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Defensive Documentation: 101 WAYS TO AVOID LABOR PAIN

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101 WAYS
TO AVOID LABOR PAIN

Avoiding labor pain is the goal of every employer when the cost of litigating a single employment dispute can exceed six digits. For smaller employers, one lawsuit can wreak havoc on an already stretched budget. There are three simple rules to follow for employers wishing to avoid such unanticipated costs of doing business:

#1. Obey the letter and spirit of each and every employment law and regulation;
#2. Treat every employee fairly and with respect; and
#3. Accomplish #1 and #2 from the perspective of each individual employee.

If achieving compliance with Rule #3 appears somewhat daunting, this article provides 101 other ways to avoid or hopefully reduce the risk of unnecessary labor pain. Each of the 101 suggestions is identified numerically in the text and is not a reference to a footnote. Some of the ideas presented are universally accepted, while others may be a bit out of the box or even controversial. Whether any specific idea is appropriate for a particular workforce depends greatly upon a variety of factors, not the least of which is what state's laws apply to the employees. These factors would need to be explored with qualified legal counsel.

I. PRESERVING "AT-WILL" STATUS

An "at-will" employee may be terminated for a good reason, a bad reason, or for no reason at all; but, he or she cannot be terminated for an illegal reason. The cynical view is that the exceptions, created by the myriad of illegal reasons, have all but swallowed the employment "at-will" rule. Nevertheless, the single most important thing any employer can do to insulate itself from the unnecessary lawsuit remains preserving the at-will status of its workforce. This must be done expressly in writing, such as the following magic language:

> *At ABC, Inc., all our employees are terminable "at-will." This means that neither you, nor the Company, are committed to continuing the employment relationship for any specific period of time. Rather, the employment relationship will continue "at will" such that either side may terminate the relationship at any time, with or without cause and with or without notice. Also, the Company retains the right to demote, transfer, change job duties, and change your compensation at any time with or without notice and with or without cause in its sole discretion. In deciding to work for the Company, you must understand and accept these terms of employment. It is important to note that no one at the Company has the authority to promise or guarantee you employment for any specific period of time, or to alter your terminable "at will" employment status except for the Chief Executive Officer ("CEO") of the Company, and such promise or guarantee must be in writing and signed by both you and the CEO.*

The last phrase is important in order to avoid claims that a former manager made an oral promise that narrowed or eliminated an employee's at-will status. Allegations of an oral promise can get complicated particularly if the officer alleged to have made the promise has since died, or worse,

been fired. Regardless of the circumstances, summary judgment is unlikely, unless the employer has expressly stated in writing that there are no oral modifications of at-will status.[1]

This critical language might be located at the bottom of the application form, in the offer letter, at the front of the employee handbook, in the proprietary information agreement, and/or even on disciplinary forms. Frankly, it simply cannot be said often enough, and preferably in a format that the employee signs acknowledging that he or she has received, read, and understood it.[2] If there are employees in the workforce who may be more comfortable reading this in another language, then for goodness sake, pay what it takes to get at least this policy translated.[3]

Once the magic language is in place, the employer still has to avoid doing something really stupid, like limiting its right to terminate employees at-will.[4] Even if the employee handbook expressly states that it is not a contract, and reserves the right to amend, withdraw, rescind, dynamite, or otherwise cause the handbook to self-destruct without notice, it is still better not to mislead the workforce. Stating on the front page that an employee may be terminated at-will, may confuse an employee when just a few pages later there is a definition of "permanent employees" (those surviving their probationary period and sprinkled with magic fairy dust on their 91st day of employment). It might be better to refer to new employees as "introductory employees," and those who successfully complete their introductory periods as "regular employees." In any event, it is important to note when making such distinctions that all employees are terminable "at-will" even if they complete the initial period.[5]

II. APPLICATION FORMS

Applications are a great starting place to avoid getting sued or to reduce an employer's potential liability and damage exposure.

A. Employment History.

In addition to preserving the at-will status by including the magic language described above, the application might also clarify that the applicant must identify all prior employers.[6] By requiring the applicant to list every employer, the list should include the places where the applicant was fired. Instruct the applicant to attach additional pages if needed. Expressly state that failure to provide accurate and complete information may result in rejection of the applicant or termination if discovered later. Why is this important? Because sometimes employees lie, and because sometimes the employees who lie file lawsuits. In this situation, if during the discovery process it turns out that the plaintiff failed to list on his application a prior employer who fired him for using illegal drugs on premises, the defendant employer may have the benefit of the "after-acquired evidence" doctrine. This doctrine, applicable in some contexts, allows an employer to argue that even if a jury finds that the plaintiff was terminated illegally in March, if the plaintiff would have been legally terminated upon discovery of the omission from his application, then the plaintiff's damage award for lost wages and benefits may be cut off as of the date of such discovery. The after-acquired evidence doctrine snatches victory (or at least a reduced loss) from the jaws of defeat. Thus fulfilling the old saying, "What goes around, comes around."

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