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Popular Threads on Solosez

Terminating Employee of Client

A good client has a long-term employee who it wants to terminate. The company is in an at-will employment state. The employee does some things well, but is highly paid and the company believes it will do better short- and long-term with a new employee who is more open to innovation. The employee also has a bad temper and will be very emotional when terminated. He also has some medical issues and needs the health insurance the company pays for. He can probably find a similar job, but at a lower starting pay. Any thoughts on how the company can handle the termination to minimize an angry scene and to ensure that there is no damage to computers, etc.? The company would like to part amicably, if possible, and help the employee to find a good job somewhere else, but they expect the employee to not react well. They want to make a business decision to protect themselves, but also be as kind as possible, although they are concerned about the employee's reaction.

Anyone have some advice I can share?

Richard C. Price

Dick -

They should call him in, discuss his positives, and then explain they are moving in a new direction. Offer him two weeks (or 4 weeks, if they really like the guy) pay and health benefits for a set amount of time without him having to use COBRA. Then, they have security (or senior management) escort him to his office to clean it out. Give him an hour or two. Everyone gets what they need. They fire him and make sure there is no damage to their property. He gets 2 or 4 weeks of pay and health insurance for a set period of time so he does not have to worry while job hunting.

Jonathan G. Stein

I would be more up-front with the employee about the reason for his termination. My former company laid off 5 of us by saying "we're moving in a different direction." But when we asked what that meant, they had no substance behind it. I'm not saying the employer *has* to provide a reason for the termination, but it might make it more palatable for the employee. Be sure the IT staff is notified in advance. They need to lock the employee out of all computer systems as soon as he is terminated. The company could go ahead and write a letter of recommendation for the employee. They could include that in his packet of termination info. That way the employee gets a recommendation without having to ask for it .Finally, think carefully about who actually notifies the employee of the termination. That could make a big difference in how he reacts. Who

does he really respect and get along with?

Andrew

"More open to innovation.." Usually a code for age discrimination. I'd be careful with that one.

Joseph Conley

Make sure there is no ADA exposure. I would be careful in extending a recommendation to someone who the company believes is not a good employee. There has been some recent case law where courts are holding ex-employers liable for not being honest in their disclosures on ex-employees.

Make sure you have an inventory of company property the employee has before meeting with the employee and that you generally know where it is. When the conversation starts on the termination, don't let the employee to leave the room unescorted until finished, then have security escort his office/cubicle. I have typically had a security guard hired for the day when doing RIF's. I had one employee ask to go to the bathroom during the RIF meeting, only to find out he ran back to his cube, grabbed all the company equipment in his cube and ran--had to get the police involved to recover that equipment.

There probably are insurance limits on being able to extend health benefits post termination, typically I have handled this by having the COBRA payments reimbursed by the employer (requiring the employee to still timely elect COBRA and timely pay the amounts, but then to seek reimbursement from the company). I have had the IT staff locking out the employee while doing the termination meeting. Be sure to cover all access points (laptops, mobile phones, email, voice mail).

Don't let the employee handle any computer when clearing out their office/cubicle, have the IT staff review the hard drives and dump "personal files" onto a DVD or CD, review to ensure no proprietary information then send to employee asking for a receipt (in addition to the FedEx signature). You may want to consider doing the termination off-site.

Regards,

Richard

Ok, I couldn't hold off on this one anymore."More open to innovation?" Probably be replaced with a much younger employee as only they are open to innovation. Has medical issues? Escort off with security? Long term employee only offered four weeks severance and no mention of any prior counseling on performance or his anger issues? Please send him to me directly if this employer is in Georgia. I would be that he will head to the nearest Plaintiff's attorney (who will probably negotiate more than four weeks severance or cost your client more in legal fees defending his suit-whether it is successful or not).Treat him like a human being first.

Give him a chance to improve. Counsel him--don't paper him to death as if targeting. Offer training. If its nota fit, give him time to realize what is happening. Let security eat their doughnuts and watch cameras. And depending on his length of service, offer a better severance. Stop basing decisions on stereotypes--i.e. younger ="more open to innovation."

Rob Reid

Rob -

I don't know the basis of the termination, but I assume the original poster's client has thought this through. Assume the decision to let the guy go has been made.4 weeks severance is not enough? Really? In this day and age, any severance pay is, quite frankly, generous. After all, employees can quit and the employer doesn't get 4 weeks notice. As for security walking someone out, it is actually the right thing to do. I have, for a variety of reasons, seen many people quit or be fired. They have always been escorted out. Why? To protect the company's property, make sure the employee doesn't take things that do not belong to him/her, make sure that there is no damage, and make sure that everything runs smoothly. Is it great? No, but it's the best way to protect everything. Should a company just let a fired employee take whatever he wants? I don't think so.

Jonathan

From the plaintiff/employee's perspective, I agree with Rob, somewhat. I would not use a juicy term like "new direction" or innovation. I'm not sure what the medical issues has to do with it, everyone needs health insurance! But if I was advising the employer and the employer believed the guy might lawyer up, I would say, don't give a reason. It's not working out should be enough. We appreciate your years of service and wish you well but this is not working out for us. Leave it at that. Don't talk about his positives, in his mind that will only reinforce that he's a good employee being fired for illegitimate reasons.

You could offer him a week for each year of service but if he's highly paid two weeks for two years is super low. If I was worried about an employee lawyering up, I'd wait for the plaintiff's lawyer to demand more money and health insurance. I'd assume it would settle at something like a month or six weeks of each year of employment. If the company is self insured perhaps they can keep him on the health insurance for as much as one year, but I would not recommend that the employer offer it's maximum deal up front if they believe an employee will react badly.

Ylda Kopka

The client didn't appear to think it through at all. The reason given for the termination was someone else (i.e. younger) might be more open to innovation. Apparently, the termination is going to be such a total surprise that everyone is worried he might go postal. There was not a mention of any prior counseling.

There are many ways to handle a termination without having security escort someone out. I wouldn't advise any employer where you practice Jonathan (California) to do that unless they have some very valid reasons. There is no suggestion of what this guy's job is or what property he has access to.

An across the board escort every terminated employee out by security is not really too sharp. A brand new client I have was escorted out in a university setting and her co-workers immediately protested and demanded(and received) a meeting with management the next day to explain why that was necessary.

Before everyone thinks my perspective comes from just the Plaintiff's Bar, until recently, I defended some of the largest corporations in the United States all across the nation against employment discrimination suits. The client might have already made the decision to terminate. That doesn't mean the best legal advice they can give is to create a situation where this guy feels he is treated fairly. That might mean holding off until this guy has some warning. Every attorney advising employers needs to do more than just rubber stamp and help implement bad decisions from an HR standpoint. HR personnel is sometimes too scared to take on management.

Every employer needs to be worried about two things in conducting a termination. First, every termination should be scripted as if it is going to be reviewed by a jury. What warning did the employee have? How was he treated? Juries tend to ignore the discrimination language in the jury charge. Rather, they are more concerned with whether the employee was treated fairly in light of the circumstances and the juror's own experiences. Second, the employer needs to consider how they can make it least likely that the employee will do anything but file for unemployment.

Handle it wrong and you might have bought a lawsuit that will take $50,000to $100,000 in attorneys fees just to get to summary judgment. If the employee gets past summary judgment you have to pay for a trial where you might lose much more (of course, by then that four weeks severance will look small and the employer will probably settle).And when dealing with angry guys, all of the above applies even more. He is more likely to file suit. Do more to try to make it less likely he will go see an attorney .Anyway, just my two cents. Can you tell I am passionate about this topic? Ha. I am constantly amazed at the dumb things I see employers do in terminations that drive very non-litigious people to me as clients.

Rob Reid

Yida

I'm sorry but not giving a reason is asking the employee to provide his own reason--thus, driving him to an attorney for sure--and perhaps later allowing a jury to fill in the blank. Providing documentation of a reason later can actually be used to get past summary judgment. As I wrote in one other email sent after yours was sent, try the best you can to ensure he

might not lawyer up. It will costs the employer much less in most cases.

Rob Reid

Rob -

Actually, this has been done in California for at least 20 years that I know of. It happened when I worked at Pru and CIGNA and others. I saw people fired and walked out at other companies. And, it didn't matter if the guy was the janitor or the president of the company or anyone in between. It just makes sense. And as long as the employer is doing it to everyone and applying it evenly, what is the problem? You explain to the jury that this is the company policy and why you do it. I would be stunned if a jury got worked up about that.

As to the reason being someone more open to innovation, that may or may not be code for someone younger. I know plenty of old folks who are innovators. But, assuming it is, then it should not be used as a reason. But, why give a reason at all? Its at-will employment.

Jonathan G. Stein

I disagree re the severance pay - in my area 2 weeks for each year of employment up to a maximum number of weeks (set by the employer) is standard severance. I assume that we're talking about a professional employee - not just a burger flipper or manual laborer. Of course, for employers the best thing about severance is that nice little waiver that the employee will sign to receive the severance. In re the "more innovative" or similar language, as a plaintiffs employment attorney, I would agree that you need to be careful re age discrimination claims. cheaper = younger, could also play into an age claim.

Lynette

It might be common to have 2 weeks severance for each year, but it is going to be an employer by employer standard. In the end, the proper amount of severance is going to be what is reasonable to avoid a lawsuit. If you make that deal before he lawyers up then it might be less. After negotiating severance for both employers and employee for a number of years, the number off weeks is what will get the deal done (or the maximum the employer will pay before digging in its heals). Once he goes to a Plaintiff's lawyer, the value of severance is what we think we might win with a jury discounted by the chance we won't win and the time it takes.

Rob Reid

Jonathan,

I used to work at Paul Hastings and I can guarantee that it is not their universal advice in California or elsewhere to escort all employees out by

security. The original post even stated that they would escort out by security or management. You assume they have escorted all employees out before this. But even if they did, the reason is that if this case ever makes it to a jury then all jurors interpret things through their own experience. And being escorted out by security just because employment is not working out will be seen as degrading in most cases. Now having them stand nearby and then called if he is a hot head--develops good evidence for the employer.

As to not giving a reason because it is an at-will state, you will guarantee that he will lawyer up. Then you will guarantee that when you try to document the reason later, summary judgment might be hard to come by. Then a jury can just fill in the blank for the employer later. Employee at will arguments don't work to good in front of a jury. You better have a good reason for the termination (that hopefully is well documented) or they will supply it. In a case where he is replaced by an employee under 40 without medical problems, can you guess what reason might be more likely (if he doesn't blow his top)?

By the way, I reviewed some jury research for an LA based jury and an Orange County based jury on employment based cases going to trial. California jurors are by far the hardest on employers and the attitudes are spreading throughout every state.

Rob Reid

I'm not an employment lawyer and the original scenario screams "We want someone younger" to me. More open to innovation, lower pay for replacement and employee needs health insurance - REALLY sounds like they want someone younger.

Veronica M. Schnidrig

Responding to the "everyone needs health insurance" thought -- yes, but employer group health insurance typically is priced based on (1) the census of employees and covered dependents, and (2) claims experience. Thus, the older the census in the aggregate, and/or the greater the claims experience, the higher the premium for each class of coverage is. This is not applied on an individual basis but on a group basis. So, for example, if an employer has a young census and low claims experience, the premium for individual coverage might be $350 per month; with an older census and more claims experience, the premium might be $500 per month. So the age and health of an employer's workforce affects the employer's bottom line -- unless the employer does not pay for any part of the health insurance.'

Robert J. Pomerene

Here is the answer. But, before I continue, I must say that if Company hasn't taken the time to counsel employee about their performance and tried to upgrade his or her capabilities, then it is not doing its own bottom line a favor, because the cost of training a new employee is very costly,

both in terms of actual training and knowledge of Company systems, but in terms of the time everyone else spends teaching them the little tricks over time. People are not inexpensive, and they should be treated like gold if it is worth it. This email assumes Company has made the final decision to fire.

If Company is in an at-will State, then it should give no reason for firing the employee, because "for cause" firings always draw hungry lawyers. I agree with Jonathan that any and all employees should be escorted out, but not necessarily by security. A manager escort is much better for any observers and more humane to employee. The way to do it is to have TWO managers bring the employee into a conference room on a FRIDAY at about 4:00pm, no earlier or later. Earlier is no good, because it gives a potential violent employee time to plan and carry out an ambush of Company employees at 5:00pm when the office empties out. Later may expose employee to too much attention from other employees who are getting ready to go home on a Friday. Better to get fired employee off the property at least one-half hour before other employees will be leaving work.

Security should be standing by but NOT visible. There should be a rehearsed speech made by ONE manager, while the other takes notes, date, time, who is present, etc. The note taker does nothing but observe behavior carefully and take notes. Note taker does not interact with employee or speaking manager, but they only take good notes. Managers should sit far apart with note taker in the peripheral but not direct vision of employee, so there is no common target created or presented, and the note taker will appear somewhat "out" of the process. Observer status is more powerful to keeping the peace. If they can keep writing the entire interview, it will make employee less concerned than if note taker writes after employee speaks or moves or whatever. Constant writing calms the atmosphere and does not draw attention to what is "perceived to be" being noted.

This is a less than ten minute interview. The speech is two paragraphs long or less. It is that "the Company has decided to exercise its rights as an at-will employer and let him go today." The employee will be given time to clear his personal property from the desk (not "his" desk), but will not be allowed to use the computer (not "his" computer) any longer. The paperwork for his COBRA or other health insurance should be handed to him, along with his final paycheck, which should be drafted in advance. Review each item individually. I agree with the earlier recommendation that a recommendation letter should be included in the packet. This helps forestall employee's concerns and the letter should be highlighted, because employee will be entering shock right about now. Do not forget to give him credit for vacation days or to include any severance pay, which should duplicate the termination credits or severance given to others - no special treatment. Vacation pay and severance credits should be given in a separate check, with the pay stub detailing exactly what is included. Employee's keys and passcards to the building should be taken away during the interview. If employee has remote access to Company computers, that access should be changed that day. All of this information should be on a check list that is checked off while items are covered, and employee should be asked whether he has any questions about the

materials handed out. Do not say, "Do you have any questions," because this is too open. Say, "Do you have any questions about [this paper] or [that process]." Make the interview seem routine and structured. No jokes or banter allowed. Then, when all items are reviewed and passcards/keys are retrieved, tell employee about packing up his personal property and that you will escort him to pack and then to the door. Let him or her know so they know what to expect. As I said, most people are in shock at this point, so it is good to review processes with employee beforehand.

Then, the TWO managers should escort the employee back to his desk with a box or two as needed. For appearances, one manager can trail but should always be in sight, while other manager walks with employee. Note taker Manager merely observes and takes notes for the file. So as not to make a scene, remain calm so as to protect employee's dignity in front of others. Keep it quiet. Trailing manager should steer non-involved employees away from involvement with employee and escorting manager.

Speechmaker needs to make SURE he does not enter into any small talk that may lead to Company commitments or statements about employee's work. Speechmaker should reply to employee's questions on those subjects with, "I'm sorry, employee, but I am not allowed to discuss that." The employee should be allowed to open drawers and take family photos, etc. but no Company property should be taken, and the computer should not be used at all. Actually better to have the IT Group take the machine from the cubicle or office DURING the exit interview, so there is no chance of tampering or whatever when he cleans out his desk.

Then, the employee should be taken to the exit, after being accompanied since they entered the conference room. I would accompany them even into the restroom after the conference room interview, so make sure one manager is female if you are escorting a female employee out. At the door, thank the employee for their work and wish them luck. Manager should NOT say this unless they genuinely mean it AS A COMPANY REPRESENTATIVE. If Company does not want to thank employee, a simple "goodbye" will suffice. This is NOT a personal goodbye time, this is a COMPANY goodbye time. Keep it that way.

The TWO managers then need to meet for about five minutes so the notes can be completed and they can emotionally download on each other. Note taker needs to document what Speechmaker noted during the interview and during the process generally. Both humans should acknowledge how weird that felt, because they will both be on edge and this is a good time to "come down" so they don't take what they feel home for the weekend. Security should have been invisible but available during this entire time. Security should have made sure employee left the property while managers are having this brief review of the process. Finally, TWO managers will need to get a blood transfusion, because there is no more bloodless process than this one. However, in this day of employee violence and lawsuits, Company cannot do any less unless it wants an undue business risk.

Best regards,

Arthur B. Macomber

Have the employer review documentation on the Texas Workforce Commission site for employers for tips. With regard to approach, it needs to be clearly developed and documented, if pursued. Question as phrased means that employer needs to carefully review, or have someone review, the thought process and approach. If materials outside the TWC info is helpful, James Publishing has a two volume work on Texas Employment Law that might assist. There are also articles on http://www.texasbarcle.com which address most common scenarios.

Darrell G. Stewartt

Art has outlined a process that might fit this situation. I especially like his point about having security standing by but not used if not needed. However, each situation is different.

If it is a situation where employees are allowed to put personal things on computers (happens all the time) an IT PERSON can even be with his computer to do the keystrokes. You can do these at 5:00 even when almost everyone is gone. You can offer to pack his stuff for him or have him come in on Saturday with the manager. Lots of variables.

But I don't think this is the standard way to do all terminations unless you have a workplace that has a lot of property/intellectual property to protect or have an angry employee that has shown the propensity to erupt in this setting (note the original e-mail said he was a hothead, but now we are assuming he is violent--not the same thing--but it does warrant precautions).

Art's point about counseling and training before termination decisions is worth its weight in gold. The Company should think seriously about going through with termination before going through all the above. He should know that he has either upgraded his performance to expectations or there is a chance of termination. Total surprise is not good for him or your defense of this suit later.

However, the advice I keep seeing over and over here to not give a reason for the termination if it is an at-will State is just not good advice. Think of the reason for the termination as if you knew you would have to explain it to a jury two to three years later. Heck, in the meantime what are you going to put on the separation notice for unemployment. Not providing an explanation allows the employer and his lawyer to later fill in the blanks. There is a case law that later documented reasons for termination create a fact issue as to whether the later given reason is a pretext for discrimination which may deprive your client of summary judgment. A jury won't like it either and will mistrust your reasons given at trial. Not providing a reason will guarantee he will lawyer up.

The company will attract more Plaintiff's attorneys like me by not providing a reason. Trust me. I will fill in the blank for later and the client will pay more. In this circumstance, the employer has given you three reason for termination. All of which are commonly used reasons some will take as code for age discrimination. Have them come up with a

better reason. A truly legitimate non-discriminatory reason that will hold up (even if that requires holding off on the termination for now). Don't just advise them the best way to take care of what appears like a discriminatory reason.

Rob Reid

Lots of good advice has posted, however, numerous studies have been done and Friday at the end of the day is the WORST time to terminate an EE. While it makes intuitive sense to fire at the end of the day after your staff has left, this will not necessarily prevent the ER from a violent episode from the former EE. There is not a one size fits all termination method. The ER should analyze the specific facts in each case a tailor a plan based on the situation.

In my experience, the best protection against that is to treat the EE with respect throughout the process. Consider this example: In a termination I was involved with that happened on a Friday at the end of the business day, the EE committed suicide over the weekend. In this case, the EE did not turn his violence against the ER, but against himself. Needless to say, the fall-out that occurred was substantial. Other EEs viewed the ER negatively after they learned what had happened. Additionally, they were concerned about how they would berated in similar circumstances. All of the information I have read suggests that the termination happen Tuesday-Thursday as soon in day as practicable. This give the EE the opportunity to redirect his/her focus into more productive areas -- like applying for unemployment, etc.

Additionally, if you are offering the EE outplacement, it is good to have the outplacement company contact the EE right after the termination. If the ER has an EE Assistance Program, this is another group to alert and also to remind the EE that they are available for the EE and his/her family. If the ER is offering severance, make sure you comply with the Older Worker's Protection Benefit Act requirements if the EE is over 40. Given the SC's ruling that if an ER fails to comply with the smallest requirement EE's can keep the $ tied to the release and waiver and file an age discrimination suit anyway, it is important the ERs follow all requirements in their release and waiver.

Sheila Aiken

Idaho is an at will State. I think the writer said Texas is too. Corporations in Idaho do not have to give any reason for firing someone, and it is a sufficient AND NECESSARY defense to say that they simply did not want to employ the person anymore. The definition of at will is just that, and there is no "arbitrary and capricious" standard as might apply to behaviors of a public entity. A private company can do what its managers want to do, unless what they want to do breaks the law. There is no presumption of unlawful behavior when firing someone in an at will State for no cause, and it is a sufficient defense here to say, "The Company did not have further need of his services."

The jury usually supports this finding, because they are employed by the

same standard, so if a company wants to fire someone, most people simply assume it had a good reason to do so, and they recognize the legal dangers of a firm stating reasons due to government interference in all manner of private enterprise.

The danger of stating ANY reason, unless the employee outright murders someone on company property, is that a good plaintiff's counsel will ALWAYS find a "hidden code" behind the stated reason to "help"a jury interpret a firm's "true" motives. With the current societal presumption against business interests, the at-will law is a business's best protection. IMO.

Best regards,

Arthur B. Macomber

Art,

I'm sorry but this is just bad advice. From a review of the language used in your response and your website, it does not appear that you are speaking with any degree of employment law experience. If I am wrong, please let me know.

Sure, in an "at-will" state you don't have to give any reason. You cannot be sued under state law if no reason is given. But under some state and many federal laws you cannot be fired for a discriminatory reason if you fall into a protected category. Your analysis does not apply there. In defense of that claim the employer must provide a legitimate non-discriminatory reason for the discharge. Replying that his services were no longer needed will not work when you replace the employee as the poster states here.

In addition, one way to prove that the legitimate non-discriminatory reason is a pretext for discrimination is to show it was made up post-termination. By not providing a reason or documenting a reason beforehand or at the time of termination, the employer guarantees a jury trial is possible.

I am really puzzled by the statement "the jury usually supports this finding, because they are employed by the same standard." You are kidding, right? A jury follows the judges jury charge? Any employment lawyer will tell you that juries typically judge the case based on their own experience. Key question to them is whether the employer treated the employee fairly. A judge who let the case go past summary judgment is nogging to reverse that ruling if evidence is presented that the reason they gave at trial was invented later.

Your paragraph seems to assume a juror would find it fair not to give a reason for termination and understand that but later states that juries are anti-business. Jurors are individuals who interpret the facts in light of their own experience. If this employee presents evidence that he was replaced by someone younger, that remarks were made that another employee may be more innovative, that there were healthcare costs concerns, and that he costs too much compared to what they can hire someone less experienced (and younger), when the employer had no

reason given at the time of termination, then the employer is in big trouble. If the employer gave a legitimate non-discriminatory reason I have to find some other evidence of disparity to even think of taking the case. However, if they don't provide a reason, my interests is definitely raised.

Rob Reid

Mr. Reid, Is there a reason why this email takes personal pot shots at another poster? Why not say you disagree and give your analysis and let the original poster pick which advice he/she wants to follow? Let's keep this site civil.

Regards,
Richard

I agree with Rob. You have to tell an employee why he or she is being fired. It's a baseline HR best practice. That said, I've always counseled employers to keep the explanation very brief and not put the reason in any termination/severance letter (with some obvious exceptions, like legitimate corporate downsizing). Generally, the tendency is to over explain the reason that the employee is being let go, which often gives the employee ammunition to question the employer's business judgment

Patrick Della Valle

Another comment on this issue. A very wise person once gave me this advice regarding age discrimination cases As opposed to other discrimination cases, every person on the jury can identify with the plaintiff. While those sitting on the jury might not be the same sex, race, etc. as the plaintiff, EVERYONE will get older and can picture themselves in the plaintiff's shoes. This is why ERs need to be especially cautious when dealing with these potential issues.

Sheila Aiken

Rob,

You are right, I am not an employment lawyer. My experience is as a hiring and firing manager for a major defense contractor. I think a "legitimate non-discriminatory reason for the discharge" is that the employees services are no longer needed. I do not see a reason, unless the law has been weaseled into a different form, which I have seen in other areas of law, for an employer to have to justify their own work processes and plans to counter an unsubstantiated charge.

On the other hand, a good plaintiff's counsel can find ambiguity somewhere, and most big firms would rather make the extortative payoff than take one person's problem to trial. By your post it appears the law currently encourages terminated employees to search for claim to generate a payoff exaction from the ex-employer.

Frankly, there are many circumstances where it is a very good and profitable idea to replace old people with younger people. All you are really arguing in the real world is that some of those old people will have to be paid off to get rid of them, which is simply another business expense to a large firm. This hurts other people, namely shareholders, many of which are old too, but the dominant paradigm is that shareholders are best viewed as co-conspirators to the firm, so no sympathy lies for them when litigation rears its head. It is simply a business decision to make the payoff, and it appears society accepts this form of payoff exaction just because it happens by a legal process.

Now you know one reason why I won't do employment law. Probably for the best, eh?

Best regards,
Arthur B. Macomber

Arthur,

Thanks for your candid reply and I apologize for the tone of my prior email. Unfortunately, in the situation provided by the poster they want to replacethis older worker. If the reason given for his termination is that hisservices are no longer needed then you just forfeit your legitimatenon-discriminatory reason. Worse, when the other reasons arediscovered--innovation-health-higher salary-that are discussed above adnauseam--a jury will be likely to award damages here. So by not providing areason up front that is legitimate and can withstand that scrutiny, theemployer has increased its legal exposure.

What we have here is that you have a philosophical difference with the ADEA and view a severance as an extorted payoff. Nothing wrong with that, but that philosophical difference seems to color you view but I will address each in turn.

Your statement that "there are many circumstances where it is a very good and profitable idea to replace old people with younger people" violates the ADEA unless there are business necessities or other qualifications that exempt you out. Those are codified as affirmative defenses by the way. Congress made the choice that stereotypes about the ability of older workers to participate in the workplace are wrong and enacted a statute that allows monetary damages and other relief when that law is violated.

I recently overheard a conversation in a public restaurant by a manager who did not hire an "old codger." He seemed to take great joy in making fun of this man and didn't care if all tables heard it. Such a conversation would be unheard of if talking about race or sex. I am going to write one of my first blog entries about this and why I believe that age discrimination claims will grow as the baby boomers age and this attitude is prevalent. I'm not putting your comment in that category by the way.

I come from an employment defense perspective because of my experience and I turn many potential clients away that think they are entitled to severance just because they were terminated. However, in many cases where it looks fishy or there are circumstances suggesting

discrimination (such as an employee is told his services are no longer needed but then replaced by a younger worker performing the same job), I will agree to represent them and my first effort is to negotiate a severance. I do not see it as extortion. There is a cost to anti-discrimination statutes. And that means in situations where an employer may see legal risks they might prefer to settle such claims up front and obtain a release in exchange.

I can understand why you have philosophical problems with it. I see the job criminal defense attorneys do in holding the government (prosecutors and police officers) to a burden as a necessary and fundamental part of our system of government, but I would have a hard time defending a child molester as some of my friends do. Thus, I don't practice criminal law.

However, I see what I do as part of the system of enforcing the anti-discrimination statutes that I believe are a necessary and fundamental basis for America as we know it as vital. After all, we started this country by declaring that "all men are created equal." But if I was as pro-business rights as you, I wouldn't practice in this area either. And I used to be that way (heck one of my first jobs was working for Newt Gingrich). Its why I started out on the other side.

But when I see a situation where someone is discriminated against (or it is highly likely they were) then it just feels wrong to me in my gut and I see nothing wrong to offer to settle up front rather than subject a company and my client to lengthy and costly litigation. I discovered that even with my similar pro-business sentiment, I enjoy representing the underdog and individual that has been wronged.

I appreciate your ideas but I think when you post on advice like this in these sort of hall law sessions you might want to disclose that this is not your area but based on your non-legal work experience or philosophy this is what you think. Your ideas about what the law should be are a valid part of the sharing of ideas.

In fact, there is a valid legal position that an employer should fight all claims and not settle any. I have defended a few employers like this and they had very few lawsuits once this idea was spread in the workplace.

However, I am not sure that is the best way to obtain and retain the best workers in this new economy. Then after reading all of our ideas its up to the lawyer to do further research and analysis and make the decision of what advice to provide his client.

Rob Reid

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