

Don't Let a Tight Labor Market Get Your Guard Down

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by Aaron Goldstein

In wrongful termination cases in the U.S., the primary source of liability for employers is an employee's alleged lost wages. Under U.S. law, an employee who is terminated for a discriminatory or a retaliatory reason is entitled to recover the amount of wages the employee would have earned had the employee not been wrongfully terminated. In a normal labor market, an employee might be able to argue that it will take him or her six months or even a year to find a new job, and the employer, therefore, should pay the employee six months' to a year's worth of lost wages.

In a tight labor market, however, it is much harder for employees to argue that they are entitled to lost wages when they can easily go across the street and get a new job—perhaps even a higher paying job. Plaintiffs in wrongful termination cases have a duty to mitigate their damages by trying to find a new job that pays as well as the one they lost. As a result, we have seen a significant decrease in the number of wrongful termination cases being brought during the recent tight labor market. Instead, many of the new cases being filed against employers are wage and hour class actions, such as cases involving failure to pay minimum wage or overtime, where the plaintiff does not have a duty to mitigate their lost wages.

Given the increased difficulty plaintiffs are facing in bringing wrongful termination cases, employers may be tempted to let their guard down on their performance management practices or employment documentation. While employers might get away with doing so in the very near term, the events of last several years suggest that employers that do so may find themselves facing a wave of wrongful termination litigation.

Most employers' performance management systems were highly disrupted during COVID when employers were forced on a moment's notice to start managing their employees remotely. The regular channels and methods for providing formal documented performance feedback stopped. Further into the pandemic, the U.S. government began issuing so called Paycheck Protection Program loans, which were forgivable if the employer maintained its headcount. Essentially, the U.S. government

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began paying companies to not fire anyone. This created a huge incentive for employers to not fire poorly performing employees.

As the economy began to open up, employers began to find it very difficult to find employees to fill open positions. This extremely tight labor market made employers desperate for headcount and very fearful of losing employees. Many employers adopted the calculus that it was better to have a poorly performing employee rather than none at all. As a result, many poorly performing employees were given passing grades on evaluations.

These events have led to evaluation grade inflation and a population of employees whose performance may be far lower than their evaluations would suggest. Such employees are apt to see a lawyer when they are terminated for performance reasons, despite having had at least decent reviews.

This flood of wrongful termination litigation has been held at bay by a continued strong labor market. But as soon as that labor market softens and employees cannot simply go across the street to find a new job, those employees will be able and motivated to sue for substantial lost wages.

Now is the time for employers to re-evaluate their performance management and documentation practices to make sure that they can justify any performance based terminations they may need to make. Reigning in evaluation grade inflation and reinstituting performance management best practices is difficult and requires careful planning. Employers with U.S. based employees should reach out to their employment counsel now, before a flood of wrongful termination cases begins.