Western New England Law Review

Volume 21 *21 (1999)*
Issue 2 *Symposium: Employment Practices Liability Insurance and the Changing American Workplace*

Article 7

1-1-1999

MANAGING THE RISK OF EMPLOYMENT-RELATED PRACTICES LIABILITIES BY INFLUENCING THE BEHAVIOR OF EMPLOYEE CLAIMANTS

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INTRODUCTION

Employers throughout the United States are faced with rapid and increasing changes and developments in the area of employment law. Currently there are staggering numbers of employment-related claims being filed with various administrative agencies and state and federal courts. Such claims can often result in tremendous employer liability as well as substantial legal expense, causing employers to settle even frivolous cases in order to avoid the risk and expense of employment litigation.

Obviously, because of the litigious society in which employers must operate, it is virtually impossible for any employer to eliminate all potential employment litigation. However, as set forth below, there are a number of specific steps employers can take to influence the behavior of employee claimants. These steps can and should be taken at various stages: (1) *before claims arise,* to prevent and deter their occurrence; (2) *after an employee makes a complaint, but before litigation ensues*, to promptly and adequately address the concern and keep it from escalating; and (3) *during the litigation process*, by aggressively evaluating the case and exploring alternative dispute resolution mechanisms.

I. INFLUENCING BEHAVIOR BEFORE CLAIMS ARISE

The most effective way for an employer to influence employment-related claims *before* they arise is to have a clearly established

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paper trail the employer can use as documentary evidence to support decisions that are subsequently the source of litigation.

When determining whether an employer has sufficient documentation of all employment-related decisions, the employer should analyze its position from the standpoint of an employment cycle. This cycle will include all aspects of an employment relationship, i.e., interviewing, hiring, employee performance, and the separation process, including discipline, termination, or voluntary separation. Each employer must be assured that it can adequately document any decision made at any point during the employment cycle.

A. *Develop and Implement an Employee Handbook*

An employment handbook is an excellent method of documenting company rules, policies, and procedures and generally acquainting employees with the way an employer conducts its business. Employers across the nation have increasingly turned to the use of employment handbooks to implement and streamline their personnel policies. Specifically, employment handbooks offer employers an opportunity to communicate personnel policies, employee benefits, and work standards to all employees in a single document. Such handbooks also provide valuable instruction and guidance for supervisors and personnel administrators regarding implementation and enforcement of company policies, thus fostering uniform and consistent treatment of employees and reducing the risk of disparate treatment.

Additionally, employers can limit their liability to employees for these benefits by putting in writing the exact nature and extent of benefits offered to all employees. These policies and provisions regarding employment benefits can then be used to refute allegations by an employee that he or she was promised, either orally or by implication, certain benefits which the employer never intended to offer.

An effective employment handbook is one of the primary methods used to ensure documentation of all employment-related decisions made at different stages of the employment cycle. As such, handbooks can have a significant influence on preventing and deterring claims and put the employer in a stronger position to defend against any claims that do arise.

1. Preparing a Handbook

Preparation of the handbook is essentially a two-step process. First, the employer must determine the audience to whom the policies will be addressed, and second, the employer must determine what policies will be included in the handbook.

a. Defining the audience

Establishing an audience will depend on the size of the work force, the nature of the organization, the geographical distribution of operations, the job classifications of employees, and other factors. For example, an employer with significant numbers of sales, professional, production, and transportation employees in various different locations may find that setting forth policies on such topics as work schedules, overtime pay, vacations, and leaves of absence in separate publications assessed to particular groups avoids confusion and misinterpretation or misapplication of policies. Operations in different states may also make separate materials desirable to reflect variations in state law requirements. If a handbook or manual is addressed and distributed to employee groups that include employees represented by a labor organization, appropriate qualifications of policies that conflict with the collective bargaining agreement must be included. A clear statement of the groups of employees to whom the policies will or will not apply should be included in all manuals or handbooks to further avoid confusion.

The selection of the audience for the handbook or manual will affect the topics to be covered by the material. For example, hiring policies and pre-employment procedures are important topics for supervisors who have hiring responsibilities. Such policies are not relevant to all employees and thus should not be included in basic employment handbooks to be distributed to nonsupervisory personnel.

On the other hand, some policies may be appropriately included in both employee handbooks and supervisor manuals, with additional information for supervisors regarding implementation. For example, an employee handbook provision on post-employment references could simply state that the employer's policy regarding references for employees who have left employment is to disclose only the dates of employment and the last title held by the employee. A supervisor manual policy on the same subject could contain an additional direction to supervisors to refer all reference inquiries to a specified individual (such as the personnel director).

Such an instruction, consistently followed, should ensure that the company's policy will be implemented as written.

Certain policies and procedures that are applicable to nonsupervisory or supervisory personnel may not be appropriate for higher-level managerial employees. Integrated employment agreements, which are generally preferable, set forth the nature of the employment at-will relationship and incorporate by reference the employer's policies (such as the equal employment opportunity policy and other protective policies) that apply to the executive's employment relationship with the employer. If such specific agreements are executed, employee handbooks and supervisor manuals should contain a statement explaining that not all of the policies stated apply to managers above a specified level.

b. Selecting policy topics

No hard and fast rules dictate which policies should or should not be included in a handbook or manual addressed to any particular group of employees. Generally, a basic employment handbook addressed to nonsupervisory personnel for post-hire distribution will contain policies such as the following:

- An introductory section describing the purpose of the handbook, the employees to whom the policies apply, sources of additional information, a description of the employment at-will relationship, and a statement that the policies in the handbook replace previous policy statements and practices.
- An Equal Employment Opportunity Policy setting forth the employer's commitment to equal employment opportunity (and affirmative action, if applicable).
- An "hours of work" section describing work schedules, breaks, meal periods, the work week and work day established for overtime pay calculation purposes, time recording requirements, and overtime work requirements.
- A benefits section setting forth vacation, holidays, sick leave, leaves of absence, insurance coverage, pension plans, and other benefits available to employees.
- Work, safety, and/or conduct rules informing employees about the company's expectations as to behavior in the workplace.
- An acknowledgment and receipt form for employees to sign and return recording their receipt, understanding of, and agreement to abide by the provisions in the manual or handbook. Such

forms, when the employer collects and retains them, are useful in establishing that employees had notice of the policies, expectations, and prohibitions of the employer and can be critical to the defense of wrongful discharge actions by demonstrating the employee's knowledge and acceptance of the at-will employment relationship.

- Additional policies addressing orientation periods, performance evaluations, solicitation/distribution rules, open-door policies, employment classifications, personnel records, punctuality and attendance, bulletin boards, jury duty, conflicts of interest, dress codes, trade secrets, confidentiality requirements, educational benefits, drug/alcohol policies, and bonus programs are also desirable and often included in employment handbooks.

To the extent that these topics are addressed in the employment handbook, an employer will be able to document that it has policies pertaining to each of these areas and how such policies are applied. As such, the employer can significantly deter claims from arising and can put itself in a much stronger position to defend against any claims that do arise.

B. *Conduct Complete and Accurate Employee Evaluations*

Employers often find themselves faced with claims of wrongful termination or employment discrimination by employees who were justifiably terminated for legitimate reasons. Unfortunately, the employer may find it difficult to defend against such claims because of inaccurate or incomplete evaluations of the employee's performance during his tenure of employment. In the present litigious environment for employment-related claims, it is imperative that employers honestly, accurately, and fairly evaluate the employee's performance in addition to thoroughly documenting the employee's conduct. Evaluation inflation, which does not accurately reflect the extent of substandard employee performance, creates a false picture. When evaluation inflation occurs and there is subsequent litigation, an employer can face the very difficult burden of attempting to contradict or explain inaccurate employee evaluations.

Performance evaluations are also an important tool from a personnel administration standpoint, because if conducted properly, such evaluations accurately communicate management's opinion of a particular employee's performance. While conducting an evaluation is not required, it is undoubtedly advantageous for employers to do so. Notwithstanding their usefulness in litigation, evaluations

often identify performance problems and encourage employees to improve or exceed performance standards without the imposition of discipline.

In conducting evaluations it is critical that the evaluator present an objective and accurate analysis of an employee's performance and resist the temptation to give false praise. As stated, inflated evaluations come back to haunt an employer who has terminated an employee on the grounds of poor job performance, especially when the employee can produce a series of strong evaluations. However, evaluations should not contain insulting, defamatory, or inflammatory language. Instead, employers should teach their supervisors to make evaluations fact oriented and not overly conclusive. For example, an employee is not to be labeled as "a bad employee" but rather, the evaluator should state that the "employee fails to arrive at work on time and is less productive that other employees working in the same position on the same shift."

The following checklist is helpful for employers to self-assess their employee evaluation system:

- Does the company conduct employee performance reviews? If so:

  For which employees?
  How frequently?
  Who performs the review?
  Is feedback provided to employees at appropriate intervals?
  Are supervisors trained in reviewing performance?
  Are reviews made in connection with prospective pay increases?

- Is a checklist or guide provided for evaluation purposes?
- Do the reviews appropriately measure performance?
- Have performance criteria been established in advance and communicated to employees?
- Is there a formal means of relating compensation to performance?
- Is there an appropriate relationship between compensation and performance?
- Are wage and salary increases based solely on merit?
- How frequently are wages and salaries reviewed?
- How is the amount of increase determined?

- Do employees in the same pay range receive the same merit increase?
- Do supervisors discuss performance reviews with each employee?
- Is the accuracy and objectivity of evaluations monitored in order to avoid inappropriately positive or negative evaluations?
- Is the performance review data used in management development/training and staffing requirements?
- Is the Human Resources Department appropriately involved?

This checklist may provide an employer with valuable insight into its evaluation system. Once the employer is aware of the potential risks posed by gaps in its evaluation system, it should restructure its review policies.

1. Recommendations for Conducting Proper Performance Reviews

When conducting employee evaluations employers should consider the following recommendations:

a. Keep your promise: periodic reviews prevent potential problems

If employees are to be reviewed periodically, review dates should be calendared and undertaken in a timely fashion. While employers should specify the frequency of evaluations, they should also allow themselves sufficient flexibility, such as the option to conduct extra evaluation sessions in the case of a problem employee. As noted, once the evaluation procedure is established, the company should take care to ensure that it is followed and that employees in fact receive evaluations.

b. Be truthful: do not be afraid to give negative evaluations

The negative impact in subsequent employment litigation can be tremendous when a plaintiff employee was not truthfully evaluated, i.e., given unreasonably positive evaluations which were inaccurate. Employers must be sure that supervisory personnel are aware of the potential problems that can arise from inaccurate employee evaluations.

c. Develop a form and follow it

Developing a standard form for employee evaluations can be extremely useful. However, the form should be flexible enough so that comments appropriate to the position being evaluated can be made. An employer must also be able to explain the purpose of each of the ratings or categories listed on the form. It is also good practice to describe and set performance goals while providing suggestions in order to accomplish such objectives. When faced with a discrimination and/or wrongful termination lawsuit, it is helpful if an employer can show objectively that a terminated employee did not meet the agreed upon and objective future performance standards. Clearly, all performance ratings must be strictly job-related to avoid claims of discrimination. Further, if the employee has a disagreement with the evaluator's assessment of the employee's performance, the employee should be permitted to explain such a disagreement.

d. Train supervisors on how to review employees so they are objective, specific, consistent, and realistic

Supervisory personnel who perform employee evaluations must be given adequate training. As part of their training, supervisors should be given examples of both proper and improper employee evaluations as guidelines. It is also important for the employer to emphasize the need for the supervisor to honestly evaluate their subordinates on a regular basis as a means of avoiding litigation and improving the overall work product.

e. The results of an employee evaluation should not be a surprise

An effective employee evaluation system should ensure that both the employee and employer are aware of the employee's performance rating. Documentation of employee performance and open communication between supervisory personnel and employees will provide awareness of the results of periodic employment reviews and thus, subsequent evaluations should not be a surprise to either the company or the employee, absent any drastic changes in employee performance.

f. Review performance evaluations before providing them to an employee

An important human resource function is to ensure uniformity, consistency, and fairness with respect to the implementation of all

employment-related rules and policies. To accomplish this on a company-wide basis, it is useful for a human resources department or other administrator to review performance evaluations before they are actually presented to an employee. Such a review will also allow for the detection of any inappropriate considerations, such as a reference to a protected class or the utilization by a supervisor of a non-job-related criteria in conducting the evaluation.

g. Include the employee evaluation policy in the employer handbook

Consider using the following language in the employment handbook when establishing a policy of employee evaluations:

> Employees will receive periodic performance reviews. The review will be conducted by your supervisor who will discuss it with you. Your first performance evaluation will be after the completion of your trial period. After the review, performance evaluations generally will be conducted annually, on or about the anniversary date of your employment with the Company. The frequency of performance evaluations may vary depending upon the length of service, job position, past performance, changes in job duties, or recurring performance problems.
>
> Your performance evaluations may review factors such as the quality and quantity of the work you perform, your knowledge of the job, your initiative, your work attitude, and your attitude towards others. The performance evaluations should help you become aware of your progress, areas for improvement, and objectives or goals for future work performance. Positive performance evaluations do not guarantee increases in salary or promotions. Salary increases and promotions are solely within the discretion of the Company and depend upon many factors in addition to performance. After the review, you will be required to sign the evaluation report simply to acknowledge that it has been presented to you, discussed with you by your supervisor, and that you are aware of its contents.

Proper communication between the human resources department and the supervisory personnel who will be performing the evaluations is an important element in avoiding inaccurate or inflated employee evaluations. Supervisors must understand the importance of accurate evaluations in order to ensure an efficient and productive workforce and to avoid problems that can arise in the context of employment litigation when evaluations have not been properly conducted.

II. Influencing Behavior After a Complaint is Made But Before a Lawsuit is Filed

A. *Conducting Effective Employee Conduct Investigations*

Employers often receive complaints from employees about a co-employee's misconduct or violation of company policy. Conducting an internal investigation of such a complaint is critical because it may demonstrate the good faith of the employer in a later lawsuit. Conversely, ignoring such complaints reflects poorly on the employer and may aggravate losses and alienate employees. There are seven steps that should be followed in any investigation: (1)Planning; (2) Preserving Evidence; (3) Selecting Investigative Tools; (4) Interviewing Witnesses; (5) Reaching a Conclusion; (6) Communicating the Results; and (7) Follow-up. These seven steps are discussed below.

1. Planning

Prior to conducting an investigation, the employer should determine whether an investigation is necessary, and if so, what the purposes of such investigation will be and who will conduct the investigation. Throughout the investigative process it is important that the employer and its investigator remember that, if litigation ensues, the investigation will be subject to scrutiny by a future plaintiff. Therefore, it is imperative that the entire investigation process be objective, fair, and neutral.

Generally speaking, once an employer receives a complaint of employee misconduct, an investigation into the facts should be conducted. Such an investigation may uncover unlawful employee activity or employee activity which violates company policy. The liability of a company for such conduct may be reduced by stopping the conduct once put on notice of it and, where appropriate, making disclosure to governmental agencies. There are, however, some drawbacks to conducting an investigation such as cost, time, and the risk of adverse publicity.

Once a decision has been made to initiate an investigation, the employer should have a specific purpose and goal in mind. The primary goal of many investigations will be to determine whether the asserted claim has any merit and whether corrective measures directed at employees are appropriate. Other investigations, responsive to receipt of an administrative charge, will likely have the main goal of defending the company's actions. Accordingly, the

events that trigger the investigation will often dictate the goal of the investigation.

Determining who should conduct the investigation is a critical decision. Usually, the investigator will be chosen from human resources, management, or an in-house legal department. Outside investigative consultants and legal counsel provide another alternative to employers. However, in such cases, counsel that conducts the investigation may potentially be characterized as a witness and thus be subject to a motion to disqualify in any subsequent lawsuit.

The investigator selected should possess three important traits: (1) credibility; (2) knowledge of company policy; and (3) interviewing skills. It is imperative that the investigator selected be both credible to the complainant and to management. The person should be viewed as neutral, objective, and unbiased. The complaining employee needs to feel that his or her complaint will be addressed fairly. Next, the investigator needs to have sufficient knowledge of company policy so that he or she can fully understand the nature of the complaint and formulate appropriate questions. Lastly, the investigator should possess interviewing skills such as the ability to analyze information, listen attentively, and direct the witness's attention to the proper question.

2. Preserving Evidence

A very important part of an investigation is the preservation of the evidence. Usually, the evidence will be in the form of documents which need to be identified and reviewed in a timely fashion. The employer should not forget to consider nontraditional forms of documents such as computer disks, e-mail, and telephonic recordings. Once any document has been discovered and reviewed, custody becomes critical. An investigative file should be set up in a secure place to maintain documents in confidence.

3. Selecting Investigative Tools

As an important part of the planning process, the employer must determine which investigative tools are most appropriate. For example, if sales associates are suspected of improper cash handling, but the employer has scant actual proof of theft, a shopping investigator might be utilized. In such circumstances, an immediate interview might actually be counterproductive.

The wide array of investigative tools should be evaluated and

carefully considered prior to undertaking any investigation. If more than one investigative tool is to be utilized, the employer must consider how each will interact with the other and must consider an appropriate sequence of their use. Although it is simply impossible to predict which tack an investigation will take, an attempt should be made to predict possible directions and to plan alternative approaches in the likely event of contingencies.

Often, the primary investigative tool selected will be to conduct interviews of employee witnesses. Techniques and suggestions for conducting such interviews are outlined below.

4. Interviewing Witnesses

Prior to interviewing any witnesses, it is essential to prepare an outline of questions pertinent to the issue being investigated. Additionally, an interviewer should have copies of all relevant documents available to show a witness when appropriate.

At the beginning of each interview, the investigator should disclose to the witness the purpose of the investigation. A written record indicating that disclosure has been made should be obtained from the witness acknowledging such disclosure. Before beginning to question the witness, it is important to assure the witness that the company is seeking the truth, whatever that may be. Reassure the witness that the company will not permit any retaliation. Stress that no conclusions have been reached, but rather, that the interviewer is merely investigating the allegations.

To conduct a thorough investigation, it is usually best to address each alleged event by asking the witness who, what, why, when, and where questions. Try to avoid questions that disclose information received from others during the investigation. Above all, show sensitivity to the witness such that you put the witness at ease and obtain the maximum amount of information.

Before concluding the interview, the investigator should review the information obtained with the witness for accuracy and completeness. Then, the investigator should give the witness the opportunity to add any additional information that he or she chooses. If the investigator is interviewing the complainant, the investigator should tell the complainant that he or she will be contacted once the investigation is concluded. If the investigator is interviewing the employee who allegedly engaged in misconduct, the investigator should tell the employee that he or she will be contacted, and possible disciplinary action may be taken, at the conclusion of the

investigation. Lastly, the investigator should request that all witnesses keep the investigation in confidence.

In a unionized work setting, employers must be careful not to violate the right to union representation for employees who might be disciplined (typically, those accused of discrimination or harassment). In *National Labor Relations Board v. J. Weingarten, Inc.*,[1] an employer refused to allow a union representative to be present at an investigatory interview with an employee. The Supreme Court concluded that the employer's conduct constituted an unfair labor practice where an employee reasonably believes that the meeting could result in employment discipline. When interviewing union members who are only witnesses and not themselves accused, the employer should advise the employee, and have them acknowledge in writing, that the interview is voluntary, that the employee may terminate the interview without retaliation at any time, and that no disciplinary action will be taken against the employee being interviewed (Blue Flash warning).

5. Reaching a Conclusion

Once the company has completed an interview of each relevant witness, each interview should be reviewed and considered. In evaluating the evidence, consider the following questions: Was the witness credible? What motivation might the witness have to be less truthful? Does the accused demonstrate a pattern of misconduct? Did the accused deny the charges or admit that he had made a mistake? How does the timeliness or untimeliness of the complaint relate to the event? On some occasions, the employer must reluctantly conclude that it cannot reach a determination.

Once the company has evaluated the evidence, an attempt must be made to reach a conclusion. Generally, the conclusion will either be that the complaint was unfounded (without merit) or that it was sustained (facts alleged in the complaint were found to be truthful). Sometimes, at the conclusion of an investigation, although the facts asserted in the complaint may have been found to be true, there may be mitigating circumstances which affect the extent or type of discipline to be imposed. Questions to consider in this regard are: (1) was any law violated? (2) was the company policy violated? (3) has the employee committed similar violations in the past? (4) how long has the employee been employed? and, (5) are any policy changes required?

1. 420 U.S. 251 (1975).

6. Communicating the Results

Once the investigation is completed and a conclusion has been reached, it is important to report the results to the complaining employee. The company should also assure the complaining employee that remedial action is being undertaken (if the complaint was sustained). Further, the employer should report its conclusion to the accused employee. The employer should give the employee the specific factual basis for its determination and, when necessary, impose discipline.

Where an investigation demonstrates that a law has been violated, sometimes an employer will be required to report such violation to a government agency. For example, some occupational health and safety rules, such as OSHA, require that an employer report a serious concealed danger upon discovery.

7. Follow-Up

At the conclusion of an investigation, it is important to ensure the integrity of any documentation that has been collected, including notes and witness statements. All the pertinent information should be kept in an investigation file separate from the personnel files, so that the company may rely on those records for later use. In some states, any document in a personnel file is discoverable as are most of the witness interview documents created in the investigation.

8. Summary

Addressing or handling employee problems is two-fold: (a) investigating and determining that problems exist and (b) dealing with problems through termination or, if appropriate, implementation of a policy of progressive discipline. If such a documented investigation approach is properly utilized and implemented, an employer can avoid and/or at least reduce its risk of liability when faced with employment-related litigation.

B. *Properly Investigate and Evaluate Employee Terminations*

To the extent there has been proper documentation, sufficient evaluations, and company policies and rules established through an employee handbook, employers have taken measures likely to influence and deter claims from arising. However, when circumstances arise that necessitate an employee's termination, employers should have additional procedures in place to assure that they do so

only after they investigate and evaluate the facts leading to the termination decision.

Employers should investigate all terminations to ensure that the behavior at issue warrants termination. It is also essential that employers be consistent and follow formal guidelines and procedures when terminating an employee. One of the primary issues in almost every employment case is whether similarly-situated employees were treated in a like fashion. Treating employees consistently will greatly reduce any individual's ability to claim that he or she has been discriminated against because of his or her sex, race, age, or other characteristic.

Once the termination decision has been made, it is often appropriate to prepare a termination letter or memorandum for addition to the file. Where the employer has reason to believe the termination may be challenged, it is imperative that the company seek guidance from experienced employment counsel to review and/or assist in the preparation of any documentation. Such records will undoubtedly constitute critical evidence in any disputed matter. Properly prepared, they may even prevent a claim from ever being filed. Employers should consider including the following items in any such letter or memorandum.

1. The Reason for the Termination

These reasons should be neither too specific ("you were 17.5 minutes late four days in a row"), as the company will be stuck with the stated reason in the event of subsequent litigation and may not be able to prove the precise matter asserted in the letter, nor too vague ("you are being terminated for failure to comply with company policy"), as that may make it appear that the Company unfairly failed to give the employee notice of the reasons for his or her termination. Rather, the description should be the one the employer is likely to be able to prove as a basis for termination and should provide the employee sufficient notice of the reasons for termination (e.g., "you failed to meet attendance standards").

2. The Dates and Subject Matter of Prior Warnings

This information can be a strong deterrent to wrongful termination claims, especially where documentary evidence supports the prior discipline. It will also put any attorney the employee retains on notice that there is more to the case than meets the eye.

3. Benefits to Which the Employee is Entitled

Benefits may include severance payments, accrued but unused vacation, the right to purchase continued health insurance coverage under COBRA, or other benefits the employee is entitled to under company policy.

4. The Employee's Last Day of Work

The letter of termination should include the last date of employment. In this context, the letter should state what, if any, company property must be returned by that date.

5. The Date, Time, and Place for an Exit Interview Where Appropriate

Voluntary exit interviews should be conducted with every departing employee whenever possible. Such an interview can be an important deterrent to a wrongful termination action because permitting the employee to discuss the termination with a company representative removed from the situation can give the employee the satisfaction of being heard, thereby reducing the risk of a lawsuit. An exit interview can also provide the company with a last chance to correct any errors that might have been made in the termination process. The employee should be told that a final paycheck will be provided at this interview, which should serve as incentive for his or her appearance at that time.

In conducting the exit interviews, employers should consider the following suggestions:

- The interview should be conducted by someone other than the employee's immediate supervisor and preferably by someone who played no role in the termination decision, such as a Human Resources representative.
- The interviewer should be thoroughly familiar with the circumstances surrounding the termination and should have reviewed the personnel file and all documents relating to the termination.
- The employee should be informed about his or her right to benefits following termination, including COBRA coverage, severance pay, or job search assistance, and any other benefits to which he or she is entitled under company policy.
- The interviewer should describe the type of reference the company will give. Former employees often initiate litigation following termination because they belatedly discover that they will not

be getting the type of reference they expected. Therefore, it may be strategically advisable to agree to characterize the employee's departure as a layoff, resignation, or retirement (keeping in mind, of course, the risk associated with giving a potential future employer a misleading impression about what may later prove to be a problem employee).

- If the employee has signed the company's proprietary information agreement, he or she should be provided with a copy of it at the interview and reminded about its provisions.
- The interviewer should provide the employee with his or her final paycheck.
- The employee should be given a chance to comment, in writing where possible, on his or her job, supervisor, termination, and/or the company in general.
- The interviewer should avoid any remarks that could be construed as discriminatory and should avoid expressing any opinion about the termination.
- All matters discussed with the employee should be documented, including any comments the employee made about his or her terminations.

Lastly, employers ought to consult legal counsel with respect to any involuntary termination that may be particularly problematic. At the very least, employers should consider the following checklist:

- Is the termination decision based solely on the employee's individual performance, or have general assumptions been made about ethnic minorities, women, persons forty years or older, persons with disabilities, or other groups?
- Does the employer have a business-related reason for its decision?
- Are there documented reasons for the decision to terminate? What examples exist as to the documentation?
- Is the decision to terminate consistent with company policy? And, has a review been made through the Human Resources Department to ensure such consistency?
- If there is a performance problem, can the employer establish documented efforts to help the employee improve? If the em-

ployee has not responded to such efforts, is this established by the documentation?

- Has the employer been accurate and straightforward in its evaluation of employees, by both praising and criticizing when warranted?
- Has the employer rated employees as satisfactory only when the employer believes their work to be satisfactory?
- Did the employer consult with the Human Resources Department when the problem was developing and before the situation got out of hand?
- Are the basis for the employer's decision consistent with the employee's work record and what other supervisors have told the employee?
- Are the actions taken against this employee consistent with treatment afforded to other employees?
- Has the employer been accurate in telling the employee the reason for the termination?
- Can discrimination or differential treatment be claimed by the employee?
- Are there any mitigating circumstances?
- Can this employee claim retaliation?
- Is this a particularly sensitive situation where alternatives to termination should be considered?

In summary, before any employee is terminated, an employer should properly investigate the grounds for termination and be able to answer all of the questions noted above in the checklist. An employer who can sufficiently provide answers to these questions will be able to avoid employment-related litigation or, at the very least, significantly minimize its exposure.

C. *Consider Adopting Alternative Dispute Resolution Mechanisms Such as Binding Arbitration*

Employment litigation is often expensive, time consuming, and presents the threat (or hope, from the employee's perspective) that an emotionally swayed jury will award extraordinary damages. For this reason, it is prudent for most employers to consider alternative dispute resolution ("ADR") for employment matters.

There are a variety of different ADR mechanisms, such as me-

diation, arbitration, fact-finding procedures, and mini-trials, among others. Mediation aims at helping the parties resolve their own disputes by providing a realistic assessment of the claims involved, but it is nonbinding. Fact-finding procedures attempt to resolve disputes by determining the facts (on the theory that once the facts are determined, resolution more readily follows), but leave to the parties the ultimate outcome. Arbitration, by contrast, actually resolves the dispute for the parties, and the parties agree to be bound by the result. Arbitration is the form of ADR most likely to be effective in the employment context, although there is an option to use it in conjunction with other approaches.

Generally, the advantages of arbitration are that it is quicker and less costly than court procedures and that an arbitrator rather than a jury decides liability and damages. There are also disadvantages. Some employers fear that the lower cost and speedier resolution offered by arbitration may encourage employees to pursue disputes through arbitration that might not have been pursued through litigation. As a general matter, however, this trend has not materialized.

Another issue that must be considered is appeal rights. If a court fails to follow applicable law, or if a jury award is unsupported by the evidence, then the losing party may be able to obtain reversal on appeal of an adverse judgment. Appeal rights from arbitration are much more limited. The Federal Arbitration Act ("FAA")[2] permits the reversal of an arbitration award procured by corruption or fraud, or an award that is the result of misconduct of the arbitrator (e.g., partiality or corruption, prejudicial refusal to postpone a hearing, refusal to hear evidence material to the controversy, or actions in excess of powers, among others).[3] Although one might consider creating such a heightened standard of review in order to lessen the risk created by an errant arbitrator, it undermines the finality of the award and the efficiencies of the arbitration process. Accordingly, one needs to recognize that there are important risks involved in selecting arbitration, just as there are risks in opting for jury trials.

In the case of arbitration, each party is waiving its right to jury trial. For such a waiver to be effective, it must be knowing and voluntary. To enhance enforceability, we recommend that an explicit waiver of rights to a jury trial (in large point type) be included

2. 9 U.S.C. §§ 1-16 (1994).
3. *See id.* § 10.

in an arbitration agreement, as well as in the employment application form and handbook.

An arbitration provision should generally be included in a written agreement with the employee, rather than in an employee manual or in other published personnel policies. In *Nelson v. Cyprus Bagdad Copper Corp.*,[4] the Ninth Circuit held that there was no knowing waiver of the right to a judicial forum where the arbitration clause was contained in an employee handbook and the plaintiff only signed an acknowledgment of receipt.[5] The court stated that any bargain to waive the right to trial in exchange for continued employment must be expressed such that the choice must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question.[6]

In light of the *Nelson* case, employers should carefully consider binding arbitration or other forms of ADR for the resolution of employment disputes. Employers should discuss the associated benefits and limitations with experienced employment counsel, as well as recent court decisions addressing the use of arbitration for discrimination-related disputes, before implementing a policy for their company.

CONCLUSION

Employers must work to affect the behavior of potential and actual employee claimants if they want to minimize the risk and severity of losses. As employers secure employment practices liability insurance coverage, those proactive measures will often be part of a cooperative project undertaken by the employer and its insurer. By implementing risk management strategies, employers and insurers will introduce noticeable changes in the workplace that can significantly reduce their exposure to employment-related litigation.

4. 119 F.3d 756 (9th Cir. 1997).
5. *See id.* at 761-62.
6. *See id.* at 762.