PERSONNEL NOTEBOOK

For Your Most Important Resource—The Human Resource

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Green Industry Survival Guide For Tough Times

Part III –Legal Issues

In this three part Personnel Notebook series we are reviewing survival guidelines for Green Industry companies facing tough economic times. In part I we focused on the considerations and decisions to make for the survival of your company. In part II we focused on the considerations and decisions you must make regarding employee cutbacks. In this, part III we will focus on the primary legal issues facing you when you make those tough employee decisions.

Many business owners and managers speak of a time when hiring and firing employees was much less complicated. You hired those you thought (or hoped) could do the best job for your company. You fired those who did the worst. If at some point you found that you had more workers than work, you ranked your employees in the order of their value to the company and started cutting at the bottom. That system still works today but it has become much more complicated and fraught with legal pot holes.

Let's start with a fundamental understanding of this issue. The hire/fire method just described is still a valid and legal process. But because employment is such a basic necessity to people's lives as well as to the viability of the nation as a whole, unfairness in the process can be personally and nationally disastrous. So the basic rights of each worker are now guaranteed. Fundamentally those rights are to be treated fairly in all employment decisions. Such decisions must be made on sound business principles instead of personal prejudices unrelated to the work. Generally, you can still hire the best and fire the worst. (There is one exception called "disparate treatment" but we'll deal with at the end of this issue of *Personnel Notebook*.) But the best and worst must be in reference to business issues.

We must also recognize that the regulations are heavily focused on the belief that some companies may say they are playing fair but may not actually be doing so. So you may have to prove, on a case-by-case basis that you have treated each employee fairly. That brings up the

dreaded word that supervisors and managers just don't want to hear…

Documentation!
To be responsible leaders in your company, you must assure that the employment decisions you make are backed up with documents!

- When you are hiring, have a written guideline that describes what you're looking for and how the person you hired fit that description compared to the other candidates.
- When you first discuss performance problems with an employee, make a note somewhere in your records (not the employee's personnel file). Date it and indicate the problem and the response. If the employee doesn't correct the problem satisfactorily in a reasonable time, write this up, give it to the employee and put a copy in the personnel file.
- If you're cutting back on the number of employees, have some documentation of the economic issues you are facing and why you are reducing the number of employees.
- When you promote or demote, grant pay increases or pay cuts, write up a rationale for the action in your records.

Everyone knows that documentation is a problem. It's time consuming, distracting and most of it is never needed. But in every Equal Employment Opportunity Commission (EEOC) complaint, National Labor Relations Board (NLRB) charge, Department of Labor (DOL) audit or law suit, those records are demanded. And in most cases the side that has the tallest and best pile of documents wins.

In many cases the person(s) being terminated is one of the protected classes. This may include minorities, the aged (over 40), handicapped and veterans. In addition someone's religion, nationality, color, sex, sexual orientation or marital status may be considered a protected class. But of all these, the number one complaint, charge or lawsuit is based on age. So let's start there.

The Age Discrimination in Employment Act (ADEA)
The ADEA prohibits the company from refusing to hire, or firing, or otherwise discriminating against an employee aged 40 or more solely on the basis of age. The company may not classify groups of workers on the basis of age. Nor can the company deny pay or fringe benefits based solely on age. An employee being terminated may file charges against the company based on any occurrence of the above.

The Older Worker's Benefit Protection Act (OWBPA)
Although the OWBPA was added to the ADEA (above), to prevent companies from discriminating against older workers by denying them certain employee benefits, the primary issue is all about severance packages.

Although few small companies (under 500 employees) offer severance packages, those that do will normally require the employee to sign an agreement releasing the company from any liability for discrimination or any other claims. So, in order to obtain the severance package the aged employee will be waiving any rights he/she may have to file age discrimination charges. Understand that the company is not required to provide severance packages to any employee. But if the company wants to get a signed liability release, they will probably have to offer a severance package. If they offer a

severance package that includes a release for age discrimination, then the company must comply with the OWBPA.

EEOC wants to be sure that the employee was clearly aware of what he was signing and that there were actually no indications of age discrimination. So courts will usually not honor a release that frees the company from age discrimination liability unless it meets *all* of the following conditions:

- The release must be in writing and written in such a way that that the employee can clearly understand it.
- It must specifically refer to the employee's rights under the ADEA
- It may not require the waiver of any claims that arise after the date of the signed release.
- The severance package must be of sufficient value (compensation) to be in excess of what the employee would otherwise be entitled to under the company's policies.
- The employee must be advised in writing to consult an attorney.
- If the employee is being offered severance in this reduction program, the release must state that the employee can take from 21 (to 45) days to sign the release. The employee is allowed an additional seven days after signing the release to revoke his signature. In addition, if the program includes more than one person, the company must provide the affected employees with a demographic analysis of the job titles and ages of all affected employees as well as the ages of all in the group who are not being offered severance.

- If any of these conditions are not met, the employee may keep the severance money and still sue the company for age discrimination

COBRA

The Consolidated Omnibus Budget Recovery Act (COBRA) applies to companies with 20 or more employees who provide health benefit policies to their employees. The law allows an employee who is leaving the company to continue certain of/her health benefits at their own expense. That is, the employee must pay both hers and the company's premium costs plus a two percent administration fee. That means that 102 percent of the total premium must be paid by the exiting employee. However, the new 2009 regulations will temporarily allow the employee to obtain that insurance coverage for only 35 percent of the total premium. The balance must be paid by the company. The company will then be able to recover those costs through a tax credit from the federal government.

WARN Act

The Worker's Adjustment and Retraining and Notification Act (WARN) is a federal law that requires companies with at least 100 employees to give 60-days notice of a mass layoff, which is defined as 50 employees during a 30-day period. The notification must be made to the affected employees, their representatives (the union if applicable), the states dislocated worker unit and the local government.

EEOC

If any person among the protected classes feels that they have been terminated because of their protected class, you will have to prove that the reason they were terminated was for business reasons such as poor performance or behavior, job abolishment, reduction in force, seniority for any good business reason, and not for

any illegal, discriminatory reasons. That will most likely require the documentation mentioned on page two.

Your Employee Handbook
Most employee handbooks have a section on how terminations might occur. This may include a grievance policy, a Performance Improvement Program (PIP) or a three step process of one verbal and two written warnings. Whatever your policy is, be sure you are following it. Your case can be an immediate loser if it can be shown that you did not follow the policy you wrote.

What the EEOC, DOL and courts want to see is in a termination for cause (such as bad performance) case is that:

- The employee was not performing the job satisfactorily
- He was made aware of the changes required
- He was given a reasonable opportunity and time to correct the performance
- He was aware of the consequences (possible termination)
- He still failed to correct the problems

They want to see that your original intention was to gain the performance you needed and not just to terminate the employee.

Deductions from Pay
There are strict limits on the company deducting money from an employee's pay. This often becomes a problem at termination time. As a general rule, you should not be deducting money from an employee's paycheck without her written consent. Weather that's for money she borrowed, tools she lost or uniforms that are missing, you should still get a signed agreement. Even with the signed agreement, there are very few cases where you can take the entire check. In most cases the amount you deduct cannot reduce the final paycheck to less than minimum wage.

Vacation Pay
No law requires you to provide paid vacation to your employees. If you do provide it, you may design your policy and its limits as you please. If your policy requires employees to work a full 12 months before they are granted vacation time and the employee does not complete an entire 12 months, then vacation is not due. If your policy states that vacation time not used within 12 months is forfeit, then after 12 months that vacation time is lost. However, in most states an employee who has vacation time earned, but not yet used or expired must be paid for that vacation time upon cessation of employment.

Disparate Treatment
As mentioned on page one, there are actually times when you cannot fire the worst employees. The term "disparate treatment" means that even if you did not intend to discriminate, if the end result of your actions adversely affects a group of employees who are among the protected classes, you may be charged with discrimination. For example, if you are terminating the last 20 employees hired and they all happen to be women, you may be guilty of disparate treatment.

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