

HIRING THE RIGHT WAY CAN AVOID THE COST OF A BAD TERMINATION **By Robert S. Halagan, Halagan Law Firm, Ltd.**

One of the worst predicaments for an employer is to face a lawsuit from a former employee alleging a wrongful termination. Once an employee has found a lawyer willing to take his case, an employer will need to be prepared for a new budget item: legal fees and settlement costs which can easily exceed \$50,000. Employment lawsuits are depressingly unpleasant for employers. You are faced with paying more money to an employee you've already determined you don't want, or at best, paying an attorney to defend you in the hope you can avoid paying your former employee. In addition to the monetary cost, you are about to spend a significant amount of time looking backward at events that happened perhaps years in the past instead of preparing for the challenges of the future. The burden financially and on productive efforts can be crippling to a business.

The only good thing about employment claims is that they can be relatively easy to avoid. Minnesota law allows employers to terminate employees "at will" which means an employee can be terminated for any reason or no reason, with the only exception being that an employee cannot be terminated for an unlawful reason such as in violation of a specific contract or for discriminatory reason. The first key to avoiding the quagmire of an employment lawsuit is to hire well and hire correctly.

Hire based upon attitude not just skill sets

The most important step in avoiding a lawsuit is to hire an employee who is not predisposed to sue. While that is of course impossible to really know, the best criteria to use is the attitude the employee brings to the application process. Skills can be taught and learned but an attitude that shows a commitment to teamwork, initiative and self-direction and a positive belief in their ability to contribute has to be there from the beginning. Conversely, someone with a sense of entitlement, or an inflated ego, someone with a negative attitude towards prior employers or with a concern only for what they will receive in wages and benefits and not what they bring in talent and energy, should be avoided. Look for clues in their resume, background or experience that shows what kind of attitude they will bring with them when they walk in the company door for the first time.

Preserve your inherent right to fire at will

For every new hire the company should also have a checklist of things that makes clear that the employer is preserving its right to terminate at will. Two key items include (1) the initial offer letter to the employee, and (2) if the company has one, the employee handbook. Every new hire should receive an offer letter the employee is expected to sign that has a clear statement about at-will status. The offer letter can be short and sweet, just identify the position, the starting date, the wages and a friendly welcome. But also make sure to include those magic legal words that preserve the right to terminate. A sample statement would be: "This letter does not alter or change the at-will status of

employment with our Company. The Company and you each have the right to terminate your employment at will, with or without cause.”

Some employers utilize employment handbooks as an effective way to communicate policies and procedures to their employees. There is no requirement to have a handbook and it is not always the correct approach for every employer. If you do have one, make sure it has been reviewed by legal counsel and that it contains disclaimer language similar to the above sample. If you don't have a handbook, you should use something like an offer letter to explicitly state your at-will employment policy.

Make your expectations clear

A third key to setting a path for success for a new employee is to make clear what it is you expect them to do and what the consequences are for not contributing successfully. It is valuable, both for the employee and the employer, to give some form of written guidelines in the way of a job description or performance goals or some other format that let the employee know what you see as their goals to be successful. This gives the positive-thinking employees clear goals to shoot for. It also allows the employer to articulate a clear business reason for the decision to terminate if those goals are not met. It is also very convincing for a potential plaintiff's lawyer to see that clear standards were articulated and their potential client simply failed to meet them.

This approach reflects the approach to legal “battle” in one of my favorite quotes from the ancient Chinese philosopher Sun Tzu in “The Art of War”

"The art of war teaches us to rely not on the likelihood of the enemy not coming, but on our own readiness to receive him; not on the chance of his not attacking, but rather on the fact that we have made our position unassailable. "

--Sun Tzu, The Art of War: c.500, 320. B.C