

SPAIN HASTINGS

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Client Update: Employment Termination Considerations

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New jobless claims soared to a more than 26-year high in the latest week and a record number of Americans are receiving jobless benefits, according to government data released Thursday. Employers considering terminating employees, plant closings or mass layoffs should be aware of certain employee rights and potential risks involved with employment terminations.

At-Will Employment. Under Texas law, there is a presumption that employment is “at-will,” even when an employment contract is in writing. At-will employment may be terminated for any reason not prohibited by law. To overcome the at-will presumption, an employment contract must explicitly indicate that the employer will not terminate the employee except under specific circumstances. However, in order to limit any prospective liability, there are various considerations employers should be aware of when making any employment decisions.

Termination “For Cause.” “For Cause” means an employee has committed a breach of the employment contract, employee guidelines or handbook published by the employer. If terminating an employee “for cause,” it is advisable to document the termination with an official termination notice stating the reason for termination. Some common examples of “causes” found in employee agreements are: an intentional act of fraud, embezzlement, theft or any other material violation of law that occurs during or in the course of employment; intentional disclosure of confidential information; conviction of a crime involving moral turpitude; breach of obligations under the employment agreement; intentional breach of company policies; the willful and continued failure to substantially perform duties (other than as a result of incapacity due to physical or mental illness).

Wrongful Termination and Discrimination. As most employers know, in any employment decision involving promotions, job assignments, wages, or termination, it is illegal for an employer to consider age, race, sex, religion, national origin, disability, or pregnancy. However, it is also illegal for an employer to terminate an employee: for refusing to break a law; in retaliation for filing a discrimination or safety claim; for taking leave under the Family and Medical Leave Act; without following its own stated procedure or policy; or in breach of the terms of an employment contract, if one exists.

Notice and Procedure. Once the decision to terminate has been made, it is important to follow the company guidelines and procedures for giving a termination notice to the employee. Sometimes this can involve a prerequisite “warning” letter that notifies an employee of potential future termination and states the reasons. Other times nothing formal is required. Always consult the employee guidelines or handbook to determine what procedure is necessary when implementing termination decisions.

COBRA. Under the federal Consolidated Omnibus Budget Reconciliation Act (COBRA), employees may be entitled to continue their health insurance benefits for up to 18 months after termination at the employer’s expense, if the employer has 20 or more employees. Texas has also enacted its own version of COBRA, which provides for 6 months of extended health care coverage and widens the application to employers with 2-19 employees.

WARN. The Worker Adjustment and Retraining Notification Act (WARN) requires employers to give workers, their families and communities by requiring employers 60 days advance notice of covered plant closings and covered mass layoffs. The WARN Act notice must be given to either affected workers or their representatives (e.g., a labor union); to the State dislocated worker unit; and to the appropriate unit of local government. The WARN law generally applies to employers who have 100 or more employees.

Whistleblowers. Employers who contract for the government should also be aware of provisions in the Federal Civil False Claims Act that allow a private citizen (usually a former employee) to file suit on behalf of the U.S. Government charging fraud by government contractors and other entities who receive or use government funds. The False Claims Act allows whistleblowers to share in any money recovered by the U.S. Government.

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