

# A Step-By-Step Analysis on Employee Dismissal

**Presented by**

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# Considerations in Terminating an Employee

- Legal Considerations
- Strategic Considerations
- Business Considerations

# Overview

- Legal Considerations
  1. Contractual limitations on right to terminate
  2. “Public policy” limitations on the right to terminate

# Overview (continued)

- Strategic Considerations
  1. Employee as member of “protected class” under discrimination laws

# Overview (continued)

- Business Considerations
  1. Essential fairness
  2. Prior warnings
  3. Documentation
  4. Management's treatment of comparable employees
  5. Investigations and witnesses
  6. Anticipated response of co-workers
  7. Handling the dismissal of the employee

# Contractual Limitations on Right to Terminate

- Employment Agreements
- Collective Bargaining Agreements
- Handbooks
  - “Implied Contract” theory

# “Public Policy” Limitations on the Right to Terminate

- Whistleblowers
- Workers Compensation claimants
- Employees approaching retirement benefits

# Employee as Member of “Protected Class” Under Discrimination Laws

- Race
- Gender
- Age
- National origin
- Disability
- Sexual preference



# Best Defense to Discrimination Claim

- CONSISTENCY in treatment of employees with similar deficiencies in performance

# Essential Fairness

- Longevity
- Performance
- Disciplinary record

# Prior Warnings

- Performance
- Conduct

# Documentation

- Performance
- Conduct

# Management's Treatment of Comparable Employees

- “Comparators”
- Different treatment justified due to change in:
  - Time
  - Circumstances
  - Management

# Investigations and Witnesses

- Performance deficiencies: Begin with supervisor
- Misconduct: All witnesses, including employee

# Anticipated Response of Co-Workers

- Influential in how employee will respond
- The employer's most valuable witnesses

# Handling the Dismissal of the Employee

- Who
  - Appropriate management representative
  - One witness
- When
  - Day and time
  - Should employee be escorted off premises?



# Handling the Dismissal of the Employee (continued)

- Where
  - Preferably in-person meeting
  - Neutral territory, with privacy

# Handling the Dismissal of the Employee (continued)

- What
  - Clarity, including pay and benefits
  - Reasons for dismissal – be careful, and honest!
  - New allegations by employee
  - Resignation in lieu of dismissal
  - Severance offer in exchange for release
  - Unemployment compensation/COBRA

# Handling the Dismissal of the Employee (continued)

- Post-meeting communications
  - Outplacement services
  - Exit interviews

# Handling the Dismissal of the Employee (continued)

- Actions upon termination
  - Block computer access
  - Change access codes
  - Delete employee's name from Website, directories, etc.
  - Collect keys, ID cards, etc.
  - Collect confidential materials
  - Contact security

# Handling the Dismissal of the Employee (continued)

- Post-termination communications
  - Internal announcement
  - References to prospective employers

# Questions and Answers



# Monitoring Employee Electronic Communications

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# Why Is Monitoring Employee Electronic Communications Important?

- IP & “trade secret” theft
- Preservation of confidential information
- Employee productivity
- Employee misconduct
- Legal duty to address harassment and/or illegal activity
- Enforcement of policies against discrimination and harassment
- Wage and hour compliance
- Abuse of company resources
- Protection of network from malware and other intrusions

# New Jersey Case Law: Employers' Duty To Monitor

Blakely v. Continental Airlines, Inc., 164 N.J. 38 (2000):

- Employers have a duty to take effective measures to stop harassment when the employer knows or has reason to know that such harassment is part of a pattern of harassment that is taking place in the workplace and in settings that are related to the workplace, including electronic communications.

New Jersey Case Law:  
Employers' Duty To Monitor

**Doe v. XYZ Corp., 382 N.J. Super. 122  
(App. Div. 2005):**

- Employers have a duty to take reasonable steps to investigate, take internal actions to stop, and report “unauthorized” activity where employer has notice of it

New Jersey Case Law:  
Employee's Reasonable  
Expectation Of Privacy In  
Electronic Communications

# New Jersey Case Law: Employee's Reasonable Expectation Of Privacy In Electronic Communications

## **Stengart v. Loving Care Agency, Inc., 201 N.J. 300 (2010):**

- Employee had reasonable expectation that attorney-client emails would remain privileged where employee took steps to keep such emails private

## **Fazio v. Temporary Excellence, Inc., 2012 WL 300634 (App. Div., Feb. 2, 2012):**

- Employee's attorney-client emails (sent using employer's email system) were not protected where employee failed to take steps to keep emails private

## Federal Law:

# Employee's Reasonable Expectation Of Privacy In Electronic Communications

Mintz v. Bartelstein & Associates, Inc., 885 F. Supp.2d 987 (C.D. Cal. 2012):

- Employee had limited expectation of privacy in cell phone (Blackberry) account paid for by employer but used as personal phone
- Stored Communications Act (18 U.S.C. § 2701 et seq.) prohibited AT&T from disclosing text messages
- Disclosure of telephone numbers, cell site information and date/time/duration of calls did not “represent a significant intrusion of plaintiff’s privacy”

## Federal Law:

# Employee's Reasonable Expectation Of Privacy In Electronic Communications

Mintz v. Bartelstein & Associates, Inc., 885 F. Supp.2d 987 (C.D. Cal. 2012):

Factors in favor of “expectation of privacy”:

- Employer aware of and permitted employee to make personal calls
- Employee paid for part of the cost of new Blackberry
- Employee did not read manual or sign acknowledgement of terms

Factors against “expectation of privacy”:

- Employer paid the majority of the cost of the new Blackberry – tends to make it unreasonable for employee to believe he retained exclusive ownership of the Blackberry
- Employer circulated Employment Manual which advised employees not to use company equipment for personal reasons, and stating that employer had the right to review content of all messages on company equipment.

New Jersey Federal Law:  
Employee's Reasonable Expectation Of  
Privacy In Electronic Communications

***Ehling v. Monmouth-Ocean Hosp. Serv.*, 872 F.  
Supp. 2d 369 (D.N.J. 2012):**

- Employees may have reasonable expectation of privacy in Facebook page where they actively take steps to protect it from public viewing, although its highly fact-sensitive inquiry



New Jersey Federal Law:  
Employee's Reasonable Expectation Of  
Privacy In Electronic Communications

***Pietrylo v. Hillstone Restaurant Group, 2009***

**WL 3128420 (D.N.J. Sept. 25, 2009):**

- Employer's unauthorized access of employees' MySpace chat group violated the Stored Communications Act

# New Jersey Statutes

- N.J.S.A. 2A:156A-27 (New Jersey Wiretap Act): Prohibits “unlawful access to stored communications”
- N.J.S.A. 2C:20-25: Prohibits “computer-related theft”
- N.J.S.A. 2C:20-31: Prohibits “disclosure of data from wrongful access”

# N.J. Password Protection Act (“PPA”) State of N.J., Assembly No. 2878

- PPA would prohibit employer from:
  - inquiring if person has an account/profile
  - requiring current/prospective employees to disclose any usernames/passwords to a personal account through an “electronic communication device”
  - requiring waiver of any protection under the PPA as condition of employment
  - retaliating or discriminating based on a refusal to provide access to an account or filing a complaint or assisting in an investigation regarding a PPA violation

# Rise Of Social Media Protections: Other States' Legislation

- States which have passed laws protecting social media profiles: CA, MD, IL, MI
- States which have introduced such laws which are at various stages of the legislative process: NY, TX, MA, NE, MN, MO, OH, PA, SC and WA
- Federal Social Networking Online Protection Act (SNOPA): Introduced to House in May 2012, not passed by Senate, referred to various committees, then reintroduced on 2/6/13 to House Committee on Education and the Workforce.

# Ownership Of Social Media Accounts (& Related Claims)

# Ownership Of Social Media Accounts (& Related Claims)

**PhoneDog v. Kravitz, 2011 WL 5415612 (N.D.  
Cal. Nov. 8, 2011):**

- Employer stated valid claims for misappropriation of trade secrets and conversion based on former employee's continued use of Twitter account

# Ownership Of Social Media Accounts (& Related Claims)

**Eagle v. Morgan, 2013 WL 943350 (E.D. Pa. Mar. 12, 2013):**

- Plaintiff had privacy interest in her name, picture and resume as used on her LinkedIn profile, and its value could be deemed to be appropriating to defendant's own use or benefit

# National Labor Relations Act

## Infringement Upon Employees' Section 7 Rights



# Application of the NLRA

- NLRA applies to most private sector employers, including manufacturers, retailers, private universities, and health care facilities
- NLRA does not apply to the following employers:
  - Federal, state and local governments, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations
  - Employers who employ only agricultural laborers, those engaged in farming operations that cultivate or harvest agricultural commodities or prepare commodities for delivery
  - Employers subject to the Railway Labor Act, such as interstate railroads and airlines
  - Independent contractors and supervisors (with limited exceptions)

# The NLRA's Protection Of "Concerted Activity" Amongst Employees

- NLRA Section 7: Permits union and non-union employees to engage in "protected concerted activity" for "purpose of collective bargaining or other mutual aid or protection."
- "Concerted Activity:" "Engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Meyers Industries, 268 N.L.R.B. 493 (1984) ("Meyers I").
- "Concerted Activity" includes "circumstances where individual employees seek to initiate or induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." Meyers Industries, 281 N.L.R.B. 882 (1984) ("Meyers II").

# Recent NLRB Precedent

## **Hispanics United of Buffalo, Inc., 359 N.L.R.B. No. 37 (2012):**

- Where Facebook post solicited co-worker views on work issue, comments by co-workers were deemed “concerted activities”

## **Costco Wholesale Corporation, 358 N.L.R.B. No. 106 (2012):**

- Policy prohibiting “statements posted electronically (such as online message boards or discussion groups) that damage the company, defame any individual or damage any persons reputation” was held overbroad

# Recent NLRB Precedent

## **Design Technology Group, LLC, 359 N.L.R.B.**

### **No. 96 (2013):**

- Employees' Facebook posts criticizing manager's handling of employees' concerns were a "classic connected protected activity"

## Recent NLRB Precedent (cont.)

- **Guiding Principles For Employers Based on NLRB Reports**
  - NLRB General Counsel issued three reports addressing social media workplace issues (OM-11-74; OM-12-31; OM-12-59; available at <https://mynlrb.nlr.gov/>).
  - Provide guidance on how to structure social media policy compliant with NLRA.

# Drafting Social Media Policies To Be Compliant with the NLRA

1. Narrowly tailor social media policy to specifically delineate what conduct is prohibited
2. Avoid generic or overly broad “courtesy clauses” (general prohibitions on use of “poor taste” remarks)
3. Do not discourage employees from discussing terms/conditions of employment
4. Permissible to restrict commercial use of company marks
5. “Savings clauses” are advisable, but not dispositive

# Concluding Remarks

- Employers should establish clear, written policies regarding electronic communications and the extent to which they may be monitored
- Employers should establish clear, written policies as to who owns the rights to social media accounts
- Employees have some rights with respect to electronic communications, especially when discussing workplace conditions. Don't make hasty disciplinary decisions
- Employers should seek counsel before accessing an employee's social media account that is not otherwise publicly available
- Law on monitoring employee electronic communications is constantly changing – Keep abreast of new developments





# EMPLOYMENT PRACTICES LIABILITY

MAY 1, 2013



**Presenter**  
Linda A. Coleman  
Regional Chief Operating Executive

## What is Employment Practices Liability (EPLI)?

EPLI is an insurance policy that protects the company and its employees from allegations such as:

- Wrongful dismissal, policies, discharge, or termination of employment, wrongful failure or refusal to employ or promote, wrongful discipline or demotion, failure to grant tenure, negligent employment evaluation, or wrongful deprivation of career opportunity.
- Sexual or other workplace harassment, and hostile work environment.
- Employment discrimination, including discrimination based upon age, gender, race, color, national origin, religion, creed, marital status, sexual orientation or preference, gender identity or expression, genetic makeup, or refusal to submit to genetic makeup testing, pregnancy, disability, HIV or other health status, Vietnam Era Veteran or other military status, or other protected status established under federal, state, or local law.

Every policy form is different

## Types of Employment Practices Liability Policies

- **Marketplace**

Very competitive

- **Monoline Coverage**

Coverage for Employment Practices exposures only

- **Package Policy**

Includes coverage for Directors & Officers Liability, Employment Practices Liability, Fiduciary Liability and Crime

Discounts available for sharing the limits

## Key Factors about EPLI Policies Underwriting Process

- Applications have warranty statements
- Known situations must be disclosed and will be excluded
- Employee Handbook critical
- Training
- Prior claims experience and lessons learned

## Key Factors about EPLI Policies

### Policy Form

- Policy Form – Claims Made
- Each carrier has their own form – features do vary by insurance company
- Wrongful Acts – the value of the word
- Notice of Claim Provision – can identify who
- Allocation of Expenses
- Mergers and Acquisitions
- Hammer Clause

## Key Factors about EPLI Policies

### Limits

- Limits can include defense costs or have them in addition to limits
- Retentions include the cost of defense

## Key Factors about EPLI Policies Endorsements

- Choice of Counsel – must be negotiated
- Wage and Hour Endorsement
- Third Party Coverage
- Privacy Coverage

## Loss Prevention Common Mistakes

The most frequently Encountered Mistakes

### **Mistakes in the Interview/Hiring Process**

- Failure to train or educate those involved in the hiring process
- Failing to adequately and thoroughly investigate an applicant's background
- Failing to comply with the requirements of the Fair Credit Reporting Act
- Failing to have accurate, written job descriptions
- Failing to have "at will" employment language in the application documents and in the employee handbook
- Failing to have appropriate documentation under the Immigration Reform and Control Act



## Loss Prevention

### Common Mistakes (cont'd)

#### **Deficient Policies**

- Failing to have and to publish a written, effective policy prohibiting harassment, including sexual harassment
- Failing to properly handle and/or document performance and discipline
- Failing to have an effective performance evaluation system
- Failing to train people in how to use the performance evaluation system
- Failing to be honest and candid in evaluating employees
- Failing to see that employees are evaluated on job-related criteria, as opposed to the tendency to rate personality rather than performance
- Failing to see that evaluators avoid bias in the evaluation process
- Failing to see that disciplinary actions are properly documented

## Loss Prevention

### Common Mistakes (cont'd)

#### **Mishandling the Termination**

- Failing to give problem employee clear notice of the performance problems and failing to advise the employee of the consequences
- Having decentralized decision making with respect to disciplinary matters which results in inconsistent policy
- Failing to conduct the termination in a professional and dignified fashion
- Providing negative reference information about former employees

#### **Mistakes Concerning Wage-Hour Laws**

- Failing to comply with the Fair Labor Standards Act, especially when it comes to “exempt” vs. “non-exempt” employees

## Value Added Services – Varies by Carrier

- Hotlines – Attorneys and other trained professional offering advice on how to handle various situations
- Training from attorneys limited to a number of hours
- On line training where employees and managers can log in 24 hours a day
- Employee handbooks – advice on how to handle various sections of employee handbooks
- Loss Prevent Consultant Services
- Websites with various tools to minimize exposure to losses



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