Unjust Dismissal

Make sure you know the legal way to fire an employee or risk litigation.

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How do the people who work for you view their employment? Common sense will tell you that your employees view their employment as more than a paycheck; it typically represents a very important aspect of their lives. That same common sense will tell you that treating your employees fairly is probably the single most cost-effective way to increase their productivity and decrease their turnover.

If you are sued, fairness equals defensibility in an unjust dismissal case. Simply put, if a jury is going to find for you, the jury has to be convinced that you treated your former employee in a way that the jurors would have wanted to be treated.

Fair Treatment

An unjust dismissal litigation fair treatment equals: (i) giving the employee actual notice of his or her work performance deficiencies; (ii) giving the employee the chance to reduce those deficiencies; and (iii) giving the employee a fair hearing concerning those deficiencies prior to the imposition of disciplinary sanctions or dismissal.

Fair treatment also means that all employees are treated in a generally consistent manner when compared to others who are similarly situated. Fair treatment is the least expensive and the most effective means of avoiding lawsuits and preventing unjust dismissal liability if you are unfortunate enough to be sued.

Employment-at-Will

In general most employees are in principal refereed to as being employed-at-will, i.e., it is presumed that the employment relationship is: (i) of indefinite duration; and (ii) terminable at the will of either the employee or the employer.

While the law of most states contains some variation to the employment-at-will principal, employment-at-will remains the law in numerous states. Therefore, it is critical for you to consult local counsel to review the law in the state in which you are practicing for the purpose of developing which employment policies are best suited to your practice. Since case law is not written in stone, there is one caveat of which you should be aware: an aggrieved former employee that you may have treated unfairly may be the one employee who makes new law by bringing a groundbreaking lawsuit in your state.

Treating your employees fairly means that you are clear, concise and consistent in all of your dealings with them. The 3-C’s (clear, concise and consistent) are the hallmarks of fairness in the terms of employment. Actual fair treatment together with its perception (both are necessary) are more easily attainable objectives for you as an employer when the hallmarks of fairness are reflected in all of your employer-employee communications and in the general policies that govern the employer-employee relationship at your practice.

Employer-Employee Communications

In what context do I put the 3-C’s into practice, one may ask? The short answer is there are two fundamental ways for you to fairly address the issue of

employment-at-will in your communications and other interactions with your employees. They are: (i) the disclaimer and/or (ii) establishment of specific employee policies and procedures.

Disclaimer Approach

If the laws of your state do not look favorably on employment-at-will, you may want to consider adopting the disclaimer approach. A 3-C statement of "at-will" employment status should appear in every classified advertisement for employment, employee application form, offer of employment letter, employee agreement, handbook, benefits agreement, or any other employee document.

In some states these "at-will" statements standing alone or together may give rise to an employment contract which defines your employee's status as "at-will." The disclaimer approach requires that your 3-C policies are uniformly applied in all instances of "at-will" employment and that you verify their uniform application by regular, frequent monitoring.

You significantly increase your chances of avoiding liability and lawsuits while maintaining management discretion by appropriately applying the disclaimer approach in states where it is accepted. Remember, however, that you should always consult with an attorney familiar with the laws of the state in which you practice in order to learn how those laws apply in your circumstances.

Establishment of Specific Employee Policies & Procedures

If the disclaimer approach is not accepted in your state or if it is not to your liking you may establish your own employee policies and procedures manual or EPPM that may be legally binding on you and your employees.

If you decide to prepare an EPPM you should consult with an attorney familiar with the laws of your state prior to implementation and dissemination of the manual. Forget about the do-it-yourself software applications that generate EPPM's, even if they are allegedly written or endorsed by attorneys. They will cost you more in the long run. If you question this suggestion, just think of the needless suffering that could have been avoided had that diabetic patient first obtained appropriate treatment for her calluses by a licensed podiatric practitioner instead of trying to save money by going to the nail salon for a pedicure.

Keeping the 3-C's in mind together with common sense notions of fairness, your EPPM should at the very least establish: (i) standards of employee conduct; (ii) grounds for employee discipline and termination; (iii) progressive disciplinary measures; (iv) internal complaint resolution procedures; and (v) other employee policies that you will enforce.

When you create your own EPPM you have the distinct advantage of being able to define your own standards. When creating those policies and procedures, remember if a jury is going to find for you, the jury has to be convinced that you treated your former employee in a way that the jurors would have wanted to be treated.

If a jury is going to find for you in a case where your EPPM is at issue you must pass three tests.

The first test you have to pass is having the jury find that your employees have been given proper notice of the specific policies and procedures that apply to them. The easy way to pass this test is to make sure every employ, new or old, has acknowledged that he or she had read, understood and received a copy of the EPPM.

The second test is passed when the jury finds that the specific policies and procedures contained in your EPPM are reasonable in their eyes. Your attorney administers preventative medicine by making sure they are.

If the jury finds that your employees have had proper notice policies and procedures in your EPPM, and that those policies and procedures are reasonable, in order to ultimately prevail you must get by the third test which is only

passed when the jury finds: (i) that you uniformly follow the specific policies and procedures found in your EPPM; and (ii) all of your employees are uniformly required to do the same.

Here, as with the disclaimer approach, you significantly increase your chances of avoiding liability and lawsuits while maintaining management discretion if the 3-C policies and procedures contained in your EPPM are uniformly applied in all instances of "at-will" employment and you verify their uniform application by regular, frequent monitoring.

An EPPM may also provide you with an added layer of protection from a subsequent lawsuit by an aggrieved former employee by barring that lawsuit if that former employee fails to exhaust the internal complaint resolution procedures found in your EPPM that is given to every employee, new or old. An example of this kind of bar occurs typically when the EPPM requires the employee to submit all claims to arbitration prior to filing a lawsuit.

There is, however, also a downside to an EPPM. For example, in that in some states it may create a binding contract where your failure to follow your own policies and procedures may result in a breach of contract claim against you. In fact, a few states recognize the right of aggrieved former employees to sue for damages from a breach of the covenant of good faith and fair dealing on the grounds that you failed to follow your own policies.

Conclusion

It bears repeating that you should always consult with an attorney familiar with the laws in the state where you practice concerning the legal consequences of any EPPM or disclaimer you may choose to adopt.

The reader also should recognize that this brief article only scratches the surface of some general considerations about the issue of unjust dismissal. It is intended only to familiarize the podiatric practitioner with several very basic concepts about the subject. It is written with the hope that it will motivate the reader to independently obtain more knowledge about the subject and to act affirmatively upon that knowledge to his or her own benefit and to the benefit of his or her employees.

Enlightening thinking when dealing with employment issues is only good management practice. Businesses and jobs created by them serve a more important purpose than simply providing a salary. They provide human dignity and a sense of security. Thankfully, more and more modern courts are serving justice by enforcing the laws prohibiting unjust dismissal, thereby protecting the right of all of us to enjoy that dignity and security.