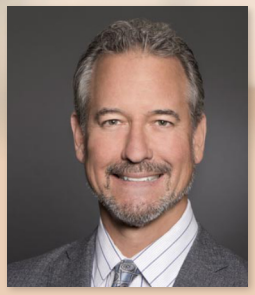
Severance Pay and "Settle and Go Home" Situations



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You terminate a poorly performing employee. They were a lousy employee, so you don't want to give them any severance pay, which is understandable, but that is Mistake #1. Then, the now-former employee goes to an attorney and asks about their "rights" after they were "wrongfully terminated." Often, the attorney will recommend that they pursue a "tort" claim, such as wrongful termination, harassment, discrimination, or retaliatory discharge. Employers often assume that because California, like most (if not all) states is an "at-will" state, the employer doesn't need a reason for the termination; or at least doesn't need to document the reason(s). Mistake #2.

As soon as an employee asserts a claim for harassment, discrimination or retaliation based on a protected category (age, race, disability, etc.), the employer cannot use at-will as a defense. Instead, the employer must demonstrate the "legitimate business reasons" for termination. So, the documentation of those reasons before termination is critical, even for new employees who are in their introductory period, if any. Note that "probationary period" is a term used in the public sector and not used in the private sector unless an employee is being disciplined and "on probation."

In a better-case scenario, the attorney takes a look at your strong paperwork that you prepared (on our advice), and concludes that the employee deserved to be terminated and there is no wrongful termination or other tort claim. The attorney is on contingency, always, so they don't get paid unless they win or settle. They won't take a weak case most of the time. Of course, in today's litigation climate, even weak cases tend to generate value for purposes of settlement. Taking the moral high ground is time-consuming and expensive, so the pragmatic approach is almost always for the employer to settle and be done with it if you can do so within a reasonable range of settlement value and before you spend money to defend the case. The reality is that over 98% of all filed civil cases settle before going to trial – so don't waste your money on defense costs if you can get rid of the case early – whether through negotiation or early mediation.

Now, back to your disgruntled ex-employee who is sitting with the attorney. The attorney switches gears from wrongful termination and moves into wage and hour issues; something the employee likely didn't consider. The attorney asks about how the employee was paid (salary, hourly, commissions, bonuses, piece rate, etc.), when and how they took meals and rest breaks, looks at a paystub or two, and maybe a timesheet. The attorney discusses claims such as meal break violations apparent on a time sheet that you had to produce informally or the employee kept when they left; paystubs that have incorrect or absent information; improper calculation of overtime because bonuses, commissions or other "non-discretionary" compensation (a topic for another day) wasn't

included in the base hourly rate to determine overtime or meal/rest break premiums. These types of claims may be common to an entire group of your employees. Then, really bad things happen.

The attorney dazzles the former employee with potential dollar signs by enticing the employee to be the "lead plaintiff" in a class action on behalf of all your hourly employees. In reality, the employee would recover more if the employee came after you individually, but the attorney will earn only a fraction of what they can receive if they pursue a class action or what is known as a "PAGA claim" under California law. PAGA, or Private Attorney General Act, claims, are a type of class action specific to Labor Code wage and hour violations. The attorney uses the employee simply as the figurehead or "straw man" to get their legal claws into you. If you were the plaintiff attorney, would you rather have 40%-50% of a very small number in a single-employee case or, typically, 30% of a very very large number in a class action or PAGA case?

The upshot of this is that we almost always recommend that you provide even lousy employees with at least some severance pay. In return, they have to sign a (simple) release of all claims. This will insulate you from all tort claims (wrongful termination, discrimination, etc.). It will almost always insulate you from wage and hour claims (with some exceptions). Note that the release can't prevent a post-termination workers compensation claim or release a pending claim.

Class action/PAGA is a nightmare for employers and is a loser 99% of the time. So we get to settlement as fast and as inexpensively as possible under the circumstances; which depends largely on the number of past and present employees at issue and how many mistakes the employer has made. And, you will make mistakes; even small mistakes generate large penalties when you do the math for dozens, hundreds or even thousands of employees. As one of my clients said after settling in mid-six figures a class action for what were largely minor violations, "I didn't realize that doing nothing wrong is not the same as doing Every. Thing. Right."

And for the beleaguered and overburdened HR Director who is faced with the CEO's edict, "I just want him out, NOW," what's your best strategy for handling both senior management and the offending employee? Details next time…