You've Been Sued!
Trends in Wrongful Termination Claims

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Increase Communication to Reduce Risk

• Evidence suggests that terminated employees who feel their employer has been fair and respectful in the process are less likely to file lawsuits.

What is “employment at will”

• Either the employer, or the employee, may terminate the employment relationship, at any time, and for any reason, except an illegal reason.

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Limitations on “employment at will”

- Violation of federal and state laws, such as a claim of wrongful discharge based on discrimination or violation of family leave laws;
- Violation of common law rights, such as a claim of wrongful discharge in violation of public policy; and
- Breach of contract, such as a claim that the employer acted in conflict with a provision in an employee handbook or did not uphold a verbal promise.

Termination: does the lingo matter?

- Termination, also referred to as being separated or let go, with no particular implication as to the reason for the termination.
- Dismissal or “being fired” can imply that the employee’s performance or conduct was unsatisfactory.
- Retirement implies that the employee has voluntarily decided to cease being gainfully employed.
- Lay-off implies that employees are being put on unpaid leave status, but as soon as work is available they may be rehired; also “furlough.”
- Reduction in force implies that more than one staff member is being terminated, but no particular implication as to the reason for the terminations; generally, not appropriate to use when an employee’s performance was unsatisfactory.
- Reorganizing implies that positions are being eliminated and that reporting relationships are being restructured.
- Elimination of a position describes a situation where a particular position is being eliminated; no implication as to the reason, although generally not appropriate when the reason is poor performance; often used when grant funding that supports a position runs out or is terminated.
- SEPARATION of employment is a neutral expression that is always appropriate.
It’s not only what you say, it’s how you say it that matters

- Compassion, fairness and kindness: keep in mind that your values count.

Radio Shack: “The work force reduction notification is currently in progress. Unfortunately your position is one that has been eliminated.”

From Send: The Essential Guide to Email for Office and Home, by David Shipley and Will Schwalbe

Economic Realities

- Nonprofits are facing hardships from coast to coast.
- The need to retrench and regroup due to loss of long-time funding is not unusual.
- Letting people go may trigger employment claims.
Why Do Separated Employees Sue?
- Affected employees may not understand why they were selected for separation
  - This is often true when action is termination for cause or separation due to economic circumstances

Why the claims “bubble” in tough times?
- One possible reason: the time required to find new positions is greater than it would be in a strong economy

Separation
- What planning is required?
- What steps should you take in advance of a separation?
- Exit Interviews: What value?
Separation Checklist

- Follow closely any internal policies and procedures in the organization’s handbook.
- Articulate the objective, business-related reason for deciding which employee will be terminated.
- Consult with legal counsel, experienced in employment matters.
- Consider using a separation agreement and release.
- Review your D&O (and EPLI) insurance.

While it is hard, if not impossible to prevent all EPL claims...

- Nonprofits that do sufficient “legwork” prior to separating employees from their jobs stand the best chance of surviving administrative complaints and litigation largely unscathed.

Employment Cases

- Defense costs can be substantial. Even if the plaintiff wins a small sum, he or she may be able to collect attorney’s fees.
- What’s the value/cost of an employment case? One insurer says: a year’s pay is a good rule of thumb.
- Seems to be greater risk/cost with employees in higher pay categories; one possible reason—it takes them longer to find new jobs.
Wrongful Termination Theories

• Constructive discharge
• Discrimination
• Retaliation
• Violation of public policy
• Breach of contract
• Breach of FMLA

Administrative Complaints

• Many future plaintiffs begin at the administrative level by bringing a claim with the state human relations commission or EEOC.
• Check your D&O (EPLI) coverage to determine if your carrier regards administrative filings as “claims” under the policy.
• If “yes” – seek your carrier’s help without delay.
• Involving the carrier at the earliest stages is in your best interest. Failing to do so may jeopardize your coverage.

If EEOC or State human relations agency offers mediation...

• Consider it...
• Mediation reveals information about what claimant is looking for.
• Keep in mind that when the matter moves to litigation, it will be highly disruptive to your organization.
• Failing to settle claim at early stages can invite future claims!!
Trend Spotter

- Age Discrimination
- ADA
- Leased Employees
- Retaliation
- Religious Discrimination
- Gender Identity/Sexual Identity

[Website link]

Age Discrimination

- “Whether trying to retain or obtain a job, older workers may find themselves susceptible to unlawful age-based stereotypes and discrimination.”
  - Acting EEOC Chairman Stuart Ishimaru, at a July 15, 2009 hearing on age discrimination

[Website link]

Age Discrimination

- “Employers’ conscious or unconscious stereotypes about older workers may cause them to underestimate the contributions of these workers to their organizations. As a result, older workers may be disproportionately selected for layoffs during reductions-in-force.”
- “To then make matters worse, evidence suggests that older workers who lose their jobs may have more difficulty finding another job than their younger counterparts, due to age discrimination.”

[Website link]
Age Discrimination

• Stereotypes about older workers prevail, despite contrary evidence
  • Common negative stereotypes include that older workers are more costly, harder to train, less adaptable, less motivated, less flexible, more resistant to change, perhaps less competent and less energetic than younger employees.
  • Does job performance decline with age? No! The opposite is actually true. Research shows that performance often improves with age, and, when declines are found, they tend to be small. (Source: Michael Campion, Purdue University)

Recent Cases

• Recent Supreme Court rulings appear to make it harder for plaintiffs to prevail on age discrimination claims
  • Gross v. FBL Financial Services Inc. (June 2009) - plaintiffs must meet a higher standard of proof under the ADEA than under Title VII and other anti-discrimination statutes

Managing the Risk of Age Discrimination Claims

• Recognize that most people—including nonprofit staff—hold age stereotypes that negatively influence employment decisions.
• Work to ensure that all employment decisions begin with an analysis of the work to be done, and the knowledge and skills required to perform that work.
• Use only job-related standards to evaluate employees.
• Train employees about the existence and consequences of age stereotypes.
• Monitor the impact of employment decisions on protected groups, including older workers.
Americans with Disabilities Act of 1990 and ADA Amendments Act of 2008
(Applies to employers of 15 or more employees)
The ADA prohibits discrimination against qualified individuals with a disability (those who with or without accommodation are capable of performing the essential functions of the position). Those who are protected include:
- currently disabled individuals, persons having a record of impairment, persons who are perceived as having impairment or those who are related to or associated with persons who are disabled/perceived as disabled.

ADA Amendments Act of 2008
- Effective January 1, 2009
- Attempt to “strike a balance” between employer and employee interests
- What’s new?
  - Law now prohibits the consideration of mitigating measures such as medication, prosthetic, and assistive technology, in determining whether an individual has a disability.
  - The law now covers people who experience discrimination based on a perception of impairment regardless of whether the individual experiences disability
  - The law now provides that reasonable accommodations are only required for individuals who can demonstrate they have an impairment that substantially limits a major life activity, or a record of such impairment – accommodations need not be provided to an individual who is only “regarded as” having an impairment.

ADA Amendments Act of 2008
- What’s new?
  - The Act now lists major life activities, rather than leaving that phrase open to interpretation.
  - The non-exhaustive list of major life activities in § 4(4)(a) includes: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.
**Changes at the EEOC**
- According to one insurer, “The EEOC is becoming more of a “force to be reckoned with…”
  - May be finding probable cause more often then in the past
  - Areas of interest: organizational trends, instances where classes of people are involved

**Claim Example: Social Services “Ranch”**
- Long-time employee was engaging in outrageous sexual harassment.
- Former employee has sued the nonprofit and a large settlement is likely.
- Lessons:
  - Long-term employees are not exempt from policies
  - Don’t discount complaints

**Unintended Consequences**
- Large east coast nonprofit decided to hire its own, highly-regarded lawyer as defense counsel.
- The firm’s final legal bill outweighed value of case. The nonprofit won partial summary judgment. After that, the amount requested by the plaintiff went up. The case settled for “more than it should have.”
- Tip: get a budget from counsel! Proceed with caution when retaining your own counsel.
Leased Employees

- Employees of a third party (the leasing company or PEO) who work at a nonprofit in a specific capacity, usually defined by the contract with the leasing company.

- Leasing firms carry staff on the leasing company’s payroll, and handle all the withholding, paperwork, and human resources administration issues, freeing the traditional employer from many human resources burdens.

- Arrangement appears to relieve the traditional employer of liability for employment law claims, including wrongful discharge claims, but in fact does not.

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Leased Employees

CAUTION: several courts have found that employees who work under the direction and control of the on-site employer are deemed the common law employees of that employer, not the leasing company.

Both the nonprofit and the leasing company will have various legal responsibilities under federal and state employment laws for the leased employees.

Even if the contract with the leasing company is structured so that the leasing company handles many of the traditional roles of an employer, the nonprofit always retains liability for claims of discrimination and for the safety of employees in the workplace. Leased employees also are included in any count for coverage and nondiscrimination purposes if they’ve worked for the nonprofit for more than one year.

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Retaliation

- EEOC reports that retaliation charges are at a record high level – second highest category of claims behind race discrimination, more prevalent than gender discrimination

- Plaintiffs’ attorneys love filing these claims – difficult to dismiss because they are so fact sensitive
Hot Topic - Retaliation

What is a retaliation claim?
• "You fired me because I complained about illegal conduct at the workplace."
• "You fired me because I participated in an investigation, offering my views about an allegation of wrongdoing."

Government contractors beware!

• Whistleblowers are often protected in government contracts. Example:
  - Stimulus funds under the ARRA* come with protections for whistleblowers who complain that grant recipients have wasted or mis-used funds, violated laws or abused authority related to the use of stimulus dollars.
  
*American Recovery and Reinvestment Act

Tips for Avoiding Retaliation

• Make sure your policies prohibit retaliation
• Make sure that supervisors know that retaliation is against the law and contrary to your policies
• Educate supervisors about what may be perceived as retaliation and
• Discipline employees who retaliate!
Tips for Avoiding Retaliation

- Have an internal complaint resolution process and communicate the process to employees
  - Having a policy can encourage employees to come forward with allegations of unethical or illegal conduct
    - 49% of all frauds in nonprofits detected through tips
  - Source: 2008 Association of Certified Fraud Examiners “Report to the Nation”

- Take complaints seriously, investigate thoroughly
  - Close the loop – communicate the results of the investigation to the complaining party so that she doesn’t assume that her complaint was ignored.

Religious Discrimination

- Growing area of litigation since terrorist attacks on 9-11; growing sensitivity to religious diversity
- Federal law: Title VII of the Civil Rights Act of 1964 – applies to employers who have 15+ employees
- New compliance guidance for employers published by EEOC
  - www.eeoc.gov/policy/docs/religion.html

- Important tool: open door policy
- Harassment policy should address religious and race discrimination as well as sexual harassment

Gender Identity/Sexual Identity

- Gender identity refers to a person’s belief about whether they’re male or female. It is not how someone appears physically or their sexual orientation.
- Growing number of states protect gender identity.
- Resource for considering whether and how to draft policies that are sensitive to gender identity issues:
  - www.hrc.org/issues/9610.htm
On the Horizon
Proposed Federal Legislation

• Employee Free Choice Act
• Employment Non-Discrimination Act (would make sexual orientation a protected category)
• Expansion of family leave: 3 states now require some form of paid family leave; April 2009 federal legislation introduced that would expand the FMLA rights for federal workers. This trend could spill over into the private sector.

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Next month’s webinar:
September 2nd
Exempt or Non-Exempt?
Managing Misclassification Risks in the Nonprofit Workplace

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Termination Checklist

- Is the employee an employee at-will?
- Does the employee have a contract of employment that limits the circumstances in which the nonprofit may terminate the employee? (consult an attorney!)
- Are there any procedures contained in the handbook or personnel manual or otherwise that describe the process of termination of employment? If so, do those procedures apply here? Were they followed?
- Are the business-related reasons for termination articulated in writing?
- How old is the employee? If over 40, did the nonprofit offer this employee severance pay, and if so, were all the procedures required by OWBPA followed? (consult an attorney!)
- Does the employee have a disability? If so, was providing a reasonable accommodation negotiated with the employee? (consult an attorney!)
- Who will the employee be replaced with? Someone younger? Different sex?
  Different religion? Sexual orientation? Different ethnic background or nationality?
  Are you confident that no one could describe the motivation as discrimination?
- Was the employee aware that termination was a possibility or was likely? If so, is there documentation of that awareness?
- If the discharge is based on failure to follow policy or violation of policy, can the nonprofit document that the employee was aware of the policy?
Does the nonprofit have proof that the employee received the personnel manual or policies that are relevant to his/her termination?

If the discharge is performance-related, was the employee notified of the deficiencies, and given a reasonable time to improve his performance? (consult an attorney!)

If the termination is performance based, have you reviewed the employee’s most recent performance evaluation and does the evaluation support termination?

Are you certain that this employee has no expectations, either because of promises made, or because of past practices of the nonprofit, that terminated employees will receive any special treatment, such as severance pay?

Has the nonprofit discharged or disciplined other employees for similar reasons? If so, was the treatment of that employee consistent with this employee’s treatment?

Could the employee claim that the termination was in retaliation for the exercise of his/her rights, such as filing a workers compensation claim, or a sexual harassment complaint or making any other complaint of illegal conduct/breach of policy? (consult an attorney!)

Have you consulted the nonprofit’s policies on accrued but unused paid leave (vacation time, sick time) and are you ready to answer questions from the employee about his/her final paycheck and what it will include?

Are you ready to advise the employee about the impact of termination on his/her health insurance benefits (and benefits for any dependents)?

Has the employee been advised of his/her obligation to return any property belonging to the nonprofit prior to departure?

Do you have any concerns about how this employee will react when told about the termination of employment, such as concerns about violence? (consult an attorney!)

This information is provided by the Nonprofit Risk Management Center for educational purposes and should not be regarded as legal advice. For further information, please contact the Center, www.nonprofitrisk.org.
Exit Interview Form

Employee _______________________ Date __________ Interviewed By ______________

1. For what reason(s) are you leaving?

2. What is your understanding of the events that have led to your separation from employment with this organization?

3. What is your opinion of the supervision you received?

4. What did you most like and dislike about this organization and its policies?

5. What do you recommend that the organization change, if anything?

6. What is your opinion of the working conditions at this organization?

7. How do you feel about the pay? Benefits?

8. What is your opinion about the training you received?

9. Did you experience or witness discrimination, harassment, or other illegal conduct during your tenure with this organization?
10. Have you obtained a new job? Yes ____ No ____ If yes, please tell us:
   Employer’s name: _______________________________________________
   Address: _______________________________________________________
   Position title: ______________________ Starting salary: ______________

11. What do you see as most attractive about your new job?

12. Additional Comments:

Exit Conference Form

I have returned all property belonging to the [Name of Nonprofit], including keys, credit cards, and equipment.

I understand that during my employment I had access to confidential information about [Name of Nonprofit] and its clients and I agree to keep this information confidential.

I understand that it is the [Name of Nonprofit]’s policy [to][not to] provide reference information to individuals calling about former employees and that the [Name of Nonprofit] will [only provide confirmation of dates of employment, compensation and title] respond truthfully to questions asked by the person contacting [Name of Nonprofit] seeking information about my employment history and qualifications for employment, which I authorize [Name of Nonprofit] to do.

Signed: _________________________________ Date: ________________

For [Name of Nonprofit]: ________________________________
SAMPLE

Termination Agreement and Release in Full

Whereas EMPLOYEE X, (hereinafter “the Employee”) has been employed as the POSITION of the NAME OF NONPROFIT (hereinafter “NAME OF NONPROFIT” or “the Employer”); and

Whereas the Employee and the Employer wish to agree upon the terms and conditions of the Employee’s separation from the Employer by entering into this Termination Agreement and Release in Full; and

Whereas the Employee and the Employer agree that the Employee’s last day of employment shall be DATE.

Thus, in consideration of the mutual covenants and promises contained in this Termination Agreement and Release in Full (hereinafter “the Agreement”), the Employee and the Employer agree as follows:

   In exchange for the promises made herein by NAME OF NONPROFIT, Employee forever and irrevocably releases and discharges NAME OF NONPROFIT and its current or former subsidiaries, divisions, affiliates and other related entities, predecessors, successors, directors, officers, Board members, assigns, agents, employees, insurers, attorneys, representatives (collectively, “the Releasees”) from any and all claims, debts, suits, charges, contracts, liabilities, damages, actions or causes of action of any nature or from whatever source that he/she may have had against the Releasees prior to the effective date of this Agreement, for, upon or by reason of any matter, whether known or unknown, suspected or concealed, and whether or not currently asserted, including but not limited to any claims that the Releasees:
   ♦ violated public policy or common law (including but not limited to claims for personal injury, invasion of privacy, wrongful discharge, negligent hiring, retention, or supervision, misrepresentation, defamation, intentional or negligent infliction of emotional distress, intentional interference with contract, negligence, detrimental reliance, promissory estoppel or loss of consortium); or
   ♦ discriminated against Employee on the basis of his/her age in violation of the Age Discrimination in Employment Act or his/her race, sex, disability or any other basis in violation of Americans with Disabilities Act, the Rehabilitation Act, Title VII of the Civil Rights Act of 1964, the Employee Retirement Income Security Act, and the Civil Rights Act of 1991, 42 U.S.C. § 1981, or any other local, state, or federal law or constitution, regulation, ordinance or executive order.

   (b) It is the specific intent and purpose of Employee to release and discharge the Releasees from any and all claims and causes of action of any kind or nature whatsoever, whether known or unknown, whether specifically mentioned herein or not, which may exist or might be claimed to exist at or prior to the date hereof. It is agreed and understood by the parties that this release is a GENERAL RELEASE to be construed in the broadest possible manner consistent with applicable law. Excluded from this General Release is any claim or right that cannot be waived by law, including any right to accrued vacation.

2. Covenant Not To Sue by Employee. A “covenant not to sue” is a legal term that means a person promises not to file a lawsuit or other legal proceeding. It is different from the General Release of claims contained in the preceding paragraph. Besides waiving and releasing the claims covered by the preceding paragraph, Employee promises never to file or prosecute any legal claim of any kind against any of the Releasees in any federal, state or municipal court, asserting any claims that are released by this Agreement. Excluded from this covenant not to sue is the right to file charges with, or participate in an investigation conducted by, any agency that expressly prohibits waiver of such rights. Employee is waiving, however, any right to monetary recovery, including but not limited to compensatory or punitive
damages, attorneys’ fees or costs, or right to reinstatement should such an agency, or any other person, entity or group, pursue any claim on his/her behalf. Employee represents that, as of the date he/she signs this Agreement, he/she has not filed or caused to be filed any claims against any of the Releasees. If Employee files or prosecutes a claim in violation of this covenant not to sue, Employee shall liable to NAME OF NONPROFIT for reasonable attorneys’ fees and other litigation costs incurred in defending against such a claim.

3. The Employee also acknowledges and agrees that during her period of employment with the Employer, he/she has been provided access to confidential information about the Employer, including, but not limited to information about board members, employees, financial matters, contractual matters and other issues. The Employee agrees not to divulge any such confidential information to any third party. The Employee acknowledges that if she breaches this promise of confidentiality, he/she will be liable to the Employer for any damages that may result directly or indirectly from such a breach, including, without limitation, attorney’s fees.

4. The Employee further agrees to refrain from disparaging the Employer and acknowledges that if he/she breaches this promise not to disparage, he/she will be liable to the Employer for any damages that may result directly or indirectly from such a breach, including, without limitation, attorney’s fees.

5. The Employee agrees to account for all of the Employer’s property and documents that he/she may have possessed during the term of employment and the Employee represents and promises that he/she will return all such documents and property to the Employer on or before DATE. The Employee understands that if the Employer subsequently discovers that the former Employee has stolen or damaged any property (including electronic assets) belonging to the Employer or any of its employees, or if the Employee has failed to return such items, the Employee will be liable to the Employer for any damages that may result directly or indirectly from such a breach, including, without limitation, attorney’s fees.

6. As consideration for the Employee’s agreement to the terms and conditions of this Agreement, the Employer will pay the Employee severance pay of a sum equal to X month’s salary in the gross amount of AMOUNT ($X amount). The amount paid shall be subject to applicable federal and state tax withholding and statutory deductions. As additional consideration the Employer will pay the Employee a lump sum of AMOUNT which is equivalent to the current monthly premium for the employee’s health coverage for a period of six months. An additional sum equal to the value of the Employee’s accrued vacation leave as of DATE will also be paid. No other benefits shall be paid or provided. The Employer acknowledges that this consideration is greater than any severance or other payments to which the Employee would be entitled without executing this Agreement.

7. The Employee agrees that the terms and conditions of this Agreement shall remain strictly confidential, and he/she further agrees not to disclose to any third party, other than her legal counsel or immediate family members, the terms and conditions of this Agreement, except as may be required by law. The Employee understands that if there is a breach of the confidentiality provisions of this Agreement the Employee will be liable to the Employer for any damages that may result, directly or indirectly, from such breach, including, without limitation, attorney’s fees.

8. Nothing contained in this Agreement, or the fact of its submission to the Employee, shall be construed as an admission of any liability or wrongdoing on the part of the Employer.

9. The Employee acknowledges that he/she has entered into this Agreement freely, knowingly, and voluntarily. The Employee agrees and acknowledges that s/he has read this Agreement carefully and fully understands all of its provisions. The Employee further acknowledges that the Employer advised the Employee to consult with legal counsel with respect to this Agreement before executing it, and the Employee acknowledges that he/she has had the opportunity to consult with legal counsel and he/she has had 21 days to review this Agreement. By signing below, the Employee acknowledges that he/she has
voluntarily accepted the terms and conditions of this Agreement and that acceptance of the terms and conditions of this Agreement may be revoked within seven days of acceptance. This agreement shall become final on the eighth day after acceptance by the Employee.

10. This Agreement constitutes the entire agreement between the parties with respect to all the matters discussed herein and supercedes all prior contemporaneous discussions, communications or agreements, expressed or implied, written or oral, by or between the parties.

11. This Agreement shall be construed and enforced in accordance with the laws of STATE.

____________________________ __________________________
Employer Signature & Date   Employee Signature & Date