

Managing the Size and Structure of Your Post-Pandemic Workforce

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For employers, the decision to terminate an employee is never an easy one. Ripple effects, including the burden on remaining staff and a potential decrease in productivity, can be felt across the organization. Even in the best of times, termination decisions are fraught with innumerable risks, including the ever-present threat of litigation.

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Takeaways

Managing the Size and Structure of Your Post-Pandemic Workforce

For employers, the decision to terminate an employee is never an easy one. Ripple effects, including the burden on remaining staff and a potential decrease in productivity, can be felt across the organization. Even in the best of times, termination decisions are fraught with innumerable risks, including the ever-present threat of litigation.

What Employers Need to Know

- Terminations are the most common source of litigation for employers.
- Any organization considering a termination needs to consider its impact overall for the organization.
 - Recruiting, hiring and training can be a time consuming and expensive endeavor.
 - Terminations can increase the workload on remaining employees who are asked to “pick up the slack,” which can have an adverse effect on employee morale and increase overtime costs for the employer.
 - Terminated employees who feel they were treated unfairly may pursue litigation or engage in other conduct designed to harm the organization and/or its employees.
- What should an organization be thinking about before terminating an employee?

Hosts



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Practices

General Employment Litigation

- Is there documentation setting forth the specific and objective ways in which the employee's performance or conduct failed to meet expectations?
- Was the employee given a meaningful opportunity to improve? If not, should the employer consider a performance improvement plan?
- Is the organization being consistent in terms of how it has treated other employees in the past and with the organization's policies and procedures?
- Are there any additional risk factors to consider? For example, is the employee the *only* member of a particular protected class in your entire workforce? Did the employee recently return from a medical leave? Etc.
- What considerations come with termination meetings?
 - Consider who should be present: typically one person to speak on behalf of the organization, and another to serve as a witness.
 - Keep the meeting brief; inform the employee that the decision has been made, perhaps with high level reference to the reasons for the decision, if appropriate.
 - The witness should take detailed notes of the meeting.
 - Do NOT provide reasons that are *inaccurate* (e.g., do not tell the employee the position was eliminated for budgetary reasons if, in fact, the employee is being terminate for poor performance).
 - Be respectful of the employee, but do not engage in a back and forth about whether the decision was right or wrong.

Transcript

Lara (00:06):

Welcome to Jackson Lewis' podcast, We get work™, focused solely on workplace issues everywhere and under any circumstances. It is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate a workforce that is engaged, stable, and diverse. Our podcast identifies the issues dominating the workplace and its continuing evolution and helps answer the question on every employer's mind, how will my business be impacted? For employers, the decision to terminate an employee is never an easy one.

Ripple effects, including the burden on remaining staff, and a potential decrease in productivity can be felt across the organization. Even in the best of times, termination decisions are fraught with innumerable risks, including the ever-present threat of litigation. This episode of We get work™, part two of our series on managing the size and composition of your workforce, explores how to best position your organization to face and defend the impact of a decision to sever the employer-employee relationship.

Our hosts today are Mike Abitabilo and Rich Landau, principals and the White Plains office of Jackson Lewis. Mike advises and trains attorneys, executives, human resources professionals, managers, and supervisors on when and how to make termination decisions and defends employers against the claims of terminated employees when they arise. A 30 year labor lawyer, Rich challenges employers to adopt long-term strategies for maintaining successful employee relationships to reduce the perceived need for employees to pursue third-party representation.

He also counsels organizations on difficult employment decisions regarding discharges and layoffs. Mike and Rich, the question on everyone's mind today is, what do employers need to know about the most effective, yet compassionate way to terminate an employee and how will that impact my business?

Rich Landau (02:09):

Thanks, Lara. Mike Abitabilo and I will do our best to answer that. By way of introduction, my name is Rich Landau, and I am a principal with Jackson Lewis. I've been here for 32 years. Whereas I may not have seen everything, I've seen a lot and I'm looking forward to sharing that with everyone through this podcast. With that, let me introduce my compadre Mike Abitabilo.

Mike Abitabilo (02:32):

Hi, everyone. This is Mike. I'm also a principal in the White Plains office. I spend about half my time providing advice and counsel to employers in hopes of avoiding litigation. And I must not be too good at my job because I spend the other half of my time as a litigator, primarily defending employers and employment litigation.

Rich Landau (02:50):

Well, Mike, now that you've inspired confidence in half the people that we represent, let's move on to our topic at hand today. And before we get too into it, let me ask you this question, Mike, what is the

one issue that generates the most litigation that we handle here at Jackson Lewis? What is the biggest employee issue?

Mike Abitabilo (03:12):

This is an easy one. This would be bad coffee in the office.

Rich Landau (03:18):

Well, that's a good answer, Mike, but it's wrong. I think everybody who's probably listening to this podcast today knows that the absolute number one litigation issue arises from terminations. And there's a reason for that. When someone gets terminated, they've lost their income. Perhaps they've lost their health insurance. They've lost a tremendous amount of status for themselves and their family and their community. It creates the greatest amount of anxiety and repercussions.

Not only that, other types of issues in the workplace don't really rise to the level of litigation, because very often plaintiff's attorneys just aren't all that interested because there might not be all that much monetary value to the other issues that arise at work. Now, I know Mike and I are going to get into many of the concerns around terminations, how to make a good decision, how to convey it to an employee, but there are a few things to be thinking about in advance before you get to that slot.

I'm just going to outline those real quick and then we'll get into the meat of our discussion today. Surely any organization considering a termination needs to think about its impact overall for the organization. It's going to create a hole in your company. Bottom line is we're removing somebody who is currently giving us 2,080 hours a year of work and effort. Maybe it hasn't been that great and maybe that's why we're thinking about termination, but we're going to have to fill that in. We're going to have to go through a search for a new individual.

That can often take up to six months. It can take 20 to 30 hours of effort for various individuals in the company. Then there might be anywhere from a three to a nine month ramp up to get somebody competent in the job. Of course, there are also impacts on the employees who stay behind. They're going to have to pick up the additional work, perhaps do some overtime, and their reaction to the termination is also something to consider. Are they going to be upset? Have we removed the popular individual? Maybe they're not going to be upset.

Maybe they're very happy we finally moved someone out. They are important because they may also be witnesses to our termination decision if it proceeds to the litigation side of the house. There's also some other impacts we need to think about from the departing employees. Sure, we're going to talk about litigation, but we also know as I'll say a compassionate organization, we typically have a human resource side for a reason. We're going to be creating a lot of hardships for them.

There may be depression or anger, even acts of retaliation against the company outside of litigation. Do we have to worry about security and property damage? What about electronic files? Certainly nothing is more important to us than electronics these days. All of our information is conveyed through various electronic means and social media. How can we forget it? Perhaps the most outwardly damaging approach that an employee can take or former employee is hurting our reputation with the public, with customers, with potential new employees or even our current workforce.

There's an awful lot going on around termination decision other than the threat of a lawsuit. But let's turn our attention that way. Let's think about the potential litigation and what are some of the pitfalls in our decision-making process that we need to focus on. So Mike, maybe you can sort of jump in here and start taking us down the path of what should an organization be thinking about to substantiate the decision to terminate?

Mike Abitabilo (07:08):

Sure, thanks, Rich. I want to start off by saying that when I'm wearing my advice and counsel hat, I don't make decisions for clients, right? Clients who call me and say, "Can we terminate an employee? We have this situation. Can we terminate this person?" My response typically is, "Well, you can do whatever you want," right? My role as outside employment counsel. Isn't to say, "Yes, you can do that, or no, you can."

I view my role as being to identify potential risks associated with the termination and then to try to offer guidance as to how to eliminate or at least mitigate against those risks. That's sort of my process when clients call me and say, "Look, we have an employee who we think we need to terminate." When we talk about risk factors, we start thinking about various things. And one that comes up with regularity is a lack of documentation, right? Clients will call up and say, "We have this employee. We've got to make a change.

This person is really hindering our operations, but we don't have a lot of documentation. Maybe they

don't have the strongest supervisor in place, or maybe things have been so busy this year, and in particular, over the course of the past year with the pandemic, that we haven't been good at documenting performance issues. So what do we do?" My response to that client typically is yes, your lack of documentation is a risk factor, right? I talked earlier about identifying risk factors. That is one of them.

But what I'll also say to that client is that a lack of documentation doesn't mean a lack of facts. It doesn't mean the things that led you to make this decision didn't occur. It doesn't mean that you won't be able to ultimately, if you're required, demonstrate and establish that the decision you made was lawful and non-discriminatory. The fact that you don't have documentation, is it an issue?

It's an issue, but it's not one that I think generally should prevent you from moving forward with this decision if you determine it's in the best interest of your organization.

Rich Landau (09:15):

Mike, let me jump in there for a second. As will happen throughout this dialogue, I'm sure we'll disagree a few times.

I hear what you're saying on the lack of documentation, but with the lack of documentation, isn't a company almost guaranteeing themselves that if there's going to be a fight over this termination, whether it's a discrimination charge or a lawsuit, that they're not going to win at the early levels, that they almost half the end up in front of a jury, which is very expensive and far down the line, because they can't prove to a state discrimination unit or the EOC that the decision was well sourced if they're jumping in and they have no documents for it?

Mike Abitabilo (10:02):

I think the answer to that question, Rich, is maybe. Obviously one of my favorite lawyerly answers to give is it depends.

Rich Landau (10:11):

It does depend, right?

Mike Abitabilo (10:12):

Yeah, yeah, exactly. But, look, Rich, by the time clients call us, things are probably gotten pretty bad, right? They know to call us because they know that there's some concern that it's not an open and shut case. I think when I say lack of documentation doesn't mean like a fax, again, really what I'm getting at is if things are so bad in your organization, how long are you going to let this go on? You have to weigh that against the fact that, okay, we have this risk factor, which is that we don't have documented performance issues.

But what I was trying to describe earlier is that there probably is a scenario where, whether it's a supervisor, manager, HR person, whoever else it is, if forced to do so, could identify the objective reasons why this person was let go. Now, the fact that we may not win at the very early stages before administrative agency or in a litigation, yeah, that's a real possibility.

But sometimes I say to clients, "We'll cross that bridge when we get there. Right now, you need to get your business pointed in the right direction. And if you need to make this decision and you're comfortable that the decision was not discriminatory, then let's move along. Let's do it."

Rich Landau (11:28):

Okay. Well, let me take us just a little bit further down the road then. What else besides that are some of the factors that you take into consideration as to whether or not we're in a good position to fire somebody? We may not have... In some cases, we don't have all the documents, but what are some of the things you like to see to help a client get comfortable with that choice to fire someone?

Mike Abitabilo (11:52):

A couple of things that we always talk about and I'll always ask clients about is whether the employee belongs to any protected class. Now, of course, almost every employee belongs to some protected class. We'll talk through those, and then we'll look at this employee in his or her protected class versus the comparator, so the other person within the employee's department, for example. And then ultimately, the key to any good employment advice is we talk about consistency and that can mean a lot of different things.

But when we look at this employee as compared to his or her comparators, are we treating this person consistently in terms of how we've treated other employees in the past? Are we being consistent with

our organization's policies and procedures? That typically is a pretty lengthy discussion, believe it or not, as far as what should be the reasonable expectation as to how we should respond here based on everything we know about our organization.

Rich Landau (12:50):

Mike, what's your view on the classic, the employer describes a certain level of poor performance or misbehavior, and we're sort of in that zone of, do we move to a performance improvement plan, whatever that might be in an organization, or do we, as they classically say, rip the bandaid off and say, "All right, you're out. We're not going down that performance improvement plan path." What are your thoughts on that?

Mike Abitabilo (13:19):

Well, as I said earlier, it depends. Look, I think the truth is that... Again, this sort of goes back to the point about documentation. Certainly it's good to have it. I understand and recognize why some of our colleagues would say, "No, no. You got to give this person a three month plan, a six month plan, a nine month plan." I get it. The one thing I would say to a client though, is if it is a fait accompli, as we say, then don't bother, right?

In other words, if you're not going to give the employee a meaningful opportunity to improve and to correct these issues, then from my perspective, it's sort of a waste. It's a waste of time to go through this process if the decision's already been made. And also, I think you're opening the door to additional risk, right? You've made the decision you want to move on from this employee, but your employment lawyer says you got to put them on a performance improvement plan first.

Well, over the course of that next three months, six month period, what happens if now the employee has a medical issue, takes a medical leave, or the employee makes some complaint about discrimination or harassment in the workplace? Now we've added a significant risk factor to that ultimate decision to terminate the person three or six months down the road that may or may not exist as of today.

So sometimes I say, "Yeah, I'm all for the performance improvement plan, but only if you're giving that employee a meaningful opportunity to improve. And if not, then if the decision has been made," Rich, to borrow a phrase from you, "let's rip the off and move on."

Rich Landau (14:53):

Yeah, I'm not sure that I can fully disagree with that, Mike. Again, it's always good to have the documentation. The one thing that I certainly have taken in over my now several decades of this is when an employer gets to that point that the performance improvement plan is really a false opportunity, most employees, they sniff it out and they know that they're going to be heading out.

What I've seen a lot of, initially I used to see this on paper, now I see people, of course, doing it on their iPhones you, they start doing the daily journal, the daily journal of things that are going wrong in that company, the hours they're not being paid for, the inappropriate comments someone made in the break room. I don't disagree with you that we have to be wary of that situation, that we're just leaving more time for someone to build the case against us.

Mike Abitabilo (15:50):

[Crosstalk 00:15:50] I feel now's the appropriate time to confess. I've been maintaining a daily journal of all the awful things you've said to me over the course of the past 14 years. You'll be hearing from my lawyer about that.

Rich Landau (16:05):

I thought I left you alone for the first year or two. It can't be more than 12 years.

Mike Abitabilo (16:10):

You might be right about that. I'll have to go back and check. But I want to ask you, Rich, how much do you rely on or look at an employer's policies and their procedures, the things that we've written? It might be in a handbook somewhere that hasn't been dusted off in six years. When you're counseling a client in real time who has an issue right now, do you find it important to go back and look at those things?

Rich Landau (16:32):

Well, I hate the fact that I'm going to quote you and say it depends, but I think it does in the sense that, is there a unique policy at issue? So if we're going to say someone has been violating our leave

policies, I'm going to want to make sure that that policy is up to date. It's being complied with. There's consistency. If we're saying somebody has engaged in insubordination, I don't really need to see the general rules of conduct on insubordination to go through it.

But I do think that we have to be aware as to whether or not we're contradicting our own policy in its enforcement against somebody. I find really what is very important to me at this stage just before the termination is to really put the organization through what I call a stress test. I steal this term from a number of years ago when we had a fiscal crisis in the country and the banks were failing. And that as we started to move forward, the government wanted to put banks through a stress test to see what would happen if there were additional losses.

And I think here, when I talk about a stress test, I become the devil's advocate. I take on the case as a plaintiff's attorney, and I start firing out at our client, "Well, this witness statement? Where's that witness statement? This contradicts what we've done in three other cases? Who's going to testify to this and what prejudices might they have?" And I don't necessarily mean unlawful prejudices, but are there any internal battles that went on that led to this?

I want I'll say our critical witness, our decision maker, to be able to withstand that stress test, because I know they're going to go through it, whether it's through a plaintiff's attorney, whether it's through a deposition at the EOC, at state division, human rights, that they can feel comfortable that they won't be flustered and unable to answer the tough questions that are part of the decision to let somebody go.

And I think that organizations can do that internally, whether it's the human resource department, whether it's some other executive who is challenging the choice that's being made. But if you haven't done that internally, you should be prepared that hopefully you have a good counsel and perhaps you're using Jackson Lewis is going to do that to you so that we're all ready to go forward and comfortable with that decision.

Once that decision is made, Mike, obviously we have to inform an employee of their termination. And that is always a unique moment in time. A lot of tension and apprehension for the employer. What are your thoughts in terms of the termination meeting? Who should be there? What do you say? What do you not say with that individual as you're letting them go?

Mike Abitabilo (19:20):

Well, Rich, it depends. I think most of us, most of our colleagues would agree less is more when it comes to the termination meeting. We're not litigating the case in that meeting. Very sort of matter of factly, explaining to the employee that the decision that's been made. Before we get there, as far as who should be in the room, I typically recommend one person to communicate and one person there as a witness who should be taking very diligent notes.

Sometimes tell whoever's going to be the note taker, "Your job is to try to get as close to a transcription as possible. Exactly what is said," so that we know what is said during that meeting and, equally as important, what isn't said during that meeting. As I started to say, I think a fairly brief discussion that this is the decision that's been made. I do think on a human level, in most cases, it's appropriate to at least get into at least big picture perhaps what some of the reasons were if in fact the employee is caught off guard by this.

But again, that should be a fairly brief discussion. If and when the employee challenges or pushes back, I typically would advise a client to say something along the lines of, "Look, we understand you might not disagree with our decision, or you might not be happy about it, but this is the decision that we've made and we're not going to change your mind." Right? The one thing I try to tell clients all the time as they prepare for these meetings is not to give a reason in the meeting that is inaccurate. Now, this might sound fairly obvious, right?

Rich Landau (20:54):

Don't lie.

Mike Abitabilo (20:56):

That's one word for it. Right. But, Rich, and I'm sure you've been in this position too where clients will call and say, "Well, we're going to say that we're eliminating the position." And I say, "Okay. Well, let's talk about what that actually means to eliminate a position, and then we'll talk about what that means in head count. Are you going to refill the position and what's going to happen to that person's duties," right? And oftentimes that might be part of it.

Maybe there is a position elimination, but I'll say, "Well, how did you identify this person then to be the person whose position is eliminated?" "Well, the person was a terrible performer." Okay. In that scenario, to the extent the person's performance or conduct is relevant to the decision, and to the

extent you're going to engage in some level of dialogue in that termination meeting about the reasons for the decision, then I think it's important and it's appropriate to provide at least an introduction to that concept during that meeting.

And the reason is a year, two years from now, and I say this to clients all the time, if you're being deposed about why this person was terminated, what do you want to be able to say? And if you want to be able to say under oath, giving sworn testimony, that yes, the person's performance was a factor or the person's conduct was a factor, then I think it's appropriate to at least allude to that during the termination meeting and not give some reason that's inaccurate or some reason that is a half truth.

Because when you have inconsistency in your statements and inconsistency as between what you said during the termination meeting and what you're saying on the road a year, two years down the road, that inconsistency can be used as evidence that the reason that you provided for terminating the employee was false and was pretext for discrimination.

I know these are difficult conversations to have, and it's always easier for me to tell a client what to say, because I'm not in the room and I'm not having that conversation, but I think it's really important to be upfront and be honest with the employee in terms of the reasons why you've made that decision, at least to some extent.

Rich Landau (23:00):

Sure. And I agree with that approach. I often counsel clients that if the person has had 10 different things they've done poorly, maybe just pick one or two so that it's clear that there are these business reasons behind it. You don't want to treat this like you're breaking up with somebody and saying, "It's not you it's me." You have to have a certain level of honesty here. Mike, I want to sort of take us down a last segment here. And I know I've thought about this a lot in terms of what do I get afraid of.

When I'm on the phone with a client and I'm hearing the story as it were behind the termination, certain things click along in my head. Give me one or two things that you just really tick off real fast that you say, "Whoa, I'm worried about this."

Mike Abitabilo (23:46):

Snakes. That's one thing I'm afraid of. Oh, you're talking about terminations.

Rich Landau (23:52):

The topic is termination decisions, but go ahead.

Mike Abitabilo (23:55):

Right. Look, again, I think this goes back to earlier discussion about risk factors, right? We can deal with one risk factor, maybe two, but all of a sudden, we have an employee who, hey, we don't have documentation. This person is the only member of a certain protected class. This person made an internal complaint about discrimination. This person just got back from medical leave. Our underlying policy isn't compliant with the latest and greatest requirements.

I think the more of those risk factors that I see and that I identify in a termination, that's when I start getting concerned and saying to the client, "Look, you have some real issues here. I'm not sure that we have a streamlined way to mitigate or eliminate all these risks." Now, you might make a business decision to move forward anyway, but I want you to do so eyes wide open. I want you to be aware that all these risk factors are here. And that if competent counsel gets their hands on these facts, this could be a problem for you.

Rich Landau (24:56):

At least for myself, I know that I sometimes... It's great. I have some really long-term relationships with clients where I will be blunt enough to say, "You haven't sold me on this. As I'm hearing you, I don't hear..." One thing I look for is organizational consensus. Different people don't actually agree the termination should occur. I worry when we have a high-level executive making a decision that has gone on challenged and I don't hear anybody else having put the case through that stress test I mentioned.

I also worry about these esoteric justifications for a termination, where I don't really hear the hardcore business justifications, and I wonder if there's some other subtexts that we're missing. There are a number of things that I'm listening for that I suppose I'm tuned into at this point. We understand, Mike and I both understand that every organization, this does become one of the toughest decisions you make. We're ending the relationship. We're going to have to start a new one with a new potential employee.

And yes, every single time we fire somebody, we are confronting the possibility of litigation and great tumult in the organization. I think it's important for everybody who's been listening to our podcast today to think about some of those blind spots as we've identified them. There are many others, and I'm sure Mike or I or any other partner principal Jackson Lewis would be discussing them with you.

But your organization will be better served the earlier you identify where are the weaknesses, where are those blind spots, how do we start to address them and put ourselves in the best position to make a solid defensible position. I know we're probably at the end of our time here today. I want to thank anybody who's tuning in and listening. I want to thank Mike Abitabilo for being such a wonderful participant. I appreciate all of his non-committal "it depends" answers, and so will all of you.

But more seriously, I think that all of you should take these decisions seriously, understand the risks, but yet make them when you need to make them. I'm Rich Landau for Jackson Lewis, and thank you for participating in our podcast today.

Lara (27:21):

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