



1000 First City Tower
1001 Fannin, Suite 1000
Houston, TX 77002
tel: (713) 654-3000
fax: (713) 654-3002
www.caldwelleverson.com

IMPORTANT TEXAS STATE LAW CLAIMS AND HOW TO PREVENT THEM

DEFAMATION

- Elements of Employee's Claim
 - Oral (slander) publication
 - Written (libel) publication
 - publication must be made to third-party
 - Defamatory statement that refers to ascertainable person
-

Types of Defamation Claims

Most common arise from:

1. Discussions of employee's poor performance, misconduct, or reasons for termination.
2. Responses to reference checks.

Self-compelled publication.

Occurs when terminated employee is required to state repeat reason for discharge while searching for a new job.

Defamation Cont'd

□ Defenses

- Truth

- Consent

- Privilege (Absolute or Qualified)

 - Most common example is an investigation.

 - Usually investigatory statements are privileged.

- SOL and non-publication

Defamation Cont'd

- AVOIDING LIABILITY FOR DEFAMATION
 - Investigating thoroughly
 - Limiting disclosure of reasons for discipline
 - Keeping all medical data confidential
 - Limiting information provided in response to reference checks to dates and positions
 - Obtaining release from employee before releasing information
-

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A. EMPLOYEE'S CLAIM

- Based on claim that employer's conduct was "utterly intolerable in a civilized society."
 - Brought in almost every lawsuit filed
 - Although only available in most egregious cases, exposure can be significant
-

Intentional Infliction of Emotional Distress Cont'd

B. AVOIDING LIABILITY

- Avoid anger in administering discipline
 - Require uninterested review by second manager or supervisor
 - Use Common Sense
 - Document, signing all critical documents
-

Intentional Infliction of Emotional Distress Cont'd

C. DECISION OF NOTE

In *Hoffman-LaRoche Inc. v. Zeltweger*, 144 S.W.3d 438 (Tex. 2004), the Texas Supreme Court held that an intentional infliction of emotional distress claim against an employer would not lie where that claim arises from the same facts and allegations of a statutory employment claim.

WORKERS' COMPENSATION RETALIATION

□ EMPLOYEE'S CLAIM

No person may discharge or otherwise discriminate because employee:

- (1) in good faith files a workers comp claim;
 - (2) hired a lawyer
 - (3) instituted a proceeding under workers' compensation law
 - (4) testified or is about to testify in any such proceeding
-

Employer's Defenses to Workers Compensation Retaliation Claim

- After acquired evidence doctrine
 - only entitled to backpay until uncovered false statements or other misconduct which would have resulted in termination anyway.
 - No individual supervisor liability (unlike FMLA)
 - Plaintiff cannot establish causal connection between his claim and his termination or Plaintiff cannot rebut employer's non-discriminatory reason for termination
-

Workers Compensation Retaliation Cont'd

Evidence of Retaliation

- Knowledge of the compensation claim by those making the decision to terminate;
 - Expression of a negative attitude towards the employee's injured condition;
 - Failure to adhere to established company policies;
 - Discriminatory treatment in comparison to similarly situated employees;
 - Evidence that the stated reason for the adverse action was false
-

Workers Compensation Retaliation Cont'd

Neutral Policy

- ❑ Employer can nonetheless terminate an employee on workers' compensation leave if "termination was consistent with a uniform absence control policy."
 - ❑ Must apply equally to personal or medical leaves and must apply to everyone
 - ❑ Policies okay: 3 days no call, okay to fire; 6 months no work, for whatever reason, okay to fire; 24 months no work, for whatever reason, loss of seniority okay.
-

INVASION OF PRIVACY CLAIMS

- ❑ Arise through disclosure of employee records, discipline, or misconduct.
 - ❑ Arise through drug testing, searches of employee and company possessions, including email.
 - ❑ Checking of references.
-

Invasion of Privacy Cont'd

□ Avoiding Invasion of Privacy Claims

- Before monitoring electronic communications, an employer should adopt a written Electronic Communications policy. This policy should be provided to all employees.
 - Do not monitor phone calls without written consent of employee and notice to second party. Under federal law, once an employer realizes a call is personal, monitoring of the call must stop, unless phones are provided for business calls only and that policy is well posted and is enforced.
 - Use common sense in requiring an employee to submit to a urine drug test (ensure privacy at collection site).
-

SABINE PILOT CLAIMS

- *Sabine Pilot Service, Inc. v. Hauck, 687 S.W.2d 733 (Tex.1985).*
 - There is a limited exception the Texas employment-at-will doctrine for an employee who is discharged “for the sole reason that the employee refused to perform an illegal act.”
-

Sabine Pilot Cont'd

- ❑ Selected *Sabine Pilot* Cases
 - ❑ On a Related Note: There is no duty of good faith and fair dealing in the at-will employment contract between an employer and an employee
-

THE TEXAS PAYDAY LAW

- The statute covers all private employers employing workers in Texas, regardless of size
 - Governmental employers are not covered
 - Does not include independent contractors
 - Wages are compensation owed by an employer for labor or services rendered by an employee
 - Whether computed on a time, task, piece, commission, bonus, or other basis
 - Includes accrued vacation, holiday, sick leave, parental leave, or severance pay under a written agreement or written policy
-

When to Employers have to pay Employees

- Depends upon the employee's status under the Fair Labor Standards Act
 - Employees exempt under the FLSA must be paid at least once a month
 - Other non-exempt employees must be paid at least twice a month
 - Employment contract may increase frequency but cannot specify less frequent paydays
-

How Must Wages Be Paid?

□ Payment must be by

- Hand delivery at regular place of employment during regular work hours
 - Hand delivery at other place agreed upon
 - Registered mail if *received* by payday
 - Delivery by one of first three options to person designated by employee in writing
 - Any other *reasonable* method authorized by the employee *in writing*
-

Deductions from Wages

- Texas Pay Day Act does not generally allow
 - May not make deductions unless ordered by court of competent jurisdiction (e.g., court-ordered child support is the most common)
 - Authorized by state or federal law (e.g., payroll taxes, IRS withholding, student loan wage attachments)
 - Deductions made for lawful purpose AND authorized by employee in writing
-

Texas Pay Day Act Wage Claim

- Any employee who feels she has not been paid all wages earned may file a complaint with the TWC
 - Complaint forms may be obtained by request through phone, internet, or mail
 - Complaints must be signed and verified by a Notary or TWC employee
 - Wage claim must be filed within 180 days of the date the claims wages became due
-

Employer's Response to Wage Claim

- ❑ Upon receipt of wage claim, TWC notifies employer
 - ❑ Employer is provided copy of claim and an opportunity to respond (within 14 days)
 - ❑ An investigator from the TWC's Labor Law Department, using the information obtained by the employee and employer, will issue a written decision
-

QUESTIONS

leverson@caldwelleverson.com
