PRACTICAL CONSIDERATIONS:
THE DISCIPLINARY PROCESS

A "hands on guide" to assist you in the legal discipline and discharge of employees

as presented by Fort Wayne Business Attorney Loren Allison, covering the following topics & more!

Documentation - Disciplinary Policies - Review & Investigation

Alternatives To Termination - Termination Or Resignation

Post-Termination Employee Benefits - Minimizing Risk Of Litigation

Advertising Material

Loren K. Allison
Fort Wayne Attorney

(260) 407-0040

info@lkallison.com

www.lkallison.com

Dear Fellow Employer,

Your job is difficult!

You are conducting business in a volatile economy with regulatory agencies and lawyers looking over your shoulder. Your biggest variable, employees, are invited by the internet to monitor your performance in your treatment of race, sex, disability, wage payments and numerous other protections afforded them.

If you fail an employee, or an employee believes you have failed based upon their perception of how they should be treated, you will receive notice of this fact in the form of a charge issued by a local, state or federal administrative agency. If not resolved at that level, an attorney may follow.

I regularly give advice to small to mid-size businesses, such as yourself, based upon the contents of this manual. I also give advice to current or former employees based upon the guidelines contained in this handout. Either way, the advice you are holding and reading is practical, "hands on" and time tested in navigating the minefield of employment law.

Enjoy, learn, and most importantly, share it with your supervisors. Prevent legal exposure to you and your business.

Your Business Partner,

Quick Reference Guide

CONSISTENCY

Discipline must be meted out on a consistent basis. Two questions that employers should ask before deciding upon what discipline to mete out is: (1) "What actions have we taken in the past under similar circumstances?"; and (2) "Are there any circumstances that would justify departure from the practice?"

Inconsistency in the application of discipline is a serious problem and one that costs employers dollars if challenged and proven in arbitration, by the EEOC, NLRB, or a judge/jury! It is imperative that discipline follow reasonably close in time from the conduct for which the employee is being disciplined. Any inexplicable delay in discipline is considered to be most unfair and could be utilized to set aside the discipline. Moreover, discipline is far less likely to have the desired result when it is not meted out reasonably close in time to the acts for which the employee is being disciplined.

Finally, even though similar situations should be treated similarly, an employer need not treat every situation the same where legitimate circumstances justify a disparity in treatment. For example, a manager or supervisor can be held to a higher standard of performance than non-management employees and can be discharged for conduct previously tolerated in hourly workers.

DOCUMENTATION

More than any other factor, the presence or lack of adequate documentation is the most important consideration in determining whether or not you win or lose a lawsuit or charge of discrimination, and, in many cases, it is the determining factor as to whether or not the former employee or current employee even files a suit or charge. In addition to being important evidence, documentation is frequently a deterrent to even the commencement of legal proceedings by a disgruntled employee or former employee. Individuals who know that their deficiencies have been documented realize their chances of success are limited and simply forego instituting legal proceedings.

Most managers and supervisors are understandably reluctant to take the additional time needed to put something in writing that could just as easily be communicated orally. However, "an ounce of prevention is worth a pound of cure." Not only is this important because it deters litigation, but it is helpful in defending a lawsuit in that it assists a supervisor or manager in refreshing his/her recollection as to the facts and circumstances surrounding a particular employment action.

I recommend the following:

1. The document be dated;
2. The document be signed by the person preparing it;
3. The employee's deficiencies should be thoroughly set forth;
4. The employee should be told what the next step will be if the needed improvement is not shown, i.e., discharge, suspension, etc.
5. The document should reflect the fact that the employee is being told that it will go in his/her file; and
6. The employee should sign the document if possible.

The importance of this cannot be minimized. It is quite common for an employee or former employee to claim either that he/she was never disciplined or that, in any event, he/she was never told that any document would be placed in the employee's personnel file. Obviously, such claims are entitled to little consideration where the employee's signature appears clearly on the disciplinary document.

RECOMMENDATIONS FOR PROGRESSIVE DISCIPLINARY POLICIES

Not so incredibly, courts are beginning to find a breach of an "implied contract" for failure to follow a progressive discipline policy in employee handbooks. This is consistent with the number of reported cases throughout the country in recent years in which employers have been found to have breached implied contracts with employees for failure to follow other personnel policies.

To minimize their exposure to liability with respect to progressive disciplinary action procedures, employers should carefully consider the following:

1. Do not include the progressive disciplinary procedure in the employee handbook.

The purpose of a progressive disciplinary policy is to provide guidelines to employees and supervisors in connection with the administration of discipline. The more widespread the dissemination of the policy, the more likely that employees will rely on the policy and will challenge the employer's actions if not followed perfectly.

2. Employers should include a general statement regarding discipline in their handbook which states:

"If your job performance conduct, or demeanor becomes unsatisfactory in the sole judgment of the company, based on violations of any of the company's policies, procedures or rules, you subject yourself to corrective action, up to and including dismissal."

3. Employers who implement progressive disciplinary action procedures should include such procedures in their supervisory policy manuals.

"The following is a list of steps that supervisors may follow in administering corrective action. However, these are guidelines only and any deviation from the 'steps' of this process may be initiated at the company's sole discretion, dependent upon the nature of severity of the offense involved."

4. Such rule of conduct should be disseminated to employees, with the caveat that they are mere guidelines for corrective action and do not imply any sort of contract/guarantee with the employee.

As a result of the numerous "at-will" decisions which have arisen in recent years, employers must avoid creating such "warranties" with their employees. Therefore, they must ensure that they "sanitize" their policies and procedures that appear in handbooks and manuals to preclude either (a) inadvertent creation of a promise, or (b) a restriction on their right to take action against an employer.

NOTICE OF OFFENSES

You should have a *list of offenses, generated from the supervisors who have* an "ownership interest" in them, that will result in discipline, distributed in conjunction with employee handbooks and posted on appropriate bulletin boards. This list should be reasonably specific but should include at least one general, catch-all offense that is broad enough to cover unanticipated instances of misconduct.

Of the many such lists that have been developed, I favor one that has approximately twenty offenses. A greater number creates the danger of being trapped by the "jailhouse lawyer" employee who will argue that he/ she did not commit the specific offense with which he/ she is charged. A lesser number generally means that the offenses are so broadly worded that they do not give the employee reasonable advance notice of the type of conduct that is being condemned.

REVIEW & INVESTIGATION PROCEDURE

The possibility of an employee being "fired on the spot" for any offense should not even be a possibility. The maximum authority any supervisor should have is to suspend an employee pending further investigation. *Immediate supervisors should be given the right to recommend termination but should not be permitted to fire an employee*. Frequently, the immediate supervisor is too emotionally involved with the employee and the termination decision to be objective in reviewing the facts.

Also, supervisors frequently are not well enough versed in company policy and legal consideration to assess whether discharge is an appropriate penalty. *It is advisable to have a management executive who is well versed in the legal consideration review all requests for termination.* This person should have the authority to deny a termination request and make the employee what action has been decided upon.

In a unionized facility, the employee has the right to request a union representative to be present where the employee "reasonably believes" disciplinary action may be issued against him. The unionized employee does not have a right, however, to union representation where the meeting is simply to tell the employee what action has been decided upon.

EMPLOYEE INTERVIEW

For those of you who have some kind of internal review, appeal, or grievance procedure, your handbook should designate that procedure as the employee's "exclusive right of review." Or you do not have such a policy, consider one because the presence of such a procedure could assist in portraying the plaintiff-employee to a jury as not being concerned enough with his or her job to even follow the internal mechanism provided by management. Also, consider it for union avoidance.

Generally, an effective procedure should include:

1. A provision for the employee to put any complaint or problem into writing and sign it as a conditions for review;
2. Provide assistance to the employee by the personnel department in putting the complaint or problem into writing;
3. Review by one or more levels of management not involved with making the decision of taking the action complained of;
4. Offering to provide the employee with an "advocate" from the personnel department to assist the employee in presenting his or her position in a face-to face meeting;
5. A written response by management within a reasonable period of time; and
6. A provision specifying that the review procedure is the exclusive means of raising and resolving formal complaints, grievances or problems.

Never make the decision to discharge prior to interviewing the employee. Nothing appears more unfair to a jury/arbitrator than to hear an employee testify that the company never asked for his or her side of the story. After the interview, tell the employee that no final decision on termination has been made and that the employee's input will be given consideration. In a union setting, if asked, have a union representative present. Also, this interview can be used to pin the employee and his/ her story down. Again, use this as an opportunity to find out the facts.

Have the supervisor during this interview unless the employee is intimidated or less than candid while the supervisor is there.

ALTERNATIVES TO TERMINATION

It may appear that termination is not the appropriate penalty. For example, a long-time employee with a good record may have developed attendance problems in the preceding months. A leave of absence, therefore, may be more appropriate than termination. If the attendance problems do not resolve themselves, it will appear before a judge/arbitrator that you have gone above and beyond the call of duty in giving the employee one final chance. In other words, it is better to back down today and live to fight and discharge another day. Employee relations is like playing chess; make good moves and make the last move lasting/final. Why discharge if you are only 70% sure, when with one more occurrence you have a 90% "perfect" case?

TERMINATION CHECKLIST

It is important to understand that facts will vary from situation to situation. When a reviewer looks at a request for termination, he/ she must fit the questions to the circumstances of that particular case. The importance of common sense, of course, cannot be overstated here.

Among the questions which a reviewer should consider are the following:

- *How long has the employee been with the company? Greater seniority needs a greater offense.*
- *What is the employee's age, sex and minority group status. Disability status? Be mindful of it!*
- *Has the employee recently complained about safety or the integrity of company products?*
- *Has the employee recently exercised a legal right such as filing an OSHA complaint, filing a worker's compensation claim, taken FMLA Leave?*
- *Are the employee's pension rights due to vest shortly?*
- *What reasons for discharge will be stated if litigation occurs and how will they be phrased?*
- *Have the company's disciplinary procedures been followed?*
- *Is the employee's improper conduct or failure to respond to correct suggestions documented?*
- *Can the superior identify specific tasks or responsibilities that were not properly carried out (who, what, when, etc.)?*
- *Did the employee have fair advance notice of the standards by which his or her performance would be judged?*
- *Are there extenuating circumstances which justify a lesser penalty?*
- *Have other employees who have engaged in similar conduct been terminated? (Dig deep, find out!) Employees have longer memories than you do—do not operate in a vacuum—what have other departments done? Remember, under the NLRA, despite your "jobs," you are all under the same "unit."*
- *How strong is the evidence of the event which triggered the discharge? Was it for drinking on the job—get and keep the bottle! (chain of custody).*
- *How strong is the documentation?*
- *Has the reviewer looked at the employee's entire personnel record?*
- *Does the employee's prior disciplinary record support termination?*
- *Has the reviewer followed the company's own contractual or employee handbook procedures for discipline and discharge?*
- *Has the employee's explanation of the "triggering event" been obtained before making the termination decision?*
- *Would transferring the employee to a different job or a medical or personal leave of absence alleviate the problem?*
- *Should there be a suspension period?*
- *Should there be one more Final Warning (substance abusers)?*

THE MEETING—
METHOD OF TERMINATION

1. **Make it confidential;**
2. **Get to the point.** If you are about to fire an employee, then there is no need to make small talk. The meeting will probably be tense anyway, and attempts to make it appear casual will serve only to increase the tension. By focusing on the individual and the circumstances that have brought about the dismissal, you will be speaking honestly and helpfully.
3. **Be specific about the reason.** If the reason is unsatisfactory performance, say so, and provide specific examples and details. Discussing problems outside of the job's scope serves no useful purpose; and
4. **Refrain from suggesting self-improvement.** The moment of firing is not a time to suggest methods for acquiring or improving skills, etc. The truth should be expressed, but in a way that permits the person to think as positively as possible. The terminated employee has a lot to think about with getting a search underway in seeking other employment.

Items To Be Covered

1. The employee should be told, to the degree possible, exactly why he/ she is being terminated. Do not try to "soften or increase the blow" by giving the employee a pretextual reason for termination; this will only make things more difficult at trial/arbitration when the employer wishes to give its entire business justification;

2. *Give the employee his or her final paycheck*. Also, have information available for the employee concerning benefit conversions, unemployment insurance, vested stock option if applicable, and other information concerning vested benefits;

3. *Be sure during this termination interview that you collect any property which belongs to the company*. A property checklist, signed by both the employee and interviewer, is useful; and

4. *In a voluntary termination, it is equally important to conduct exit interviews of employees leaving the organization*. Some "voluntary" terminations are not voluntary at all, and you may find yourself with a "constructive discharge" lawsuit after the person has quit. In a constructive discharge situation, the employee alleges that work conditions were so intolerable, for sexual harassment reasons perhaps, that he/ she was forced to quit.

It is possible during a well conducted interview to discover that the employee's stated reasons for leaving the company are not the real reasons. Frequently, an employee who has been sexually harassed or has suffered other forms of discrimination may choose to leave rather than deal with the problem. This may come out in the exit interview.

If the employee indicates that it is because of alleged mistreatment that he/ she is leaving, the reviewer should get as many specific details as possible and ask the employee to delay the resignation. An immediate investigation should be conducted, and the employer should either remedy the situation, if the employee's contentions are true, or establish that the employee's contentions have no merit.

TERMINATION AGREEMENT

In certain non-routine discharges, where it is probable that the employee will file suit, a termination agreement or release should be considered. When viewing this, you must consider the key question of whether settlement might be less costly than a lawsuit. Apply a balancing test! A release or termination agreement can be especially appropriate where documentation is less than adequate and/or the employee's retention presents serious morale or performance problems.

It is sometimes preferable that a termination agreement not contain a release since this type of agreement will be less apt to alert the employee to potential litigation. However, if a *release is to be included in the termination agreement, the release must be knowing and voluntary*. The employee must understand what he/ she is releasing and must enter into the agreement voluntarily. It is undesirable to present an employee with such an agreement and demand that the employee sign it at that meeting; an employee might well execute the agreement and later claim that it was not voluntary.

PARACHUTE AGREEMENTS

A 'parachute agreement" is a written employment agreement that is designed to protect an employee in the event of a corporate change in control. It provides benefits to the employee if the change in control results in termination or has some other impact on employment, such as a change in duties, work location, or recording responsibilities. "Golden parachutes" are provided for executives, and "tin parachutes" for lower-level employees; the main difference being the greater benefits provided by the former.

OUTPLACEMENT

A frequent cause of litigation is the *terminated employee's inability to secure employment*. A job cuts off liability for backpay and mitigates jury sympathy. Juries tend to look forward and help those who need it. Outplacement, therefore, can be a relatively inexpensive method of protecting yourself by mitigating the bitterness of the termination.*If a service is selected, you should pay for the service directly* to ensure that the employee avails himself of the program.

CONSISTENCY

Some grievance/arbitration provisions permit the parties to mutually waive the steps of the grievance procedure and proceed directly to a higher step, or sometimes directly to arbitration. However, *this should only be done in an important/ controversial case because many grievances simply, "wither on the vine"* as they proceed through the various steps of the procedure.

Grievance meetings should be utilized by an employer to narrow *the issues and focus* on *the areas of dispute.* Detailed notes of what transpires at grievance meetings should be made and retained for use at a later time. Use these meetings as your deposition/fact-finding conferences-not to argue or debate.

Formal settlements usually involve the execution of some type of document disposing of the grievance and stating the basis upon which the grievance is being disposed. Execution of the grievance settlement should involve the grievant waiving any and all claims arising out of the matter being grieved, in an effort to foreclose any future procedure arising out of the same incident. Moreover, a formal settlement of grievance issues has the appearance of being "above board," which is also an advantage. Finally, under certain circumstances, it may be important to specify the settlement of a particular grievance is "without precedent/prejudice," meaning that settlement shall not be construed as precedent for future cases of a similar nature.

TERMINATION OR RESIGNATION?

1. Resignation

In order to make a legal difference, it is imperative that an employee voluntarily resigned. *An employee who is told that unless he/ she resigns he/ she will be discharged, has not voluntarily resigned*. If the resignation is involuntary, the former employee has precisely the same legal recourse he/ she would have had if he/ she had been formally discharged by the employer.

There are, nonetheless, some significant advantages where an employee resigns, albeit involuntarily. The primary advantage rests with the fact that the employee may not know that it makes no difference; that he/ she was forced to resign, as opposed to being discharged. Many employees believe, as many employers do, that by resigning they forego any legal recourse against their former employer. In short, though no legal protection is afforded by a resignation as opposed to a discharge, the practical effects may be the same.

Also, by permitting an employee to resign, the employee is left with his/ her self-respect, which in many cases will do much to appease the employee and make them far less likely to take retaliatory legal action. Finally, by permitting an employee to resign, prospective employers can be told the employee resigned, thus enhancing the ex–employee's chances for securing new employment. It is recommended that the employee be expressly told at the time of resignation that should prospective employers contact the former employer, the prospective employer will be told that the employee voluntarily resigned.

It may also be advisable to discuss the question of unemployment compensation benefits at the time resignation/ discharge is being discussed. An employee may be induced to resign if the employer makes it clear that unemployment benefits will not be contested. By not contesting unemployment benefits, the employee may be induced to forego any additional legal proceedings.

2. Constructive Discharge

The resigning employee may still bring legal action against the former employer by arguing that he/ she was "constructively discharged." Constructive discharge occurs when the employer deliberately makes an employee's working conditions so intolerable that the employee is forced to resign. Under such circumstances, the employer will be held liable for any illegal conduct as if the aggrieved employee had been formally discharged.

The constructive discharge doctrine has been recognized by both the Equal Employment Opportunity Commission and the National Labor Relations Board. The EEOC has established three elements that an employee must prove to substantiate a claim for constructive discharge; 1) a reasonable person in the employee's position would have found the working conditions intolerable; (2) conduct constituting actionable employment discrimination against the employee created the intolerable working conditions; and (3) the employee's "involuntary" resignation resulted from the intolerable working conditions.

The NLRB's emphasis arises in the context of a potential violation of Section 8(a)(1) of the NLRA, that prohibits employers from retaliating against employees for engaging in protected labor organizing activities. In general, the NLRB, upon a finding of constructive discharge, generally concludes that the employer engaged in calculated efforts to force an employee to leave and that the employee had no free choice in the matter.

In addition to the EEOC and NLRB, the constructive discharge doctrine is well-accepted in all state and federal courts. The basic standard applied is that an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation.

An employer's defense against such claims is to apply an "objective" standard, whether the working conditions under which the employee was required to work were objectively intolerable as measured from a reasonable employee's standard. Therefore, when faced with a claim of constructive discharge, an employer's initial challenge to the claim should be that the type of conduct being complained of does not constitute the type that a reasonable employee would have found so intolerable as to compel that employee's involuntary resignation.

POST-TERMINATION EMPLOYEE BENEFITS

The employee benefits law is a complex and highly regulated subject, encompassing such matter as wages, vacation pay, bonuses, sales commissions, qualified retirement plans, employer-provided insurance, and other fringe benefits. An employer who is not alert to the employee benefit implication of termination of employment can be exposed to considerable liability.

For purposes of our discussion, "employee benefits" is a broad scheme, encompassing wages, vacation pay, bonuses, sales commission, qualified retirement plans, employer provided insurance, and other fringe benefits. Some employee benefits are pervasively regulated. Wages are subject to federal minimum wage and overtime requirements and state wage claim laws.

Qualified retirement plans, as well as employer-provided insurance and other "welfare benefits plans," are governed by ERISA-the Employee Retirement Income Security Act of 1974, and a never-ending parade of amendments, such as CORBA. Some vacation or bonus plans are subject to ERISA, while others are not. The courts in Indiana and other states have created common law rules regarding vacation pay, bonuses, sales commissions, and other such benefits in the absence of federal or state statutory regulation.

1. Payment of Wages

First, when must a company pay a terminated employee their final wages? In Indiana, the answer is relatively straightforward. *An employer must pay a quitting or terminated employee the wages or salary due him/her on or before the next regular pay day for the pay period in which the separation from employment occurred.* Failure to pay the total amount when due exposes the employer to a claim under Indiana's wage claim laws. A wage claim may be brought by the employee himself/herself, may be processed through the office of the Indiana Commissioner of Labor. Under the wage claim statutes, the employee may recover the unpaid wages, plus liquidated damages up to double the amount of wages due a treble damage recover–plus attorney fees.

2. Vacation Pay

A second issue concerns vacation pay. For companies which provide paid vacations but have no formal written vacation policy, under the common law developed by the Indiana courts, vacation pay is considered to accrue, and in the absence of a specific policy to the contrary, a terminating employee is entitled to a pro rata share of accrued, but as yet unpaid, vacation pay.

The same Indiana court decision which determined that vacation pay accrues also rules that claims for vacation pay are subject to the wage claim statutes, and that, therefore, an employer who fails to pay accrued vacation pay to a terminated employee is liable to the employee not only for the unpaid vacation pay, but also liquidated damages up to double the amount of vacation pay due, plus attorney fees.

It is important to note that this common law rule applies only when there is no established policy to the contrary. *An employer may avoid the imposition of this rule if it adopts a vacation pay policy which provides that vacation pay does not accrue and that an employee is entitled to vacation pay only if they are employed on their anniversary date*. In order to be effective, such a policy should be in writing and should be communicated to all employees, preferably either as part of a contract of employment or in a personnel or employee manual.

3. Sales Commissions

It is safe to say that any *unpaid sales commissions derived from sales which were final and for which a company receives payment from the customer are due as compensation*. These amounts, as well as any unpaid salary, are governed by the wage claim statutes previously discussed. More interesting questions arise with regard to commissions relating to sales which were "in the works" but not yet closed or paid for, by the date the employee's employment was terminated. For example, assume that a salesman had been negotiating a sale, but the customer did not submit its purchase order until after the salesman was terminated. Is the salesman entitled to a commission on this sale? Most likely not in Indiana, but courts have been known to do strange things. A written policy or agreement would remove any doubt.

What if the customer had submitted its order and the company had accepted it but neither shipment nor payment had occurred prior to the salesman's termination? *In the absence of a written agreement, the general rule is that a*

salesman is entitled to commission on a sale when the order is accepted by the employer, thus, the employee would be entitled to a commission on this sale. This general, court-imposed rule may be altered by a written agreement or by a clear practice which unambiguously demonstrates a different compensation scheme. I urge you not to attempt to rely upon past practice to avoid commission liability, but rather to reduce your commission program to writing.

What about an employer who pays its salesman a specified minimum salary as an advance, or "draw" on commission: May the employer recover advances from a terminating salesman when the advances exceed the commissions actually earned by the salesman? The majority rule, followed in Indiana, is that *the employer may not recover excess advances from an employee in the absence of an express or imposed agreement or promise to repay* any excess of advances made over commissions earned. If, however, the employer and employee agree that advances exceeding commissions are deemed loans, they must be repaid.

A final question on the matter of commissions: What if an employer promised to pay a certain advance but when the salesman is terminated, only pays the amount of commissions actually earned, which is less than the promised advance? The general view is that the employee may sue to recover the promised advance (prorated, presumably, through the date of termination), unless there is a contrary agreement that the employee is only entitled to commissions actually earned. Although there are no Indiana cases on this precise question, it seems likely that the wage claim statutes would apply to such a situation. Again, the lesson is clear–put the terms of the commission arrangement in writing.

4. Bonuses

If an employer makes a bonus a regular part of its compensation package or specifically offers to pay a bonus, a terminated employee may be able to recover some or all of the bonus in the absence of a specific agreement. Bonus compensation might even be subject to the treble damage and attorney fee provisions of the wage claim statues. Therefore, *it is advisable that the employers make clear to their employee that bonuses are discretionary and not a regularly recurring or fixed component of compensation*. Employers should also address, in writing, in what circumstances a bonus or partial bonus will be paid on termination of employment.

5. Qualified Plans

a. <u>Overview</u>

When I speak of "qualified plans," I refer to employer-sponsored retirement and profit sharing plans which qualify for favorable tax treatment. If a plan qualifies, employer contributions to the plan are currently deductible without the participating employees being currently taxed on their interests in the plan, and earnings on plan assets are not taxed until they are actually distributed to a participant. Qualified plans are governed by ERISA.

A brief overview of some issues which arise in the context of the termination of an employee are:

b. <u>Interference with Protected Rights</u>

What if an employee claims he/she was terminated to prevent him/her from becoming eligible to participate in a plan? There do not appear to be any problems under ERISA for ex-employees who were not yet participants when there is a bona fide reason for their discharge. However, employers should be aware that ERISA prohibits an employer from discharging a participant "for the purpose of interfering with the attainment of any right to which such participant may *become entitled under the* plan."

Accordingly, the lesson which I urge you to take from these examples is that employers increasingly must be able to justify termination decisions to courts, administrative bodies and arbitrators, and must tread lightly in a minefield of legal regulation. Given the complexity of the problems posed by ERISA and the obvious serious consequences of a wrong decision, in a termination where any question of interference with ERISA-protected rights is involved, counsel should be consulted.

6. The "Flip Side" of Employee Obligations

Let's consider the "flip side" of employee benefits; collection from a terminated employee who "owes" the employer money for tools, uniforms, shortages, and the like. Most employers would like to be able to deduct any amounts an employee owes from the employee's final paycheck. In such event, an employer should proceed with extreme caution.

An employer cannot deduct amounts owed to it by an employee from his wages without a valid, written assignment of wages. In addition to being in writing, the <u>assignment must</u>, by its terms, be revocable at any time by the employee. Moreover, the assignment will be considered valid only if it is made for one of a limited number of purposes specified by law, one of which is the repayment of loans made to the employee by the employer if the loan is evidenced by a written instrument executed by the employee.

In the case of missing tools, your company may not deduct the cost of those tools without a valid wage assignment from the employee. Finally, you should also be aware that it is illegal for an employer to assess a fine against an employee and retain it or a portion of it from the employee's wages. An employer who violates this law may be fined up to $500.00 plus court fees and attorney fees.

At worst, deduction of the money owed by a separating employee from his final paycheck may be considered an illegal fine. Absent a written wage assignment, it may, at best, be considered an invalid assignment of wages. In either case, an employer is prohibited by Indiana law from making the deduction, and the employee may recover the deducted amount, liquidated damages, and attorney fees under the wage claim laws. *Unfortunately, without a valid wage assignment, the employer's only recourse against the former employee may be a lawsuit to recover the money he/ she owes.*

Employers should attempt to avoid this problem by having employees read and execute a checklist and acknowledgment as to company-provided property which must be returned upon termination of employment.

In addition, employees should also be asked to fill out wage assignment forms permitting the employer to deduct the cost of any loaned property which is not returned to the employer from the employee's final paycheck.

MINIMIZING THE RISK OF LITIGATION AFTER TERMINATION

Just because a person has been terminated does not mean the company will not receive some mail from or about that person. For example, you may get: (1) a letter from the employee; (2) a letter from an attorney and, if the employee does not immediately get a job; (3) a request for information from prospective employers or (4) a request for unemployment. Each of the four types of correspondence deserves its own distinctive response.

1. Letter from the Employee

a. Proceeding in the Face of a 22-6-3-1 "Service Letter Request"

I. If there is no written application, there is no legal requirement to answer.

ii. I.C. 22-6-3-1 requires that the service letter state the:

a. Nature and character of services rendered;

b. Duration of employment; and

c. Reason for termination.

Courts have found the answer to be libelous, if false.

b. "Blacklisting"

Indiana has a "blacklisting" statue which makes it a Class C infraction for an employer to *prevent* a discharged employee from obtaining employment with any other employer. Moreover, the statute provides that any attempt to prevent a former employee from obtaining employment elsewhere may result in the employer being liable for compensatory and punitive damages to the former employee.

Though the statute was amended to make employers "immune from civil liability" for the disclosure of information regarding current or former employees, another amendment to the statute provides that current or former employees who have applied for employment elsewhere have the *right* to request disclosure from a prospective employer of "any written communications from current or former employers that may effect the employee's possibility for employment with the prospective employer."

Therefore, employers must assume that whatever they write *about an employee will end up in that person's hands, and potentially the hands of their lawyer. This will enable the employee and attorney to scrutinize the documents and determine whether there is* a foundation for a civil suit and a means of circumventing the immunity.

2. Letter from the Employee's Lawyer

Turn such a letter over to your counsel because the real reason a lawyer is writing your company is because they are advising their client to sue.

3. Request for Information from New Employer

a. "Neutral Reference" Policies

Some employers have "neutral reference" policies which typically mean that they will only confirm the dates of employment and the job classification of the job applicant. The reason for such a policy is to avoid unnecessary legal entanglements that could result from a disgruntled former employee filing a discrimination charge or defamation suit alleging that he/ she was denied employment as a result of an unfavorable and/or untrue employment reference. The disadvantages of such a policy is, of course, that it largely negates the significance of the reference check as a whole. Frequently, having the employee's written authorization to release certain specified information will persuade an employer to be reasonably candid and give more than a "neutral" response to prospective employers.

b. Job References

A policy concerning what information will be released to prospective employers who contact the former employer for a job reference should be established. Anyone who is in a position to receive a call from a prospective employer should be told in advance precisely what information, if any, will be given.

Remember, a favorable job reference may be used by a discharged employee to prove that his/her performance was satisfactory and that his/her firing was, therefore, improper. Be careful!

4. Unemployment Compensation

First, what the former employee himself states as the reason for termination can be of vital importance in *subsequent legal proceedings*. Often, a former employee can be discredited by statements made in an effort to obtain unemployment compensation where the employee subsequently attempts to deviate from what he/ she said at that time.

Second, what the employer states as the reason for termination is just as important for precisely the same reason. Just as with the termination papers mentioned earlier, *it is imperative that the reasons set forth by the employer be reasons that can be lived with in the event litigation should ensue*.

Third, an unemployment compensation hearing can be a useful tool as a *means of* "*early discovery*" to find out precisely what the former employee's position is. Again, use it as a deposition/fact-finding conference.

While technically not material in any subsequent proceeding, a decision favorable to the employer by an unemployment tribunal may be of some value in persuading a subsequent finder of fact to rule for the employer again.

Loren K. Allison

Attorney at Law

Loren is a single father of 4 sons, he shares his fulfilling life with his boys and faithful family companion, Nila, the family dog.

Employment Law - Business Law - Bankruptcy Law

Loren K. Allison possesses over 35 years of progressively responsible experience as a corporate and "big law firm" attorney who took his skills and formed a solo practice. Responsive and cost effective, Loren practices in business, employment and bankruptcy law. Born and raised in small town Waynedale, his clients respect his practical and common sense approach. In three areas of practice: business, employment and bankruptcy law.

Business wise, Loren guides small to medium-sized companies through the matrix of laws, ordinances and regulations to keep them profitable. In the realm of employment law, Loren is a frequent speaker and author on topics as diverse as unemployment compensation hearings, employee handbooks, discrimination law and traditional issues such as wage compliance.

www.lkallison.com **info@lkallison.com**