C&G INSIGHTS

The Hidden Liability in How You Let People Go

BY KAREN BROMBERG, PARTNER AND CHAIR, U.S. EMPLOYMENT PRACTICE GROUP, COHEN & GRESSER

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I have a question I ask early in almost every termination matter that comes across my desk. It is not about the employment agreement, the severance package, or whether HR followed the right steps. Rather, it is: Will this person be surprised they are being terminated?

If the answer is yes, I want to understand why. That single question is one of the most efficient equalizers in employment law, because it tells me almost everything I need to know about whether a company's performance management and documentation practices have been doing their job. A surprised employee does not necessarily mean the termination decision is wrong. It can, however, be a signal that concerns were not communicated clearly, expectations were not documented consistently, or the potential corrective action was never formalized.

From a workplace culture perspective, employees should generally understand when there are concerns about their performance or conduct. Those conversations should occur in real time, while there is still an opportunity to improve performance.

From a litigation perspective, employee surprise can be equally significant. It may indicate that the contemporaneous record does not adequately reflect the concerns that ultimately led to the decision. When that happens, employers often find themselves defending not only the termination itself, but also allegations that the stated reason for the decision was not the real reason.

And a thin paper trail does not just make a termination uncomfortable. It can make it expensive.

The Termination Decision Is Rarely the Issue

Here is what most employment disputes are actually about: not whether the company made the right call, but whether the company can prove it.

The decision to let someone go may be entirely justified. What becomes difficult is defending that decision when the personnel file contains no documented performance concerns, no written warnings, no records of conversations in which expectations were clarified and shortfalls were addressed. When a terminated employee walks into an attorney's office and says "I had no idea this was coming," the issue is not the surprise itself. The issue is what that surprise may suggest about the company's performance management process and whether the evidence gathered as events occurred supports the stated rationale for the decision.

The fix is not complicated. It requires consistent documentation from the moment a performance concern surfaces. Not two weeks before the termination. Not after HR has already decided to move forward. But when the issue actually first appears.

A well-documented record does not guarantee that an employer will avoid litigation. It does, however, place the organization in a much stronger position to demonstrate that the reasons given for a termination were supported by objective facts, consistent communications, and legitimate business considerations. Whether the documentation is extensive or limited, an early discussion with employment counsel before a termination occurs can be valuable. Where the record is strong, counsel can help assess legal risk, pressure-test the rationale for the decision, and prepare for the separation discussion itself. Where documentation gaps exist, counsel can help employers evaluate those risks, consider alternatives, and think strategically about how to proceed.

In many cases, the value of that documentation is realized long before a lawsuit is ever filed. When employers can point to real-time performance discussions, written feedback, and documented concerns, they are often in a far stronger position to address allegations of discrimination, retaliation, or pretext at the earliest stages of a dispute. By contrast, when employers are forced to reconstruct months of conversations after the fact, allegations of discrimination, retaliation, or pretext become more difficult and expensive to defend.

A manager who raises concerns verbally but never follows up in writing may believe the message was received. The personnel file, however, may tell a very different story.

Reductions in Force: Where Process Failures Become Class Actions

Individual terminations generate individual disputes. Reductions in force can generate class actions. The difference between a defensible RIF and a catastrophic one almost always comes down to process, not headcount.

The most expensive RIFs I have seen were not the largest ones. They were the ones where the process was rushed or where key decisions were made before the company established and documented the criteria that would govern the process. That often leaves employers unable to meaningfully assess or address adverse impact concerns before selections are finalized.

Some examples include:

- The manager rankings were subjective, undocumented, or inconsistently applied.
- The selection criteria were defined after someone had already decided who was leaving.
- The business rationale for the reduction was documented only after the selections had already been made.

That last point is worth repeating: adverse impact analysis is not a checkbox to complete before you send the separation agreements. It is a planning tool. If the analysis reveals a problematic pattern, you need time to understand why and whether the selection criteria or their application needs to be adjusted. That process often requires HR, business leaders, and employment counsel to work together to evaluate whether the criteria are sufficiently objective, consistently applied, and supported by the underlying business rationale. Running it at the last minute means you either ignore what it tells you or you scramble to change course in ways that create their own documentation problems.

Too often, HR, business leaders, and employment counsel are brought into the process only after preliminary selections have already been made. By that point, the company may have far fewer options to evaluate the criteria, test assumptions, and address issues before decisions become difficult to unwind

More broadly, a defensible RIF requires contemporaneous documentation of the business rationale, the selection criteria, and how those criteria were applied. Employers are often focused on the outcome of a reduction in force, but in litigation the process used to reach that outcome is frequently just as important. Consistent documentation throughout the planning process helps demonstrate that decisions were driven by legitimate business considerations and applied in a disciplined and non-discriminatory manner.

Piecemeal RIFs, meaning ones that happen in waves over several months because companies are reluctant to make the full cut at once, carry additional risk. Beyond the cultural damage, multiple rounds of terminations can trigger state WARN Act* look-back provisions that companies frequently overlook until they are already in litigation.

Investigations: The Twenty-Minute Call That Saves Six Months

One of the most consistent and costly mistakes I often see is companies launching workplace investigations before they have fully understood the allegation, its potential legal implications, and what level of review is actually required. A workplace investigation is a significant undertaking. Depending on the circumstances, it may require a defined scope, witness interviews, document review, careful privilege considerations, and clear documentation of findings and remedial actions. Done well, an investigation can identify problems, establish credibility, and reduce legal risk. Done wrong (e.g., it's rushed, poorly scoped, or conducted without appropriate planning or independence where warranted), it can generate retaliation claims and credibility problems that are often worse than the original complaint.

Not every workplace issue requires the same response. A critical question is not whether an issue should be taken seriously, but whether the company has properly assessed the nature of the allegation and determined the appropriate path forward. Some allegations require a formal investigation from the outset. Others may warrant a more limited inquiry, management intervention, coaching, or other corrective measures.

A twenty-minute call with employment counsel at the outset can make that determination, course-correct appropriately, and save a significant amount of time, money, and organizational disruption. It can also help preserve privilege where appropriate, clarify the investigation's purpose, identify retaliation risks, and ensure that the process is structured to support whatever decisions may ultimately follow.

The companies that seek advice before defining the scope of an investigation are almost always in a better position than the ones that call after the process has already begun.

Before the Next Termination: A Five-Point Documentation Checklist

Use this as a gut-check before any significant individual separation or RIF:

01 Is the concern documented before the decision is made? Performance issues, behavioral concerns, and expectation gaps should be in writing. This is the case whether in a formal PIP (Performance Improvement Plan), a written warning, or an email summarizing a conversation. These should happen as they occur, not after the termination decision has already been reached.

02 Would the employee recognize the concerns being cited? If the issues being used to justify a termination were never clearly communicated to the employee, the documentation does not protect you. It needs to reflect conversations that actually happened, not a retroactive narrative constructed to support a decision already made.

03 For a RIF: Are your selection criteria objective, defined, and applied consistently? Document the criteria before you apply them, apply them consistently across affected staff, and keep the records showing how each individual was evaluated against those criteria.

04 Has adverse impact analysis been conducted with enough time to act on it? Run the analysis early in the planning process, not as a final checkpoint. If it reveals a pattern that needs to be addressed, you need time to understand the cause and adjust the selection process accordingly.

05 Are the departure mechanics documented and executed? Written reminders of ongoing confidentiality, non-compete, and non-solicitation obligations; IT access termination on the day of separation; device and equipment recovery; and documentation of all of the above. A well-executed departure is not just about the conversation in the room; it is about what happens in the hour after. Equally important, however, is ensuring that legal, HR, and business stakeholders have been involved early enough in the process to identify issues, assess risk, and address concerns before decisions become difficult to unwind.

Why This Matters, and How Cohen & Gresser Can Help

Employment disputes are among the most preventable categories of corporate litigation, but they are also among the most expensive when prevention fails. The difference between a separation that closes cleanly and one that escalates into a protracted dispute almost always comes down to documentation discipline and process rigor applied long before the termination date.

Cohen & Gresser's employment practice works closely with GCs and HR leaders to build the policies, processes, and documentation habits that make terminations defensible. We also serve as client partners to advise quickly when a situation is developing that requires outside perspective before it becomes a dispute. In our experience, the strongest employment cases are often the ones that never become cases at all because the underlying record clearly demonstrates how and why the decision was made. Whether you are managing an individual separation, planning a workforce reduction, or navigating a workplace complaint that may or may not require a formal investigation, early legal involvement can help identify risks, assess options, and strengthen the process before positions become fixed. The time to call is before the decision is made, not after it has been challenged.

The common thread in each of these situations is not the ultimate decision; it is the process supporting it. Consistent communication, contemporaneous documentation, and disciplined decision-making not only help employers defend their actions when challenged, they often help prevent disputes from arising in the first place.

Karen Bromberg is a Partner and Chair of the U.S. Employment Practice Group at Cohen & Gresser. She has more than 20 years of experience advising company management, boards, and special committees on employment matters, workplace investigations, workforce reductions, and the employment aspects of M&A transactions. She regularly advises employers on employment-related risk management, internal investigations, and complex personnel decisions.

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