

# Firing do's and don'ts

BUSINESSES CAN LEARN A LOT FROM ATTORNEY GENERAL ALBERTO GONZALES' RECENT TESTIMONY BEFORE THE U.S. SENATE



### EMPLOYMENT LAW

John T. Palter

Regardless of the color of the grass on your side of the political fence, Attorney General Alberto Gonzales' recent testimony before the Senate Judiciary Committee paints a bleak landscape of the Justice Department's employment practices.

Putting aside the question of whether the termination of the eight U.S. Attorneys was proper, Gonzales' handling of the firings clearly has resulted in an astronomical waste of time, money and political capital.

Private-sector companies can't afford to use Gonzales' "trial- and error" approach when making employment decisions. Even the Attorney General conceded that he learned important lessons from his experience. To leverage the benefit of mistakes made and lessons learned, let's review some key parts of Gonzales' testimony:

1. Employees deserve better.

*"First, those eight attorneys deserved better."*

Employees are the most important asset of any successful business. They all contribute to the success of the company and often define their identity and value by the work they perform. Even in an "at-will" state such as Texas, termination decisions should be carefully reviewed and properly documented. "For cause" decisions should be made (or at least reviewed in advance) by an objective and experienced manager, based upon the then-existing documentation.

More important, firing decisions are and should be treated as private life-changing

events. Care should be taken to anticipate the employees' response and to distinguish between the termination and the employee's self worth.

2. The truth? Less is more.

*"Second, I want to address allegations that I have failed to tell the truth about my involvement in these resignations."*

All too often in employment cases, the actual decision isn't the problem, it's the after-the-fact attempts at justification that create the predicament. In fact, U.S. Attorneys serve at the pleasure of the president. There was nothing improper in making a change to have another qualified individual serve. It was simply unnecessary — and ill-advised — to announce, early on, that the firings were "performance-based."

In the at-will context, an employer may terminate an employee (or the employee may resign) at any time, with or without cause — provided it's not for a prohibited reason (including race, gender or age-based discrimination, or whistleblower activities, to name a few). Unless disclosure of the reason for a firing is necessary, employers should resist the natural urge to volunteer any extraneous information surrounding the decision.

Full disclosure is, of course, required in certain situations, whether by contract or subpoena or to determine eligibility for unemployment compensation. Accordingly, if an employer provides the employee with the basis for termination — even if no disclosure was originally required — it needs to be both accurate and supported.

3. Create and consistently enforce employment policies.

*"What I have concluded is that ... the process was nowhere near as rigorous or struc-*

*ured as it should have been."*

Employment is a process: interview, hire, oversee work, pay, promote, discipline, accept a resignation or terminate. All employees and potential employees are hardwired with an inherent sense of fairness.

To determine whether or not they're being treated fairly, employees must know what the rules are, and have confidence that the employer is playing by them. Without clearly-articulated employment policies, the chances are slim that the employee will be able to see the boundaries of the playing field, let alone conclude that the field is level.

Of equal importance, proactive procedures are the employer's best defense to prevent difficult termination decisions in the first place. Before hiring anyone, employers should secure written approval to investigate and thoroughly check references.

4. Terminate only for proper purposes.

*"Finally, let me be clear about this: ... It would be improper to remove a U.S. Attorney to interfere with or influence a particular prosecution for partisan political gain."*

From 1998 to 2004, the average successful jury verdict in employment discrimination cases exceeded \$580,000. Employers would do well to invest in a periodic review of anti-discriminatory policies.

After weeks of preparing for testimony and hundreds of man-hours reviewing and producing e-mails and other documents, the Attorney General publicly acknowledged these lessons learned. Let's hope that the private sector won't need taxpayer funding to arrive at the same conclusions.

**PALTER** is with the commercial litigation firm Riney Palter PLLC. He can be reached at [jtpalter@rineypalter.com](mailto:jtpalter@rineypalter.com).