



Avoid Common Mistakes When Terminating Employees

IN TODAY'S BUSINESS CLIMATE, EMPLOYMENT-RELATED litigation is commonplace. Some frequent missteps on the part of employers are easy to avoid through forethought, common sense and an understanding of how such disputes arise. The following are top mistakes that will either invite litigation by a disgruntled employee or increase the need for litigation against a former employee, as well as suggestions for avoiding such mistakes.

1. *Withholding the real reason for termination, because management wants to be nice.* When it comes time to terminate an employee, the termination meeting often includes

managers with whom the employee interacted on a friendly basis during the term of employment. Such managers might be inclined not to hold the employee accountable for the misconduct that prompted the termination, or they simply might not want to cause the employee unnecessary embarrassment or emotional

upset. However, it is important not to sugarcoat the reason for firing.

It is not uncommon for a fired employee to make allegations of misconduct on the employer's part. For example, if the employee files a discrimination charge, the legitimate basis for termination will be critical to the case. The specific reasons for termination might be apparent from the company's records, but if the employer does not address these legitimate reasons during a termination meeting — or worse, makes statements inconsistent with the legitimate reasons for firing the employee — it can appear to a judge or

jury that the employer is inventing after-the-fact reasons to justify the termination. The changing story will be evidence of pretext or a falsified reason for termination and can seriously jeopardize the employer's defense of an employee's suit.

2. *Failing to follow the employer's written policies and procedures.* Many employers create form

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employee manuals and file them away in a cabinet; no one ever gives them another thought, until a former employee files suit and requests a copy in a discovery request. Personnel manuals frequently address such matters as progressive discipline.

A primary benefit of a written manual is that, if properly drafted, it guides management through the process of disciplining and terminating employees by outlining procedures for addressing misconduct in a fair, neutral manner. One of the easiest employee claims to make is one of discrimination against an employee in a protected class; termination decisions made on an ad hoc basis increase a former employee's ability to claim disparate treatment when compared to other classes of employees.

Typically, employees know the employer's policies. If a manager doesn't understand them, the manager might not follow specific procedures set out in the manual and thus increase the risk of litigation. The simple solution is to develop an appropriate employee manual and require managers to review and understand its provisions and follow them in connection with all disciplinary situations and termination decisions.

3. *Failing to document an employee's misconduct in a personnel file.* If a suit goes to trial, the result often hinges on the credibility of witnesses. Proper documentation can be critical to an employer's

HOW NOT TO SAY "YOU'RE FIRED"

- A DESIRE TO BE NICE CAN LEAD MANAGERS NOT TO SHARE THE REASON FOR TERMINATION.
- FAILING TO FOLLOW POLICIES AND PROCEDURES IN TERMINATIONS AND FAILING TO DOCUMENT MISCONDUCT CAN LEAD TO SIGNIFICANT HEADACHES.
- WITHHOLDING WAGES AS THE RESULT OF EMPLOYEE MISCONDUCT CAN CONSTITUTE A VIOLATION OF FEDERAL LAW AND RESULT IN DEPARTMENT OF LABOR SCRUTINY.
- REMIND DEPARTING EMPLOYEES OF THEIR OBLIGATIONS UNDER NONCOMPETE CONTRACTS.

credibility regarding allegations of a pattern of misconduct — or even a single instance of serious misconduct — on the employee's part.

In connection with any disciplinary action or warning, managers should ask the employee to sign a document acknowledging the occurrence and the employer's action. The document should permit the employee to state reasons for disagreement and should not require the employee to admit fault. The manager and another company witness present at the time of counseling or termination also should sign the document. If the employee refuses to sign the acknowledgment, the manager should document that fact. In connection with employment litigation, a company's well-kept records will go a long way toward convincing a judge or jury of the defendant's prior course of conduct and the legitimacy of the termination.

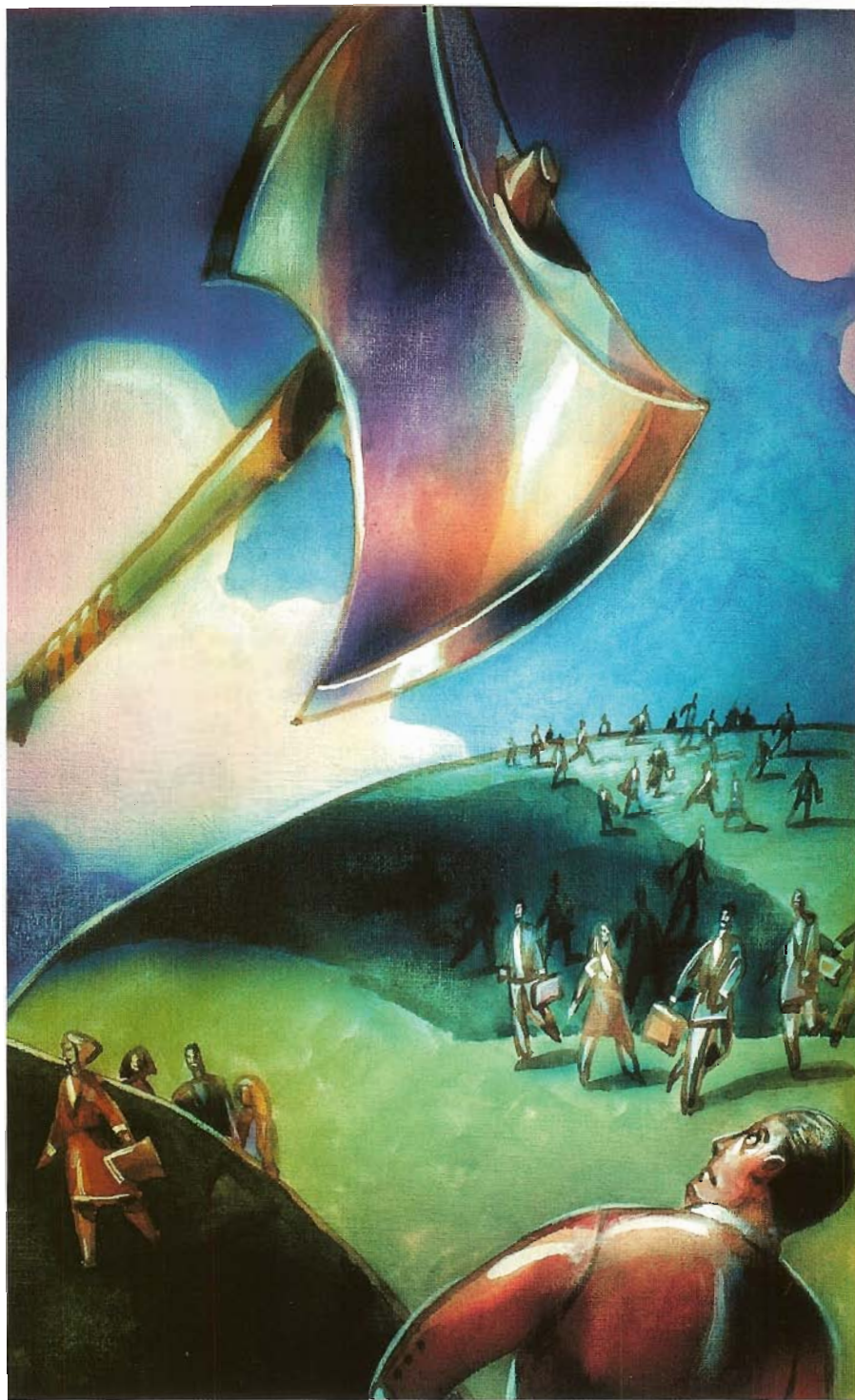
PAYMENT PROBLEMS

4. *Withholding payment of employee wages.* An employer often assumes that, if he fires an employee for misconduct that damaged the company, he can withhold the employee's last paycheck or offset the company's damages against the employee's wages. Under Texas law, however, an employer is not entitled to do so without an agreement to this effect signed by the employee. An employer should obtain this agreement at the outset of employment, as securing the employee's agreement at or after termination is difficult, if not impossible.

If the employer withholds or offsets wages without such an agreement, the employee can seek relief in a wage claim under the Texas Payday Law or under the federal Fair Labor Standards Act for violation of the minimum-wage laws. Once the U.S. Department of Labor starts such an investigation, the employer may be subject to a much broader review of its pay practices.

5. *Failing to remind departing employees of confidentiality and/or noncompete obligations.* Employers sometimes spend thousands of dollars developing noncompete and nondisclosure agreements, primarily for their deterrent effect. Such a policy can lose this effect quickly, however, if an employer does not remind an employee of post-employment obligations at or promptly after the date of termination. Where trade secrets, confidential information and customer goodwill are involved, it is much easier to keep them protected than to put the horse back in the barn using equitable or legal remedies.

Presenting the employee, at the time of termination, with a reminder of the employee's obligations along with a copy of the post-employment



restrictions accomplishes several things. First, it lets the employee know the employer is serious about the agreements and intends to enforce them. Second, it often prompts the employee to seek advice of counsel or to present the restrictive covenant to prospective employers prior to engaging in prohibited conduct, instead of proceeding to compete without understanding the potentially serious consequences. Third, providing a reminder will make it easier to establish that the employee's post-termination misconduct was malicious and intentional, rather than a result of forgetfulness or a misunderstanding of the employee's obligations. ELA

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