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Q&A

Avoiding The Top 10 Employment Law Mistakes

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We only ask six or less questions, so we can't include all 10 mistakes employers make as you will be discussing before the South Windsor Chamber of Commerce. One on the list that surprised us, though, was "Thinking that a former employee who was terminated for poor performance or routine misconduct will be ineligible for unemployment compensation benefits." Why do people who are fired for poor performance get unemployment?

It's basically a policy decision: In establishing our system of unemployment compensation, the legislature determined that employees who are terminated for poor performance or routine misconduct will nevertheless be eligible for unemployment benefits. However, employees who commit "willful misconduct" in the course of their employment, commit a felony during the course of their employment, commit larceny in the course of their employment in an amount over $25 or participate in an illegal strike will not be eligible for unemployment benefits. It's simply a matter of where the legislature chose to draw the line regarding unemployment eligibility.

Another surprising mistake employers make, according to your list, is withholding amounts from the employee's final paycheck for company property not returned to the employer. Why can't companies protect their investment in this way? Does it mean employees don't have to return the property?

The Department of Labor is very leery about employers making deductions from employees' paychecks. There are only limited circumstances in which an employer is permitted to make such deductions, and covering the cost of company property that an employee failed to return is not one of them. Employers are not left completely without a remedy, however. They have the option of suing the employee, typically in small claims court.

You also mention that employers should tell an employee why he or she is being fired but there is no legal requirement to do so. Why is not doing this "fraught with legal issues" if companies aren't legally required to do it?

I mention that employers should tell employees the real reason that they are being fired. This isn't because there is a law against telling an employee "a little white lie," which is often done either to spare the employee's feelings or because the employer dislikes confrontation, or both. The problem is such untruths can be helpful to a former employee who later sues the employer for, e.g., discrimination. For example, let's say an employer terminates an employee for poor performance, but tells the employee that the company has decided to eliminate the position. Assume further that the employee is 55 years old, which means that she is in the protected age class. The employer then fills the position a short while later with a younger employee. The discharged employee will be able to argue that she is 55 years old, that the employer told her that it was eliminating her position, and then the employer hired a younger employee to replace her.

This, of course, does not mean that the former employee will be successful in her age discrimination suit, because she will still have to prove that she was terminated because of her age, but a case is certainly harder to defend when the former employee is able to allege that the employer misrepresented its reasons for discharging her. The law refers to such misrepresentations as a "pretext."

You say it is a problem to tell a prospective new employer that the former employee was a poor performer, lousy employee, had attendance problems, etc. What should a former employer do when a prospective employer calls?

Because such substantive recommendations regarding former employees can be problematic, I counsel employers to establish a policy of providing only a former employee's position and dates of employment.

What causes more problems — the emotional, spur-of-the-moment firing or the well-thought out firing? Do both lead to their share of litigation?

Either can be problematic, depending on the circumstances. In general, however, I counsel my clients to be circumspect, and to consult with counsel as part of their decision-making process. Very often, spending 15 minutes on the phone with (an attorney) can save a client money and aggravation in the long run.

As a follow-up to that, do most firings lead to some kind of litigation? Or, is it more a case of contesting denial of unemployment benefits that people fight about?

I would not say that most firings lead to some kind of litigation, but many do. Thanks largely to the Internet, employees are very knowledgeable about their rights. However, employers are also much more savvy about what they can and cannot do from a legal perspective, and so are often successful in defending non-meritorious claims. It is very common for employers to contest unemployment benefits but, as I explained earlier, there are limited circumstances in which a former employee will actually be ineligible for benefits. ■