ALP: How can an employer protect itself from having to defend an employment lawsuit? How can an employer prevail in the event such a suit is filed?

Although there is nothing an employer can do to guarantee it will not face an employment lawsuit, there are many steps, including those below, it can take to limit and/or defeat such suits. Perhaps the most important thing that can be done is to get professional advice before a decision is made, when there is time to still take the necessary steps to insure that the employer is best protected.

Preserve At-Will Status. Kentucky and Indiana are “at-will employment” states, which means for the most part that aside from a statutorily prohibited reason (e.g. gender, race, etc.), an employee can be discharged at any time, for any reason (or no reason), with or without notice. This concept effectively ends most wrongful discharge claims. Discharged employees, however, often claim that something their former employer said or did altered their “at-will” status and bestowed upon them a right to employment for a specified time or to not be discharged except “for cause.”

To help defend against such a claim, an employer should:

- clearly state in every employment application, offer letter, and employee handbook that unless expressly altered in writing by the President (or some officer) of the company, all employment is at-will, and explain what that means;
- avoid formal “probationary” periods, because they create an impression that if an employee makes it through the probationary period, he/she has some right to continued employment beyond “at-will” status; and
- carefully draft offer letters to not create an impression that employment is for a specific or fixed duration. For example, do not state a salary in terms of “annual,” but rather state it in terms of weekly or monthly. Also avoid gratuitous statements such as, “We anticipate a long and productive relationship,” which as a matter of law should not alter the at-will employment status, but which nevertheless gives a plaintiff’s lawyer something to argue.
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Conduct Honest Employee Evaluations. Make sure employee evaluations are done honestly. Juries do not like to be told an employee was fired for poor performance when the employee’s evaluations for the last 5 years all indicate he was an “excellent,” or even “average” employee. It is natural to want to avoid the conflict that sometimes comes with honest evaluations, but failing to be honest with employees is unfair to them, and can later make the employer appear dishonest when explaining a discharge decision.

Conduct Anti-Discrimination & Harassment Training. Most employers know that an anti-discrimination/harassment policy will help them avoid and prevail against discrimination lawsuits. To be effective however, the policy must be clearly written and widely disseminated. Furthermore, an employer must take reasonable steps to ensure its management team and employees are aware of the policy and know what it means and how to use the complaint process. In practice, this means an employer should hold at least annual training meetings with every employee and member of the management team to review the policy. The benefit of conducting such training far outweighs the risk and potential cost of not conducting it.

Do Not Retaliate. At the core of almost every employment lawsuit (or internal discrimination/harassment complaint) is the allegation that some manager or supervisor is a racist, bigot, or liar. Naturally even the most professional manager or supervisor has a hard time not taking such allegations personally. However, the same laws that prohibit discrimination/harassment, also prohibit retaliation against employees for making such claims. In fact, few things are more common in employment litigation than for an employee to have absolutely no claim for discrimination, but nonetheless have a solid retaliation claim based on something that happened after he/she first made the allegation. It is crucial, therefore, that no one in the company (especially the target of the allegation) retaliates against an employee for making an allegation, even if the allegation seems meritless. This is not to say that an employee who makes an allegation is thereafter “bullet-proof” or immune from discipline. The employer must simply ensure that all actions against the employee are consistent with past practice and/or can be objectively justified to a jury.

Be Consistent Whenever Possible. One of the benefits of being a union-free employer is being free from a “book of have-tos,” otherwise known as a collective bargaining agreement. With such freedom, however, comes responsibility. An employer must be responsible to act consistently toward its employees. Not being consistent causes resentment among employees and opens the door to discrimination allegations. In practice, an employer should strive to see that employees are treated consistently, and, when exceptions are made, the reasons are legitimate, non-discriminatory, and easy to explain (with documentation if possible).