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YOU'RE FIRED! THE ART OF TERMINATION

By John L. Valentino (October, 2005)

The words "You're Fired," most recently made famous by Donald Trump on NBC's hit reality show, "The Apprentice," have become the source of many jokes around water coolers all over the nation. While those two words have created humor for some, the termination of an employee often opens the door to lengthy and costly legal battles for employers that can end in large damage awards to employees.

Efforts to minimize employer risks against claims of discrimination and wrongful termination should occur long before the words "You're fired" are ever spoken. Although New York is an "at-will" employment state, numerous laws, both federal and state, provide employees with substantial protections. Employers must not only be aware of their obligations under these laws, but should have processes and policies in place to minimize the risk of lawsuits by former and existing employees.

1. THE VARIOUS LAWS

Employment lawsuits continue to be filed in increasing numbers under federal and state statutes such as:

- (a) Title VII of the Civil Rights Act of 1964;
- (b) New York State Human Rights Law;
- (c) Pregnancy Discrimination Act;
- (d) Age Discrimination and Employment Act;
- (e) Americans with Disabilities Act;
- (f) Fair Labor Standards Act;
- (g) Family and Medical Leave Act;
- (h) Federal and State "Whistleblower" laws; and
- (i) Other federal, state and local laws designed to give additional protections to employees.

2. PREVENTION Preventing employment lawsuits requires employer sophistication during all facets of the employment relationship. Employment contracts, interview procedures, evaluations, policy manuals and discipline/termination procedures are all areas to be handled with care and legal input.

3. TERMINATION CHECKLIST Before terminating an employee, ask the following questions:

- (a) Has the company handbook or policy manual been reviewed to confirm that the company is in compliance with all its internal procedures?



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(b) Has the employee's personnel file been reviewed to ensure that documentation exists to support a legitimate reason for the termination?

(c) Does the employee fall into any protected category (i.e., is the employee pregnant, older, or disabled, or has the employee requested an accommodation, or previously complained of sexual harassment or discrimination)?

Consultation with legal counsel is most appropriate where a possibility exists that the employee may be protected by any federal or state employment laws.

Employers should consider the appropriateness of offering severance in exchange for a release agreement. Obtaining a proper release from an employee can, if the release is prepared correctly, eliminate the risk of future litigation.

4. TERMINATION PROCESS

Once a decision has been made to terminate an employee, an employer should follow a few rules to ensure that the termination is handled appropriately. For example:

(a) Two employer representatives should attend the termination;

(b) Don't argue with the employee. While providing a reason for the termination is not legally required, it is often wise to give brief, clear answers substantiating the termination.

(c) Explain any benefit entitlement the employee may have upon termination and don't make excuses for the employer's actions. Saying too much can come back to haunt an employer. If appropriate, escort the employee from the premises.

(d) Take notes during the termination meeting and prepare a memorandum of the comments made by both the employer representatives and the employee immediately after the meeting.

(e) Be respectful. Termination can be a life altering event for employees. Courteous behavior alone can help avoid lawsuits.

If you have any questions regarding the employment process from hiring to firing, proper techniques for preventing and minimizing lawsuits, and how to terminate an employee, please contact John Valentino at 315.701.6308 / jvalentino@gsllaw.com.