A GUIDE TO CALIFORNIA WRONGFUL TERMINATION CLAIMS (PART I)

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Fired? Laid Off? What to Do First

You're called into your Human Resources department and are told you have been terminated. What should you do? Here's a quick checklist:

- ☐ Remain calm!
- ☐ Listen carefully to reason given for termination (take notes)
- ☐ Ask if others are also being terminated
- ☐ Request copies of your personnel documents
- ☐ Do NOT sign a severance agreement without consulting an attorney
- ☐ Return employer property cooperatively
- ☐ Final Paycheck: This should be given to you at time of termination
- ☐ Contact an Attorney

SEVERANCE AGREEMENTS – SHOULD YOU SIGN?

When employees are terminated, the employer will often times offer a severance payment in exchange for signing an agreement waiving your right to file a future lawsuit against the employer. These agreements may be presented in a "take-it or leave-it" manner, with pressure on the employee to accept immediately or lose the severance money offered. This is NOT proper.

You should ALWAYS consult an attorney before signing a severance agreement. One of the key factors in evaluating the enforceability of a severance agreement is whether or not the employee had time to seek counsel from an attorney. In fact, for employees over the age of 40, the agreement must specifically state that the employee has – days to review the agreement before signing.

Takeaway: **CALL YOUR ATTORNEY BEFORE SIGNING**

TYPES OF WRONGFUL TERMINATION CLAIMS

There are several types of wrongful termination claims, but most are predicated on one of three basic theories: (1) Violation of public policy, (2) Breach of an express or implied contract to fire only for cause, or (3) Breach of the implied covenant of good faith and fair dealing. Each of these theories is explained in greater detail below. When considering whether your termination falls within one of these three categories, ask yourself the following questions.

- What was the reason given for termination?
- Have you recently made an internal or external complaint about your employer?
- Have you participated in a proceeding or lawsuit against your employer (either as a party or non-party witness)?
- Were you terminated for missing work while reporting for jury duty?
- Had you recently filed a claim for workers' compensation?
- Are you an "at-will" employee (one that is terminable at the will of either party)?
- Do you have an employment contract or agreement that states that you can only be fired for certain reasons or for "good cause"?
- Is there conduct by your employer that implies you will only be fired for certain reasons or for "good cause"?
- Has your employer given you assurances that you will remain employed for a certain amount of time?
- Have you been promised a promotion?

TORT: VIOLATION OF PUBLIC POLICY

A termination that violates public policy may give rise to tort liability and provides an exception to the employer's broad authority to terminate an at-will employee with or without cause. An employer may not avoid the duty imposed by law not to terminate an employee in violation of public policy by reserving the right to fire an employee "at-will" in employment agreements or personnel handbooks. Nor can an employee waive his or her protection from this type of wrongful termination.

Three of the primary types of these cases involve (1) a refusal to commit an unlawful act, (2) engaging in lawful conduct or exercising a legal right, or (3) engaging in whistle-blowing.

REFUSAL TO COMMIT UNLAWFUL ACT

An at-will employee may not be fired for refusing to engage in unlawful acts. Examples include refusing to commit perjury, violate environmental regulations, or participate in unlawful advertising practices, or violate any other state or federal law. This limitation on employer firing prevents employees from making the difficult choice between retaining their job or complying with the law.

ENGAGING IN A LAWFUL ACT AND EXERCISING LEGAL RIGHTS

Employees are protected against discharge for performing lawful or exercising a legal right. For example, an employer cannot terminate an employee for reporting unsafe working conditions or filing a claim for workers' compensation. Nor can an employer terminate an employee for participating as a witness in an employment discrimination hearing against the employer. Other examples include filing with the state for unpaid overtime compensation, making internal complaints about employment practices, or performing jury duty.

WHISTLE-BLOWING

Whistle-blowing activities have recently become a frequent basis for wrongful termination claims. Under this theory of law, employees are protected from termination for certain actions against the employer, even if there is no specific, affirmative legal obligation to do so. Typically, these type of cases involve reporting matters internally, publicly, or both. Although often these cases involve reporting a violation of law, it is possible that a court may apply the rule to reporting improper conduct that is not necessarily unlawful.

The purpose of this exception to the employer's blanket right to terminate at-will employees is to encourage employees to report unlawful acts without the fear of retaliation. Thus, the fact that an employee may have bypassed an internal grievance procedure to inform the government directly will not protect the employer. In California, broad protection is given to employees against retaliation for whistle-blowing. However, the employer is able to defend itself if it can show legitimate for the employee's termination unrelated to the whistle-blowing.

CONTRACT: BREACH OF AN EXPRESS OR IMPLIED CONTRACT TO ONLY FIRE FOR CAUSE

The second basis for a wrongful termination claim involves a breach of an express or implied contract to fire only for cause. This basis will not provide a claim for an at-will employee. Rather, in order to succeed on this type of wrongful termination claim, the employee must overcome the presumption of at-will employment that exists under California state law.

To rebut the presumption that you are an at-will employee, the employee must demonstrate that an express or implied-in-fact agreement exists specifying either the length of employment, the specific grounds for termination, or that termination can only occur for good cause. Note, however, that a written communication regarding the proposed length of time to work on a project does not necessarily convert an at-will employee to one with a claim based on breach of an implied-in-fact contract

DUTY: BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Even if an employee does not have an express employment agreement stating that he or she may only be fired for cause, such a covenant may be created by the *conduct* of the employer and employee. Thus, the presumption that an employment relationship of indefinite duration is "at-will" may be refuted by conduct of the parties that manifests their mutual intent to create limitations on the employer's ability to fire the employee.

A court will examine the totality of the circumstances when determining whether the parties' conduct has created an implied-in-fact agreement to only terminate for certain reasons or "good cause". Key factors in this evaluation include (1) length of employee's service, (2) content of employer's employee handbook and policies, (3) discussions of future promotions, (4) assurances of continued employment, and (5) standard industry practices. None of these factors is weighed more heavily than the other, and even the existence of a majority of these factors does not guarantee that the court will find that an actual understanding existed between the employee and employer.