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# Minimizing Legal Risk When Terminating Difficult Employees

May 8, 2019

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# Kara Maciel

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**Kara Maciel** is a founding partner at **Conn Maciel Carey LLP** and Chairs the Firm's national Labor & Employment Practice, where she represents employers in all aspects of the employment law relationship:

- Defends employers in litigation at both the federal and state levels, including matters related to ADA, FLSA, FMLA, Title VII and affirmative action/OFCCP regulations
- Counsels employers on compliance with federal and state law, including issues related to hiring, discipline, internal investigations, and termination

# Livya Antonacci

- **Livya Antonacci** is Senior Vice President, Associate General Counsel at **JBG SMITH Properties**, a real estate investment trust that owns, operates, develops and invests in over 20 million square feet in the Washington, DC region, with another 18 million square feet in its development pipeline.
- Ms. Antonacci advises on and oversees legal operational matters for JBG SMITH, which include employment law and related issues such as employee relations, litigation management and dispute resolution, and risk management.
- Prior to joining JBG SMITH, Ms. Antonacci was Legal Counsel at Federal Realty Investment Trust where she focused on similar legal operational matters.

# Objectives

- Best Practices to consider in terminations
  - Issues to consider before deciding to terminate
  - How to prepare for the termination meeting
  - Pros and cons of including in-house counsel in the decision to terminate
  - Post-termination considerations
- How to respond to difficult employees who may try to shield from a termination



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# Best Practices for Terminations

# Reasons for Termination

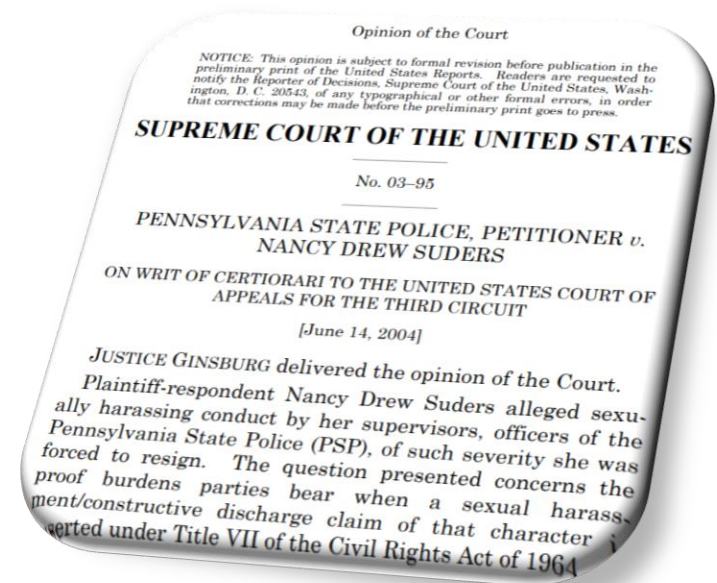
- At-Will v. Employment Agreement
  - There is a presumption that employment is at-will, unless there is an employment agreement or CBA
    - Different from a Right to Work state
  - At-will employment allows employers to terminate for any reason, *so long as it is not unlawful*
- Employers must always be cautious in assessing whether the decision to terminate *could be* considered unlawful, especially for challenging employees

# Wrongful Termination

- An employer may face a claim for wrongful termination if it terminates an employee as a result of:
  - Discrimination based on a protected class (race, color, sex, national origin, religion, disability, age, etc.)
    - And, broader categories including sexual orientation in DC and MD.
  - Retaliation against the employee for engaging in protected activity (e.g., whistleblowing)
  - Workplace harassment (all forms)
  - The employee seeking or taking protected leave (e.g., FMLA, disability leave, pregnancy/parental leave, military leave, etc.)
  - The employee's union activities
  - The employee seeking to enforce wage rights
  - Other reasons prohibited by state law

# Constructive Discharge

- Wrongful termination can also arise with a resignation (e.g., when the employee “beats the employer to the punch”) under extreme circumstances
  - Constructive discharge is when the terms and conditions of the workplace were so intolerable they made it impossible for the employee to stay (see e.g., *Pennsylvania State Police v. Suders*, 542 U.S. 129, 143 (2004))





## Is Termination Appropriate?

- Before making the decision to terminate, ask:
  1. Is termination the most appropriate course of action and in the best interest of the company?
  2. Does the employer bear any responsibility for failing to prevent the conditions that led to the termination?
  3. Has the employer given the employee a chance to address any problems that led to the termination?
  4. Will the termination have an adverse impact on employee morale or public opinion of the employer?

## Is Termination Appropriate?

5. Has the employer documented and implemented its policies and procedures consistently?
6. Has the employee recently complained internally or filed a charge of discrimination / harassment / workplace misconduct?



## Conduct / Work Rule Violations

- Before terminating an employee for inappropriate conduct or violations of work rules, ensure that you:
  1. Properly communicated the performance expectations previously;
  2. Thoroughly investigated the misconduct by talking to witnesses and reviewing relevant records;
  3. Discussed the conduct with the employee and offered him/her an opportunity to be heard; and
  4. Consistently enforced discipline for similar infractions with similar employees

# Poor Performance

- Before terminating an employee for poor performance, ensure that you:
  1. Accurately and objectively evaluated the employee's job duties and performance using effective performance reviews;
  2. Created a written record of the employee's performance;
  3. Considered implementing a performance improvement plan (PIP) to give the employee an opportunity to make corrections; and
  4. Consistently handles similar performance issues with other employees through all levels of the organization

## Position Eliminations or RIFs

- Before terminating an employee due to position elimination or RIF, ensure that you:
  1. Have well-documented that the elimination or RIF is based on legitimate business needs;
  2. Used objective criteria to select the employees for job elimination; and
  3. Conducted a disparate impact analysis to ensure no protected class is disproportionately affected
    - A disparate impact analysis is critical because, while unintended, position eliminations that target a protected class are more likely to result in disparate impact litigation

# Pre-Termination Checklist



- Before termination, employers should:
  1. Collect all documents related to the employment relationship, and review them to determine employer and employee rights and obligations;
  2. Review whether the employee has any payback obligations (e.g., tuition benefits, relocation, signing or retention bonuses)
  3. Consider employee benefit obligations (e.g., under the federal COBRA and state mini-COBRA laws);
  4. Determine final wage payment obligations (e.g., accrued but unused vacation and sick days and other paid time off);
  5. Identify notice and reporting requirements;

# Pre-Termination Checklist



5. Select the termination date, taking into account any required minimum notice periods, time needed to transition work and organizational knowledge, and any workplace safety, information security, or litigation risks that could arise from the employee's continued presence;
6. Develop a transition plan; and
7. Involve internal personnel who play roles in the termination process, disclosing only the minimum information necessary to those who have a need to know, such as payroll, benefits, and IT personnel

# Severance Agreements

- Does your company have a severance policy?
- If not, you may want to consider offering a severance package in exchange for a release of claims
- Ensure sufficient consideration for the separation and release agreement – for example, extended health benefits in lieu of continued salary or waiving employee debts





# Termination Meeting

- Plan the logistics of the termination meeting
  - The meeting should occur at a time when there will be few interruptions, in a private location out of the view of office traffic
  - An HR rep is a practical choice to assist in note-taking and to act as a witness to any comments or questions that arise
  - HR should prepare a one-page document to hand to the employee explaining the impact of the termination on benefits, insurance, etc.
  - Be sensitive to the employee's emotions without agreeing that the employer has made any mistakes or acted inappropriately
    - Comments such as, "This is not my decision," or "I would not have fired you if the decision had been mine," may encourage litigation by highlighting inconsistent motives for the termination decision
  - While consistency is key, it is also important to be sensitive to the employee's feelings by delivering the termination message with professionalism

# Termination Meeting

- Managers involved in the termination meeting should coordinate with Legal & HR so that they:
  - Are well-prepared to deliver the termination message (e.g., by drafting talking points and answers to anticipated questions from the employee, and by role-playing a termination meeting to receive coaching and feedback);
  - Have the relevant documentation ready to present to the employee at the meeting; and
  - Can provide other information and services that might be helpful to the employee, such as contact information for the state unemployment agency, EAP or outplacement services

## Pros and Cons of Involving Legal

- The decision of whether to include legal in the termination process is a crucial one with significant consequences
- Pros:
  - Attorneys know the law, and are best suited to evaluate and manage the legal risks of termination
  - Attorneys are in the best position to prevent, or proactively gather the appropriate defenses for, the filing of a wrongful termination claim
  - While training to managers and supervisors can allow for understanding of the law, there are always subtle nuisances which arise that are difficult, if not impossible, to predict



# Pros and Cons of Involving Legal

- **Cons:**
  - According to Rule 3.7 of the Model Rules of Professional Conduct, a lawyer may not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
    - (1) the testimony relates to an uncontested issue;
    - (2) the testimony relates to the nature and value of legal services rendered in the case; or
    - (3) disqualification of the lawyer would work substantial hardship on the client
  - This means that, if legal is involved, and a claim is filed, the attorney might not be able to represent the employer in trial because he/she is precluded as being a necessary witness

## Practical Tips

- The decision of whether to involve legal is very fact-specific, and should be determined on a case-by-case basis
- In House counsel should:
  - Train managers, supervisors, and other decision makers in the basics of applicable employment-related laws;
  - Advise decision makers to coordinate termination decisions with HR and, when necessary, legal;
  - Create procedures that offer supervisors and HR multiple ways to obtain advice about upcoming termination decisions;

# Documenting the Process

- Documenting the termination process can be useful evidence if the employer must later defend against a claim
  - Typically, juries are suspicious of a lack of relevant documents, which can indicate to the jury that discrimination or some other unlawful motive was the actual basis for the termination
- The employer's documentation should include:
  - The objective reasons for termination, and any supporting documentation
  - A separation agreement, including an employee waiver of rights and release of claims

# Maintaining Confidentiality

- The employer should:
  - Keep confidential all information related to a employee's termination;
  - Maintain the information in a secure location and establish controls to protect from unauthorized disclosure; and
  - Make the information available only to those who have a legitimate business reason to access the files

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# Notifying Others

- When communicating with others about the separation:
  - Avoid disseminating negative information about the terminated employee;
  - Refrain from inappropriate post-termination conduct or remarks;
  - Be mindful of employee morale;
  - Reduce the risk of defamation and other claims by the terminated employee by disclosing termination details only to those who have a legitimate business need to know; and
  - Make sure all termination documents are consistent with, and do not contradict, the reason for termination





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# Unique Legal Risks with Challenging Employees

# The Drinker

- Employee has been having difficulty focusing at work and has had repeated tardiness and attendance issues. One day, the employee reports to work reeking of alcohol on his breath and you send him home for the day. That evening, you receive a call from the employee's spouse informing you that the employee needs leave to go to rehab.
- Can you terminate?

# Family and Medical Leave Act

Leave for substance abuse treatment can qualify under the FMLA if the treatment is by a health care provider, a provider of health care services, or on a referral of a healthcare provider (and other conditions for FMLA leave are met).

- Absences because of the employee's use of substances is *not* covered.
- Employer can discipline for use of substances, but not for leave for treatment.

# Americans with Disabilities Act

- The current illegal use of a controlled substance, or the non-dependent use of alcohol are not impairments.
- Alcoholism may be a disability if it substantially limits a major life function.
- Prior addiction may also be a disability.
- Employees may be disciplined for poor performance or use of illegal drugs or alcohol in the workplace.

# Undue Hardship

- The employer must show that an accommodation is an undue hardship.
  - must consider whether there is an alternative that would not impose an undue hardship.
- ▶ Employer must determine undue hardship on a case by case basis:
  - consider the undue hardship in relation to the size of the employer,
  - the resources available, and
  - the nature of the operation.
- ▶ Assessment of undue hardship is an ongoing process as resources and situations change.

# The Smoker

- Monday morning, employee appears to be under the influence of cannabis. His manager asks him about it, and he says he engaged in cannabis use over the weekend in D.C. – where it is lawful activity.
- Can you terminate? Does it matter if the employee has a medical marijuana card?

# Recreational Marijuana Laws



The District of Columbia (as well as Colorado, Washington, Oregon, and Alaska) has legalized recreational marijuana use for individuals who are 21 years old or older

## D.C. Trends Regarding Marijuana Use



- In 2014, D.C. Council passed legislation banning arbitrary, pre-employment drug testing
- Prohibits employers from testing potential employees for marijuana before making conditional job offer
- Allows employers to require drug test after job offer.
- Employees must adhere to workplace policies set forth by their employer after hire



# The Whistleblower

- Employee works in manufacturing plant and is required to clean tall equipment off the ground. Employee complains that his manager is not training him properly on fall protection under the OSHA regulations. Manager confirms that under the circumstances, fall protection is not required. The following week, the employee walks off the job because he isn't provided with fall protection. The company has terminated other employees for walking off the job.
- Can you terminate?

# Elements of Retaliation/11(c) Whistleblower Claim



**Protected Activity:** must establish employee engaged in activity protected by specific statute under which filed



**Adverse Action:** must demonstrate complainant suffered some form of adverse action by employer



**Causal Connection:** Employer would not have carried out the adverse action but for the protected activity.

# The New Parent

- Employee takes FMLA leave to care for a new baby. While out on leave, the employee's direct reports complain to management about the employee's poor management style, retaliatory nature, and the low morale in the group. Several reports are considering resigning because of the manager's style.
- Can you discipline or terminate while the new parent is on leave?

# Questions

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