

Employee Terminations – Best Practices

The decision to terminate an employee carries with it the risk of a possible legal challenge. Depending upon an employer's policies or whether an employee has an employment contract, an employee may, for example, have a breach of contract or "wrongful discharge" claim. An "at-will" employer - that is, an employer who reserves the right to terminate employees without cause - generally does not need to worry about such claims. Like all other employers, however, an at-will employer still must be concerned about claims of discrimination and retaliation for exercising a legal right, such as reporting discriminatory or other unlawful employment practices.

Given the potential exposure associated with terminating an employee, an employer should ask themselves the following questions when termination is a possibility. Depending on the answers, termination may be premature or ill advised.

- **Does the employee have a legitimate explanation for his/her actions or poor performance?** Before deciding whether to terminate an employee, conduct a thorough investigation of the events in question and get the employee's version or explanation. Consider whether a neutral third person would find the employee's explanation plausible.
- **Does the punishment "fit the crime"?** Consider whether a neutral third party would agree that termination was fair given the nature of the conduct or the seriousness of the performance problems.
- **Is the decision to terminate inconsistent with previous actions of the company?** For example, has the employee recently received a favorable performance review, promotion or pay increase? If yes, this would make it more difficult for an employer to justify terminating an employee for performance related reasons.
- **Is the decision to terminate premature?** Determine whether alternatives to termination are more appropriate, such as giving an employee a "last chance" or placing the employee on a "performance improvement plan."
- **Does the employee have any pre-termination rights?** Ensure that any pre-termination procedures provided for by the company are followed (Note: special procedures may exist for public sector employees who have certain due process rights not accorded to private sector employees).
- **Has the company administered discipline in a consistent manner?** Ensure that members of a protected classification are treated the same as employees outside the protected classification who engaged in similar conduct, under similar circumstances (severity of conduct, prior offenses, length of employment, etc.).

Following a termination, an employer can reduce the likelihood of a challenge in a number of ways.

- **Ensure that post-termination procedures are followed.** Public sector employees may be entitled to a post termination hearing. Private sector employees would also be entitled to a hearing if provided for in company rules or in an employment agreement.
- **Protect your assets.** Request the return of keys and all other company property at the time of the termination meeting. Wage laws may restrict your ability to recoup losses for unreturned property from the employee's final paycheck. Immediately revoke the employee's access to electronically stored information and all information systems.
- **Be candid with the employee.** Be candid when advising the employee of the reason for termination. Don't "sugarcoat" the reason in order to avoid hurting the employee's feelings. If an employee later sues, these statements will adversely affect the employer's defense.
- **Respect the employee's feelings.** Do not embarrass the employee during the termination process. When possible, avoid "escorting" the employee from the workplace in front of co-workers. Employees who have been humiliated are more likely to challenge their termination.
- **Respect the employee's privacy.** After termination, advise only those who have a need to know the reason for the termination, and advise them to not discuss the matter.
- **Obtain a release.** If any severance benefits are provided (severance pay, payment of medical insurance premium, outplacement counseling, etc.), in addition to those owed an employee, consider making the benefits conditioned on the employee signing a release. For a release to be effective against federal age discrimination claims (employees 40 or older), the release must contain several specific provisions, including a 21-day consideration period and a 7-day revocation period.
- **Consider obtaining a resignation.** Where appropriate, offer the employee an opportunity to resign. This will improve the chances s/he will find work elsewhere which reduces the chances that the employee will file for unemployment compensation.
- **Avoid inconsistent post-termination statements.** Do not make post termination statements in a termination notice, reference letter or response to the state unemployment compensation office that are inconsistent with the reason for termination. Such written statements, like comments to the former employee, will create credibility problems for the employer.
- **Use caution when responding to reference requests.** Potential future employers requesting a reference for the terminated employee should be given only basic employment data such as dates of employment and position held. If additional information is requested, require a signed authorization and release from the former employee before responding. The response should be accurate.

- **Respond promptly and completely to any request for unemployment compensation.** Generally, termination for poor performance will not disqualify an employee for unemployment compensation, while termination for misconduct or refusal to perform duties will generally disqualify the employee. If you paid any severance benefits to the terminated employee, include that information when you respond to the claim. Severance pay will delay the start of unemployment benefits for the period covered by the severance pay and may result in less benefits being paid, depending on if and when the former employee finds another job.
- **Maintain relevant documents.** An employer should secure the employee's personnel file and retain all documents, including the employee's poor work product, that support the decision to terminate the employee.
- **Help the employee find other employment.** Consider providing outplacement services to aid the employee in finding another job. The sooner an employee is reemployed, the less likely the employee will bring an action against his/her former employer.

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