Management rights clause. Experience in collective bargaining can be drawn on in drafting the handbook/contract. Most union contracts contain a broad management rights provision which makes clear that:

"Except as specifically provided herein, management retains all rights which it enjoyed prior to its execution of the agreement, including but not limited to, the right to determine the size and nature of the workforce and the qualifications of employees; to be the sole judge of the competence and performance of employees; to determine the means and manner in which the business is to be conducted, including location of facilities, equipment to be used, products to be produced and services to be provided; to set and from time to time change employment policies of the Company, including wages paid, benefits provided and holidays

recognized; and to direct and control the workforce through discipline, including termination with or without cause as may be deemed necessary or appropriate in the sole discretion of management."

D. Termination Provision/Arbitration.

1. The crux of the handbook/contract is the express termination provision. This provision is necessary to negate the possibility of an interpretation that the contract contains an "implied" limitation on the employer's right to terminate.

The employer's dilemma here is that it intends to terminate employees only for a good business reason. Indeed, the cost of recruiting and training replacement employees is such that termination at whim or caprice usually does not make good business sense. For morale and recruiting reasons, it wishes to assure employees that their jobs are relatively secure. Committing to fire only for business reasons, however, will create a contract to that effect. Once established, a contract can be enforced in expensive court proceedings and a jury is free to second-guess the employer, replace its judgment for the managers and impose unlimited damages on the employer. The employer's true concern, therefore, lies not in the terms of the contract, but in the nature of the remedy for the breach.

2. Unfortunately, once a contract of any kind is established, a remedy, by definition, has to exist. That remedy, in our judicial system, is a court trial in which litigants have the right to have a jury of their peers determine all "issues of fact." "Issues of fact" include a wide range of matters, including whether the factual bases for a contract existed, whether, under the circumstances, the agreement was breached, and, if so, what amount of money will compensate the aggrieved party for the damages which resulted. In employment cases, as noted above, the jury may be asked to determine whether the employer acted "maliciously" or "oppressively," and whether "punitive damages" ought to be assessed.

3. Once a "wrongful discharge" case reaches a jury, most attorneys will agree, company defendants are at a severe disadvantage. Few jurors have much sympathy for "corporations." This is not to say a jury cannot be convinced that management is right. It is nonetheless accurate to state that the cards are all stacked against the employer. Moreover, with the possibility of punitive damages in the pot on the table, it is not the sort of friendly card game one would choose to join.

4. There is no easy way out of this dilemma, but there appear to be only two variables with which to deal. An employer can either restrict or eliminate the contractual commitment, or attempt to limit the remedy for breach of the commitment to avoid the expense and risk of a jury determination.

The legal system does, however, provide voluntary binding arbitration as an alternative method to resolve contract and related disputes. We submit that given the alternative set forth above, it is one worth hard consideration, even if not for every Company. Arbitration has its drawbacks, of course. Many believe it stimulates baseless employee claims from disgruntled employees. It is costly in management time, arbitrators' and attorneys' fees.

Moreover, fear is rampant of "cut the baby in half" awards driven by the arbitrator's penchant for predictability (see #5C below) even when the employee's claim is weak.

5. For decades unionized businesses have lived with contracts with employees which provide for arbitration of any and all disputes, including termination. It has much to be said for it as a solution to the "wrongful termination" dilemma. It is, in fact, the only way an employer can hope to safely avoid the risks inherent in a jury trial determination of employee claims.

a. Arbitration is swift. While court cases can drag on for years, most arbitrations can be brought to completion in a matter of months.

b. Costly appeals are eliminated. By statute, the grounds for appeal of arbitration decisions are very limited. This is not true in court proceedings, where costly appeals on legal issues can be lengthy, and where victorious employers often pay substantial amounts to former employees, simply to put an end to the legal fees.

c. Arbitrators, who make their living by hearing employment termination cases, understand the employer's point of view, as well as the employee's, from a perspective of experience unmatched by a randomly selected jury of citizens. Juries disband after making their decisions, and go back to their vocations and anonymity. Arbitrators, in contrast, know that the decision will follow them, and they must rely on employers, unions and employees to select them to remain in business, and must, therefore, be relatively predictable, avoiding wild emotional swings to which juries are often prone.

d. As a corollary to the "predictability" consideration mentioned above, arbitrators dealing with a termination issue will rarely impose "punitive" or excessive "compensatory" damages against an employer. Arbitrators, having years of experience in discharge cases, are accustomed to "back pay" and reinstatement as remedies for termination cases. "Punitive" damages could be expected only in the most egregious of cases, and there only rarely. This, unfortunately, is not the case with juries.

e. Finally, there can be no question that the "get rich quick" promise of the big jury award has played a major part in the rush of employment-related litigation in recent years. As long as plaintiffs' attorneys view "wrongful termination" cases as a golden opportunity to "play to the jury" for the possibility of million dollar plus awards, the area will be rife with litigation. Few plaintiffs' lawyers, on the other hand, will view the opportunity to "play the arbitrator" as a great lottery prospect.

f. A sample termination/arbitration policy could read as follows:

> "(1) Employees with less than _____ service with the Company may be terminated at the will of the employer, with or without cause.
>
> "(2) Employees who have _____ or more service with the Company will be terminated only for a fair and

honest business reason, as determined by the Company in its sole discretion.

"(3) 'Fair and honest business reason' shall include, but is not limited to, the following:

"(a) Lack of work for which the employee is qualified as determined by the Company.

"(b) Failure to meet the employer's standards of competence, job performance or cooperation with fellow employees or supervisors.

"(c) Unsatisfactory behavior, including but not limited to, violation of Company rules and policies.

"(d) Any other 'fair and honest business reason.'

"(4) Employees with _____ or more of service, who believe they were terminated in violation of the Company's commitment herein, may appeal in writing within 20 days of termination to the Vice President of Human Resources. Such appeal shall set forth all of the reasons why the employee believes his or her termination was not for a 'fair and honest business reason,' or should otherwise be reversed. A response shall be provided within a reasonable period of time.

"If the response is not satisfactory to the employee, he or she may pursue the matter of the termination and any and all related claims in arbitration as provided below.

"(5) Arbitration. Any dispute or claim, whether based on contract or tort or otherwise, relating to or arising out of the employment of Employee by Employer, shall be subject to final and binding arbitration in accordance with the labor arbitration rules of the American Arbitration Association in effect at the time the claim or dispute arose. The arbitrator shall have jurisdiction to determine any such claim, and may grant any relief authorized by law for such claim. The Company agrees to pay all costs of the Arbitration. Any claim or dispute subject to arbitration shall be deemed waived, and shall be forever barred, if arbitration is not initiated within six months of the date the

claim or dispute first arose. In any arbitration under this paragraph, depositions may be taken and discovery obtained [in the discretion of the Arbitrator, or, in California, for example, as provided in section 1283.05 of the California Code of Civil Procedure]. As the Company is engaged in interstate commerce, this agreement is also governed by the Federal Arbitration Act, 9 U.S.C. sections 1-14."

E. Bargained-for "At-Will" Provision.

1. An alternative approach to the employer's termination dilemma is a hybrid which contains both a "fair and honest business reason" standard, without arbitration, and discretion to terminate "at-will." The "at-will" discretion, however, is openly "bargained for" in the contract. In exchange, the employee receives the benefit of a special severance plan.

2. The "no-fault" termination outlined below recognizes that in most termination cases, the "fair and honest business reason" is clear and, therefore, the risk of litigation is acceptable. It also recognizes, however, that some terminations are not based upon reasons which are readily apparent or easily understood by a court or a jury. This is particularly true for employees who hold positions which require the exercise of sound judgment or discretion, or where close teamwork and mutual trust is essential to the successful operation of the company. There are many other possible situations, as well, where management may choose to exercise its discretion to terminate but, at the same time, may be uncertain as to the outcome if its action were to be reviewed by a jury. The "no-fault" termination concept provides a way out.

3. The amount of severance exchanged for the "no- fault" termination can, of course, vary. The example sets it on the high end, since we believe courts will more readily accept and hold the employee to the bargain where the benefit is perceived to be relatively generous.

4. Without the severance "buyout," the language set forth below would, under the current state of the law in most jurisdictions, probably be held to create an "at-will" employment. The "buyout" anticipates that a court will struggle to avoid what it may perceive as an unfair result, but would have difficulty flagrantly ignoring what appears to be a bargained-for understanding between employer and employee. It also makes "at-will" employment more palatable for employees and employers alike.

5. Example:

"Employees of the Company may be terminated at the sole discretion of management, and may resign their employment, at any time. Terminations will generally fall in the following categories:

"a. Resignation or retirement of employee.

"b. Termination due to lack of work, where, in the discretion of management, the services of the employee are no longer required.

"c. Termination due to performance which is deemed not up to the high standards the Company expects.

"d. Termination for violation of Company rules, policies or procedures.

"e. No fault terminations. Employees may be released on a 'no fault' basis at any time, in the sole discretion of management. Where management designates a termination to be 'no fault,' and the employee has more than [two years] service with the Company, the Company shall provide the affected employee with [six] months' notice of termination, or, at the option of either party, [six] months' pay in lieu of notice. With mutual agreement of the employee and the Company, such terminations may be characterized as 'voluntary resignations.'

"Where appropriate and requested by the employee, the Company will provide assistance to the employee to secure other employment. Such assistance may include the provision of office, telephone and secretarial assistance, and an appropriate letter of recommendation.

"Employees terminated for any reason may seek and obtain a review of the termination decision by submitting a written request for review within 10 days of termination to the Vice President, Human Resources. Such request must include any and all reasons why the employee believes the decision was unlawful or otherwise should be reversed."

F. "At-Will" - Severance Pay Plans.

1. Severance pay provisions can serve well as a vehicle to protect an employer from wrongful termination lawsuits. They reemphasize that employees may be terminated for many reasons, and that such termination was anticipated by the parties and, again, the Company bargained for the right to terminate "at-will." In the face of such a specific provision, it is difficult for an employee to assert that "permanent" employment was "implied" from other provisions.

2. Severance pay provisions also provide another potentially valuable strategic and legal defense for employers. This is because severance pay plans are welfare benefit plans governed by the Federal Employees Retirement Income Security Act (ERISA). As a result, the employer may argue:

a. The wrongful termination lawsuit unavoidably involves interpretation of the severance plan and thus raises questions of federal law. Therefore, removal to federal court is proper. For many reasons, trial of wrongful

termination actions in federal court is often preferable to being in the state court system.

b. The argument is further available that the employee's suit is essentially one which arises out of the application and interpretation of an ERISA benefit plan, and federal law under ERISA preempts state law. The legal standard against which an employer's conduct is judged, an "arbitrary and capricious" standard, is far more favorable than the amorphous standards of "good faith and fair dealing" or "cause," etc., which can be applied under state law.

3. We make no representations that such would be the decision of any particular court, since we know of no case in which the issue has been faced. Nonetheless, an integrated "termination/severance" policy does raise the possibility that such defenses could succeed. It may well be worth a try.

Example: Termination With Severance Pay:

"a. The Company does not and cannot guarantee continued employment. Employees may be terminated for cause, or for other reasons which are no fault of their own, or in situations where no reason need be stated. In recognition of the broad discretion reserved by management to terminate employees, management provides the following severance plan:

"Any employee who has been employed _____ years or more who is terminated for any of the reasons stated below shall be paid _____ week[s] of pay for each year of service:

"(1) Termination for lack of work.

"(2) Termination due to the relocation or closure of part or all of an operation of the Company.

"(3) Termination due to failure through no fault of the employee to perform the job as required or expected by management.

"(4) Any other reasons, other than voluntary quit or resignation, which are determined by management to be not the fault of the employee.

"b. Employees shall not receive severance pay if terminated under the following circumstances:

"(1) The employee has been employed less than _____ years and is terminated for any reason.

"(2) The employee retires or voluntarily terminates employment.

"(3) The employee is terminated for misconduct, excessive absenteeism or other violation of Company rules or procedures or willful failure to perform his/her duties as assigned.

"(4) The operation/division/corporation is sold as a going concern and the employee's employment continues with a new owner.

"c. This policy is inapplicable if in the Company's opinion circumstances dictate establishing a separate policy applicable only to a particular situation."

4. Employers may also wish to create severance pay plans which differentiate benefits depending on whether the employee executes a release. Thus, the employee might pay "x" amount of severance without a release of all rights and x+1 if the employee signs a legally effective release of a type and quality the employer then prescribes.

G. Tenure Provisions.

1. Tenure provisions, if properly drafted to allow management discretion, can be helpful in the defense of discrimination or wrongful termination cases where selection of certain employees for termination is at issue.

2. Actions an employer takes pursuant to a "bona fide" "seniority" system, for example, are not normally violative of Title VII of the 1964 Civil Rights Act.

3. In addition, employees are accustomed to the concepts of "tenure" and (in the non-unionized work force) tenure, both of which concepts employees generally recognize as "fair" because they reward the neutral criterion of long loyal service. Thus, where "close calls" between employees for layoff, promotion, etc., exist, tenure provides a "safe harbor" upon which to base decisions which employees may otherwise more conveniently challenge.

4. Where there may be no specific provision for "tenure," it is nonetheless a concept which tends to be implied in certain workforce situations or assumed to be a "right" by some employees (and supervisors). If the employer grants no tenure rights, we recommend that this be clearly and expressly stated, as in Example 2 below.

5. Following are two examples of tenure clauses. The first grants tenures "rights," to non-union employees but provides maximum flexibility to management. The second severely limits any employee rights as a function of tenure.

Example 1:

"Nonexempt employees shall begin accruing tenure after the completion of a _____ period of time.

"Where all other factors are equal and the needs of the business permit, tenure shall apply to the selection of vacation periods, assignment of overtime, both voluntary and required, and in selection for terminations due to lack of work.

"Other factors besides tenure may include job performance, qualifications, attendance, disciplinary record and other related factors."

Example 2:

"Certain of our employee benefit policies provide additional benefits based on length of service. These include vacation, personal leave, sick leave, Christmas bonus, medical expense reimbursement plan and profit-sharing plan. Other than these, there are no other rights or preferences based on length of service or tenure. As a matter of practice, however, when scheduling employee overtime or time off, the firm will usually give preference to the employee with the greatest length of service. Such preferences are nevertheless subject to the needs of the business."

H. Review of Termination Decisions--The Termination Czar or Czarina

1. Whatever legal strategy is adopted to deal with termination of employment, the fact remains that it is in the best interests of all employers to treat employees fairly, prevent unlawful discrimination from tainting employment decisions, and to handle layoffs and terminations in a rational and consistent manner with attention to basic elements of "due process." This result is extremely difficult to achieve when the critical termination decision-making power is placed in the hands of more than one decision-maker.

2. All employers should seriously consider the following:

a. Where terminations due to lack of work or disciplinary or performance-related terminations are involved, the same executive should make all final decisions, if possible (to insure uniformity of process and standards for adverse action).

b. The selection of this executive will be important since he/she will necessarily be the company's primary witness in any subsequent litigation. He or she should appear credible, and "just," and should be one who will not alienate a jury or become upset or rattled under cross-examination. Pick your witness.

c. The chosen executive should be at a level in the organization high enough to be independent of and immune from pressure from the person making the recommendation.

d. This executive is to be charged to sit as an appellate judge and thus inspire deference from other reviewing authorities. The czar or czarina should review the recommendation for:

(1) Proper and adequate documentation;

(2) Discriminatory motives or impact;

(3) Consistency of application of rules and policies to ensure "like cases treated alike"; and

(4) Employee on notice, express or implied, and/or has had opportunity to correct problem, if appropriate, and does the file so reflect.

e. This Executive should, prior to acting on the recommendation also:

(1) Get the employee's side of the story or present the employee with documented opportunity to do so, advising the employee that unless this is done, the decision will have to be made on the basis of the information received from others;

(2) Meet with the employee, wherever possible, to conduct the termination meeting (see "intentional infliction" materials, above); and

(3) Keep careful documentation of everything employee says by way of excuse, admission or defense, as it may contradict what he/she says after consultation with an attorney.

f. Using the same manager to take adverse action who hired the at-issue employee so as to avail the Company of the so-called “same actor” defense. (This technique makes it less likely to the judge or jury that the manager who hired, for example, the plaintiff, despite the applicant’s race, color or age, relied on these immutable characteristics to now take adverse action...because of the plaintiff’s race, color or age, etc.)

II. EDUCATING MANAGEMENT - THE POPULAR PLAINTIFFS' STATUTES

Management always needs to know which are the biggest rattlesnakes closest to them. While the following list does not purport to be comprehensive, it is a listing of the most popular causes of actions we typically see plaintiff employees claiming in response to terminations in the workplace. These include "contract," "statutory" and "tort" causes of action. A contract is an exchange of promises supported by "consideration" (i.e., compensation or some other benefit): Example: an employer promises to pay employee "x" amount of money in exchange for the employee's promise to provide services. A statutory cause of action alleges the company lacked discretion to undertake the complained of action because the employer violated a statute or regulation or order limiting management's discretion to take the challenged action. A "tort" cause of action alleges the employer violated the standard of care our community of

citizens generally agrees the employer owes. Example: Auto accident cases are torts because the driver at issue allegedly "negligently" failed to live up to driving standards our community imposes or expects. Tort damages have three components: (1) actual damages; compensatory damages (for pain and suffering, emotional distress and anxiety) and punitive damages (which a jury may award in very rare circumstances when the employer's conduct is so outrageous the jury wants to send a strong message to this and other employers in the community to deter such conduct in the future).

Contract damages recompense the employee for any economic consequences of the broken contract. Example: if the employer breached the employment contract to compensate an employee $200 per day, the employee is entitled to recover $200 for each day such compensation was wrongly not paid. Statutory damages vary widely, by statute, but include attorneys' fees to prevailing plaintiffs (employees) in most civil rights actions.

Cases Plaintiffs Like

1. Wrongful Termination

   - Violation of express or implied, written or oral contract term(s)
   - *Breach* of implied (contract) covenant of good faith and fair dealing
   - Tort damages for public policy violation(s)

2. Sex Discrimination Claims

   - Sexual harassment
   - Failure to promote or train forcing "constructive discharge"
   - Also gives rise (in California) to common law "public policy" tort (*Rojo v. Kliger*, 52 Cal.3d 65 (1990).

3. Race Discrimination

4. Age Discrimination

5. Retaliation for Exercising Statutory or Common Law Rights

   - FMLA leave

6. Minority Shareholder Oppression Claims (typically, in small closely held corporations)

7. Disability (i.e., "Handicap") Discrimination Claims

8. Common Law Claims:

- Whistleblower cases
- Invasion of privacy
    - Publication of private facts
    - False imprisonment (typically following investigatory interview of cashier theft)

Moreover, it has been our repeated experience that managers making termination decisions are often unaware of the prohibitions contained in these numerous and sundry state and Federal statutory and state common law causes of action. Accordingly, we strongly recommend a regimen of in-house managerial training to make managers aware of the general requirements, prohibitions and pitfalls of these most popular of all plaintiff employee causes of action.

III. STRATEGIES TO DEAL WITH THE DIFFICULT EMPLOYEE

With the increased legal risks involved in termination, each one must be viewed as a high risk business decision. As with any such risk taking in a corporate setting, one must ask (1) can the risk be avoided entirely, i.e. is this termination really necessary or are there alternatives? (2) how risk averse is the company, i.e. is Neville Chamberlain, ("Peace at any price") or General George S. Patton the patron saint of the corporate culture? and (3) what strategies are available to reduce the risks to an acceptable level?

As a threshold strategy too, it is terribly critical that the company identify a termination "storyline" and not vary from it unless the facts surrounding the employee or the company change. The storyline will identify specifically why the employee is being separated. This is the first fact an investigating agency, judge or jury will want to know: "Why did the company terminate the employee?" If the company's explanation has varied over time, not only does its explanation lose credibility, but may appear "pretextual" and defeat "legitimate non-discriminatory reasons" for adverse action articulated in discrimination cases.

STRATEGY NOTE #1: "Surprise" terminations are often the most volatile of all separations. Moreover, terminations for poor performance against the background of good employee performance reviews are among the most difficult to successfully defend.

STRATEGY NOTE #2: Employers which repeatedly tolerate poor performance or variations from company policies or standards often are surprised to subsequently find themselves victimized by the employee they "bent over backwards" to help. We place these cases in a large file entitled "No Good Deed Goes Unpunished."

A. Can You Avoid Termination?

There are any number of alternatives to a forced termination as the solution to a difficult employee problem. Among the possible non-termination options are:

- A rehabilitation program for the employee;

- Demotion or transfer of the employee;

- Leave of absence with or without benefits;

- Disciplinary suspension and/or "final warning";

- Resignation/"Horse Trading": the negotiated termination.

1. Termination or Rehabilitation? This is the first question I want my client to answer. What does management want to do? A preliminary determination will have to be made about the goal with the particular employee. Can he/she be saved? Is there a missionary manager in the executive suite with special restorative skills? Has any effort to secure improvement been made? Is rehabilitation a viable possibility? In many situations, an effort at turning around the employee is a no-lose situation since, if it succeeds, the Company has a good employee. If the rehabilitation effort fails, termination risks are greatly reduced since management appears fair, sensitive and deliberate.

a. The "Program:" The tailored and, if possible, jointly agreed upon plan for improvement in performance.

b. In conjunction with a supervisor, the H.R. representative's goal is to establish a specific and written Performance Improvement Plan. The P.I.P. will as objectively and clearly as possible establish a "blueprint for success" and acknowledge that termination will be the alternative. If termination results, the employee cannot claim: (1) it came "out of the blue," (2) "I was doing all that was expected," (3) No one told me what was expected," or (4) "the standards weren't fair".

c. The "program" and appraisal which precedes it should:

(i) Outline, specifically, prior failures in performance (with examples where possible);

(ii) Identify all performance characteristics to be improved during the program or probation period;

(iii) Ascertain whether the employee agrees on the need for improvement;

(iv) Contain a timetable for improvement;

(v) Identify, specifically, the consequences of continued failure;

(vi) In many performance terminations, this tactic results in a voluntary quit when the employee, in mid-program, recognizes that he simply is not

going to cut it, and chooses to bow out with his or her pride and employment record intact;

(vii) The "program" approach should not be necessary if a well run performance appraisal system is in effect. Unfortunately, few such systems are in place. Even fewer are effectively administered. Thus, many performance appraisal systems do not permit the company to easily establish (1) that the employee's performance had been poor (he was rated "good" for the last ten years); (2) that the employee had ever been told he was doing poorly ("I was using positive reinforcement," explains the supervisor); or (3) that the employee had any idea that termination was a possibility. Accordingly, a current evaluation against the P.I.P. will help cure any historical flaws in the employee's performance appraisal file; ("I had no idea I could get canned for this. I have been doing this for years and I didn't get fired.")

(viii) At least half of the time, employees will set goals for themselves higher than the supervisor would have set.

2. Demotion or Transfer Alternative:

a. If performance problems relate to the application of the "Peter Principle" (i.e. promoted above the level of competence); or can be laid to "personality" problems with supervision, the demotion or transfer alternative must be considered.

b. Plaintiff's counsel often argue that the "real reason" for adverse action must have been an illegal one: for example, age. Plaintiff had been very successful as a first line supervisor for ten years before his promotion to plant manager, so why didn't they put him back? Because he was too old!

c. Employers often cite concern for "morale" as a reason to not use demotion as a human resources tool. Unfortunately, this reason is mostly speculation and often not subject to proof in our experience.

d. Others say, why offer it, he or she is too proud to accept it. This, of course, is all the more reason to offer it. If the employee refuses the offered demotion, we can treat his or her leaving as a resignation and we have cut off, or reduced any claim for back pay by the amount of salary offered in the lower position.

e. When a demotion offer is coupled with an offer of "red circled" salary (i.e. no reductions in pay, but no increases until rate for lower job catches up) the employee's burden is increased substantially to make out a "constructive discharge" claim, or place the employer in a poor light before a jury if he or she turns it down.

f. Lateral transfers can also be considered if the goal is to rehabilitate the employee. A very high percentage of employee problems are the result of bad chemistry. The employee will claim, of course, that his/her supervisor was "out to get him." This argument pales when a transfer does not cure the problem.

3. "Head Count" Termination/"Leave of Absence":

a. This is one form of "termination" which can and should be eliminated entirely.

b. A typical "head count" termination involves a suspected malingerer who has been out "sick" for a period beyond his/her sick leave. Multiple "extensions" of disability have been received from a doctor. The supervisor insists he/she be fired. Invariably the reason given is "head count." The supervisor cannot hire an additional "grommet counter" until this malingerer is fired, or so s/he believes. The answer is to change the head count requirement, hire a replacement if business realities so require, let the malingerer remain on unpaid leave of absence, cut off benefits in accordance with the benefits plan, and deal with the problem when, and if, the employee decides to return by transferring the employee to a "vacant" "equivalent" position, if one such exists, and state workers compensation and/or state and federal disability laws or contract provisions require.

c. The "leave of absence" concept is one which avoids the trigger of "termination but, in fact, is very little different. Thus, a "leave of absence" can be no more than a state of suspended animation giving the "employee" nothing more than a right to ask for reemployment, if a job is available, sometime in the future. It is, or can be, employment in name only, which at most gives some right to preferential rehire over someone "off the street" for jobs as they become available at the conclusion of the leave.

4. Disciplinary suspension and/or final warning:

a. Employers in the unionized sector have long dealt with the concept of a "just cause" standard for termination. Many employers have found that disciplinary suspensions can be an effective and low risk tool to deal with problem employees.

b. Following the concept of "progressive discipline," it has tremendous value as a means to avoid a troublesome premature termination. If the problem continues, it gives the employer the "what else could we do?" defense.

c. Normally a disciplinary suspension is combined with a "final warning" as well. A termination following a suspension and a repeat violation of a final warning will survive virtually any challenge.

5. Resignation/"horse trading": the negotiated termination

a. A resignation can avoid the "wrongful termination" nightmare sometimes, but not always.

b. "Constructive Discharge" theory. *Turner v. Anheuser-Busch, Inc.*, No. 5029985 (Cal.Sup. Ct. July 25, 1994) [to constitute a constructive discharge, the working conditions that cause the employee to resign must have been so unusually adverse that a reasonable employee in plaintiff's position would have felt compelled to resign, and that a poor

performance rating or demotion, even when accompanied by a reduction in pay, does not constitute a constructive termination].

(i) Was it voluntary? Resign or be fired! Most courts treat as termination;

(ii) Working conditions which "no reasonable employee wishing to retain the job could be expected to endure," if established, can create a cause of action for wrongful termination where no discharge took place.

c. "We do not fire anyone. We simply take away their job duties, secretary, office and they quit." Intentional constructive discharge.

d. "My bosses are treating me so badly I had to quit. I couldn't take it anymore." Unintentional constructive discharge.

e. Securing a resignation which will effectively block a wrongful termination case, then, takes sensitivity, tact, and, usually, negotiations. It represents the "honorable alternative" which should normally be left open. More on that below.

f. Where risk factors appear unacceptable, consider a negotiated termination. With the costs of the litigation alternative high indeed, employers can afford to be generous in negotiating the "package."

g. Money is only one of the "deal points."

(i) The employer wants the employee gone and assurances there will be no litigation;

(ii) The employee can have a longer list of concerns in the negotiation, including:

(a) Timing of the termination;

(b) Public "story" to explain departure;

(c) Letter of reference to protect future employability;

(d) Continuation of health and life insurance during period of unemployment;

(e) Pay during period of unemployment. Structured salary continuation - e.g. full pay, six months, four months, two months, or until employed;

(f) Perquisites:

i) Company car - can s/he keep it? buy at book value?;

ii) Advances, credit card charges, country club membership?;

(g) Stock options: "vesting" period, waiver of employment condition? Other conditions?;

(h) Special benefit treatment - such as pension plan vesting or credit?;

(i) Availability of unemployment compensation?

(j) If nearing, but not eligible for, retirement qualification, will employer offer a "special early" retirement proposal to "gap" the remaining year(s) to eligibility?;

(k) Outplacement assistance (formal or informal).

B. Document, Document, Document the File

1. Even before you make the decision to terminate a problem employee, begin to DOCUMENT the file. The mere fact that he or she is a problem employee alerts you to this need. The discharge will be based on the totality of the employee's conduct and performance, perhaps going back as much as one year before the termination decision.

2. Without documentation, dates and the sequence of events often become confused and merge together, particularly as years pass in administrative and pre-trial proceedings.

3. Contemporaneous writings documenting the facts of specific events are often more powerful and telling than five year old recollections.

4. The art of the memo: recite the facts, but write for the jury. Do not, however, make it appear you were "setting the employee up."

5. In an abundance of caution, your strategy should include a review of all applicable corporate termination formalities, including notices, hearings, procedures, etc.

C. Give the Real Reason for the Termination.

A very important part of any termination is the "reason for termination."

1. The real reason: some employers are reluctant to deal with performance, or other such problems, and, instead pick another reason for the termination, or, worse yet, call it a "layoff," and refill the job a few weeks later.

2. In litigation, the "real reason" almost invariably surfaces--so let's deal with it openly in the termination process.

3. In discrimination cases, the plaintiff's burden is usually to show that the "articulated legitimate, non-discriminatory reason" given was not the real reason, but a "pretext" for an unlawful motive. Once the reason given is exposed as false, the jury is not likely to believe that a lawful motive was the honest reason.

4. The Whole Reason: Make it clear that the decision to terminate was based upon the employee's entire record, and not merely on the "last straw." Otherwise, the plaintiff will be able to point to many others who committed this particular offense and were not fired.

a. Nothing But the Reason (which can be substantiated).

b. Where multiple possible reasons exist, and some are strong suspicions but difficult to prove, articulate only those reasons you can prove!

c. As an example: an employee is found by a supervisor taking an unauthorized break in a non-smoking area with a hand-rolled cigarette in his or her hand and the strong smell of marijuana in the air. When asked what s/he is doing there, s/he refuses to answer, expressly taking the "fifth amendment."

Those who include in "reasons for termination" "violation of drug policy" are turning a winner into a potential loser. Take adverse action based on what you can prove: an unauthorized break and smoking in a non-smoking area. Who knows whether the hand roll was a contraband substance or merely lawful tobacco. By the way, where is the physical evidence at trial? Hint: preserve the physical evidence if there is such to be had.

5. Reduce the Number of Reasons for Adverse Action to Not More than Three.

a. Avoid "piling on." Judges and juries know that there are not seven or eight reasons an employee was fired. Usually there are one or two or at most three reasons for a termination. If there were seven or eight reasons, you would have never hired the individual or would have taken adverse action earlier if these were real problems.

b. Many articulated reasons are merely examples of a singular reason (e.g. tardiness, absenteeism, breaks too long, "employee cannot be found at desk during the day" are examples of a singular reason for adverse action: work rule violations).

6. Never give a criminal label to a reason for termination.

a. Terms like "theft," "embezzlement," "sale of narcotics," or other criminal terms should never be used in a termination.

(i) You may have to prove all of the legal elements of the crime - in some cases "beyond a reasonable doubt" - the stiff criminal standard;

(ii) You are asking for a libel/slander action if you accuse of a crime.

b. Substitute a lesser sounding, but equally inclusive, label for the conduct. "Unauthorized possession of company property" will do just fine for one caught taking product out the back door.

7. If the employee asks to be given the reason for termination "in writing," contact your lawyer. The employee already has one.

IV. TERMINATE WITH SENSITIVITY

Having determined initially that termination, not rehabilitation, discipline, demotion or transfer is the appropriate response, how does an employer proceed? Our experience suggests the value of PATIENCE, SENSITIVITY, "Horse Trading," and Careful Review of the REASON given.

A. Patience

Most employers move too quickly. Defense lawyers often sit around the office drawing "short straws" to determine who will be the brave soul sacrificed to throw our body in front of this fast moving termination freight train and risk offending our very favorite and very good client.

1. It is all too typical for an employer to put up with poor performance, with little or no complaint (often times for years) and then erupt, demanding immediate termination.

2. A termination discussion should not be a surprise. If, in the course of the discussion, it appears that the news of poor performance is, indeed, a "bolt out of the blue," consider the Performance Improvement Plan approach outlined above, or a disciplinary warning.

3. A rushed termination is likely to be fatally undercut by the documentation in the file.

a. A careful review of the file is likely to reveal "good" ratings and no documented criticism thus badly undercutting the defense. Defense lawyers typically dread receipt of the personnel file of the allegedly "turkey" employee replete with performance commendations and merit bonuses only three months prior to termination. The other response is to take your spouse out to dinner to announce the good fortune which arrived on your desk that day and the long billable hours and profitable hard labor ahead.

b. This could also dictate that more time is necessary to "build the case" and some action, short of discharge is required.

4. A rushed termination can appear to be emotionally driven. Juries do not react favorably if they are convinced that a supervisor merely "flew off the handle" and acted in the heat of the moment. Slowing down the process lets emotions cool.

5. Employee claims of "condonation/inconsistent enforcement" are often persuasive to a jury and are often overlooked in a rushed termination. With time to investigate, it often turns out that other supervisors have condoned conduct similar to that undertaken by the employee in question, or other employees are found to do it too, or are worse, etc.

6. Lack of "Due Process" - While private employers are not subject to constitutional due process requirements, many judges, juries, and employees increasingly expect employers to afford employees some semblance of "due process." A termination rushed to judgment and lacking "due process" is a high risk termination. In the context of a termination, due process includes, at the very least:

a. Fair warning that conduct will result in termination: i.e. notice of the rule, expectation, etc. A chance to improve;

b. A reasonable and "fair" investigation by the employer;

c. An opportunity for the employee to give his/her side of the story;

d. A punishment which "fits the crime."

7. Slow down the Process -

a. Suspension Pending Investigation:

(i) In misconduct cases, particularly, there is often immediate internal pressure to "take action" to satisfy supervision, to get an employee out of the plant/office, and to do so NOW!;

(ii) The "suspension pending investigation," with or without pay, is a very helpful device to accommodate the need for action, with the need to make a careful decision according "due process;"

(iii) In some situations, such suspensions can be labeled "administrative leave" to avoid the disciplinary implications of the "suspension" label;

(iv) With the employee on suspension, the employer creates the time necessary to make, document, and have lawyers review the termination decision before it is made. Tempers can cool, an opportunity is provided for the employee to tell us, in advance, what he/she would later tell the jury, and an "impartial" decision maker can review the situation;

(v) Pre-termination Review Process - For Performance Related Problems:

- Generally, suspension will not be necessary or appropriate in a performance related termination. A full "due process" review is nonetheless still highly recommended, for all the reasons stated above;

(vi) "Don't yank the trigger - squeeze it."

B. Sensitivity

Judge Gesell, a Federal District Judge in Washington, D.C., confirmed not too long ago what our office has observed for years. He noted that "insensitive personnel management" is to blame for much unnecessary employment litigation (see Attachment). It was Judge Gesell's observation - as it is ours - that "the human side of personnel management has been overlooked."

1. Overlooking the "human side" can have two very serious, and separate, results:

It stimulates litigation, by infusing in employees a powerful emotional incentive for revenge, or vindication which foments litigation. Moreover, if left feeling "powerless" following the ultimate employer sanction of termination, the employee will often help balance the power equation by hiring a lawyer or filing an agency charge. Most sexual harassment cases, for example, are not in fact about alleged touchings or sexual invitations/innuendo: they are about power -- who's on top.

Furthermore insensitivity invariably forms the basis for the legal claim that the employer "intentionally inflicted emotional distress" on the plaintiff, justifying an award of punitive damages.

2. While we do not purport to provide "sensitivity training," certain generalizations can be drawn from our experience in defending particularly wrongful termination and employment discrimination cases:

a. Employees who know a train is coming are more likely to get off the train track. Try "signaling" the message "off the record." It takes time to prepare for and accept "failure." Give the employee the opportunity to act first - "You can't fire me, I quit!"

b. If you can avoid assessing "fault," do so. Don't attack character, credibility, etc., needlessly. Important: Let the employee know you respect him or her, but you must nonetheless have a parting of the ways.

c. Candor need not be cruel.

d. Consider the personal circumstances of the employee, e.g., wife or husband sick, children problems, or other tragedies or distractions. You certainly will hear about them in court if you do not.

e. Review what you say and do from the perspective of the employee--and from the point of view of a juror in the box. Ask your 14 year old at dinner what he or she thinks about a "hypothetical" fact situation you have been thinking about at work. If the kid heaves, get a different termination strategy by morning.

3. When, where and how? The manner in which the termination is handled is important.

a. Not at the end of the day;

b. Yes, at the beginning of the week, not the end;

c. "Merry Christmas, Tiny Tim";

d. Cleaning out the office (allow as much dignity to the employee as legitimate concerns for the trade secrets and company property preservation will permit);

e. Escorting out of the premises? Do not humiliate in front of other employees.

f. "On the verge" of vesting in pension, bonus or commission income?

g. Two weeks after a complaint? announced pregnancy? Employee of the Month award?

4. "Outplacement" assistance.

a. Full, "cadillac" treatment?

b. Demonstrates employer concern for former employee's future;

c. Counseling, career planning, job search, resume assistance, office, etc.

d. Placement officers help hold former employee's hand and instill a sense of self worth;

e. Placement officers help break the bonds, particularly of more tenured employees, and cause former employees to look forward, not backwards;

f. Employee must understand that new job is to "sell" himself/herself to new employer.

g. Lesser "outplacement" assistance? Office, voicemail, stationery rights and access to secretary?

h. "Employee assistance" counseling.