
THE RESOURCE

A Legal Newsletter for Employers & Human Resource Professionals

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Topic: Tips on Employee Terminations

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One of our earliest newsletters, discussing employee terminations, has been our most frequently requested, especially in recent months when companies are downsizing or “right sizing.” Whatever your company’s situation, sooner or later an employee will have to be let go. While an employee cannot be prevented from making a claim for wrongful termination or discrimination, there are steps you can take to minimize the risk of a claim and to limit the employer’s exposure if a claim is filed. This update of our popular newsletter “Tips on Employee Terminations” will provide advice on preparing for and handling company-initiated employment separations.

1. Review Your Personnel Policies

Before considering any termination, carefully review your employee handbook and any other written personnel policies. Does your handbook give examples of behavior warranting immediate termination? How does the conduct of this particular employee compare with those examples? If employees are to be given warnings or notice prior to termination or if your policies call for “staged” disciplinary measures (for example, one or more verbal warnings, followed one or more written warnings, followed by a final warning or termination), you need to be sure those policies are followed. In some states, written policies found in employee handbooks have been held to the level of contractual commitments by employers to follow those procedures. (If your policy handbook does not give you unilateral authority to terminate employment at any time for any or no reason, your policies may need to be revised.)

2. Check the Employee’s Personnel File

Be sure to review the employee’s file before finalizing the termination. Does the employee have a contract? Is the employee’s employment “at will”? Is there a contract for a specified period of time or does it require “cause” for termination? (If so, consult counsel before proceeding.) Is there any evidence that could be used to support a claim that the termination is retaliatory for a report of unsafe

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working conditions, illegal practices or a workers' compensation claim? Look for any performance reviews or other notices of performance or disciplinary problems. It will be easier to defend a wrongful termination claim if there are documented performance problems that have been communicated to the employee. If the employee's file is silent or if the performance reviews are neutral or positive, think about whether you can articulate a clear business justification for the termination. Do not try to "load up" the file just prior to termination. The EEOC or a court will look at belated attempts to "paper" the file as evidence of an ulterior motive.

3. **Look at the "Big Picture"**

Look beyond the individual employee being terminated. Is there a pattern to terminations over the past months or years that could be evidence of bias against a protected class of employees? If you are terminating more than one employee, are the employees disproportionately of one or another protected class? Will the termination of this employee be consistent with the way other similarly-situated employees have been treated? If you terminate one employee and not another for the same or similar conduct, you could be opening the door to a claim of discrimination. Also, if you are terminating a large group of employees within a short period of time (such as in a "mass lay off" or "plant closing"), there may be statutory requirements relating to the terminations under the Worker Adjustment and Retraining Notification Act ("WARN") or comparable state laws.

4. **Don't Procrastinate**

If you are terminating an employee for unacceptable performance or behavior, act swiftly once you have the necessary facts. The longer the time between a terminable offense and the termination, the less credible the cause and effect relationship will seem. Giving an employee second, third and fourth chances also

will give him/her the impression that the poor performance or offensive conduct is acceptable or will be overlooked.

5. **Consider Getting a Release**

If you are willing to give the employee severance or any other consideration to which the employee is not otherwise entitled, you should have the employee sign a release. Your attorney can provide you with a severance agreement that will set out the terms of the severance and a release of the company from liability under most state and federal employment laws. Be aware, however, that if the employee is forty years of age or older, the Age Discrimination in Employment Act ("ADEA") includes specific statutory requirements for an effective release of claims. The ADEA requires, among other things, that the release be written in understandable language; that the employee be advised, in writing, to consult with an attorney before signing; that the employee have 21 days to consider whether to sign the release; and that the employee be given seven days after signing the release to change his/her mind. If the termination is part of an employment termination program offered to a group or class of employees, the terminated employees must be provided 45 days to consider the offer and must be given information about the job titles and ages of all employees in the group or class.

6. **Be Sure the Person Conducting the Termination Is Trained and Experienced**

Don't let just anyone conduct the termination and/or exit interview. To ensure consistency, your company should have a designated HR person who conducts (or at least sits in on) all employee terminations. Be sure that the person conducting the termination meeting is familiar with all of the facts and can answer any questions that may arise in the termination process. The person conducting the meeting should take notes of what is discussed at the

meeting and/or have another person present to act as witness should there later arise a dispute over what transpired at the meeting. No employee ever forgets what is said to him/her when he/she is terminated. What is said at the termination meeting will set the tone for the separation and could mean the difference between an amicable parting of the ways and a lawsuit.

7. Secure Company Property

You can never tell when an employee might be so resentful of the termination that he/she tries in some way to harm the company. You should take all possible steps to avoid retribution by the employee for the job loss. Steps frequently advisable are to change the employee's computer password; have the employee hand over all keys to the employer's premises; escort the employee to his/her office to collect personal belongings (or have the belongings collected and sent to the employee's home); and have the employee turn over all company credit cards and company-owned items as soon as possible. Do not let the employee have unrestricted access to company property after the termination.

8. Avoid Terminations on a Friday or Before a Holiday

Although most employers would prefer to terminate an employee at the end of the work week, psychologically, this is a bad idea. The weekend is a time when most people relax and enjoy themselves. The terminated employee will feel more disgruntled as his/her family and friends enjoy family and social activities. Over the weekend, the terminated employee will also have greater opportunity to talk about his/her termination with other employees and friends because they are not at work. If the employee is terminated on a Monday or Tuesday, he/she will have time to accept and adjust to the termination before having the opportunity to air his/her grievances to friends and family.

9. Be Discreet

Be considerate of the feelings of the employee being terminated. Termination is almost always embarrassing for the employee. Do everything you can (bearing in mind Tip #10) to preserve the employee's dignity and self-respect. Conduct the termination meeting in a private place, away from others in the office. Allow the employee to collect him/herself before facing co-workers. If you escort the employee to his/her workspace to collect personal belongings during business hours, try to avoid any impression that the employee has done something wrong. Employees often define themselves through the jobs that they do; to take that identity from them is traumatic enough, without public humiliation.

10. Be Truthful about the Reasons for Termination

Do not attempt to make the termination easier by "sugar-coating" the facts. If the employee is being terminated for performance issues, say so and give one or two recent examples. If you do not give the real reasons for termination, or if you put a more positive spin on the facts, the true reasons for the termination will seem pretextual or false if you are required later to explain the employee's termination to the EEOC or in court. Do not give a positive letter of reference, especially if the employee was terminated for performance problems. That letter of reference may later turn up as "Exhibit A" in the employee's EEOC file as evidence that the employee was terminated for an unstated illegal reason.

11. Avoid Confrontation

Occasionally, an employee will become angry and confrontational. Do not allow the employee to argue with you. Calmly inform the employee that the termination decision

has been made and that you are not in a position to debate the facts with him/her. Do not allow yourself to lose your temper or be drawn into an argument with the employee. If it is likely that the employee will become violent or physical, plan ahead by seating yourself closest to the door and have one or more other employees on alert in case you need to have the employee physically escorted out of the premises. If it is clear that the employee is angry or at risk of losing control, immediately escort him/her out the door and have his/her personal belongings delivered to his/her home. Do not risk endangerment to other employees or to company property. If necessary, contact an appropriate law enforcement agency.

12. Solicit Feedback

If you can, solicit feedback from the employee about the Company, his/her job and the workplace. If the employee does not raise issues about harassment or discrimination when given the opportunity to do so, you may be able to provide this in response to later charges as evidence that no such harassment or discrimination took place. You may also receive valuable information regarding other issues in the workplace.

13. Be Sure the Employee is Paid All Wages and Earned Benefits

State wage and hour laws set out the requirements for paying a terminated employee's wages. Some states require payment of all earned wages to a terminated employee immediately; some other states require payment within twenty-four hours of the termination. North Carolina requires that a terminated employee be paid all earned wages on the next regular pay day after the termination. In addition, unless you have a specific written policy that has been clearly communicated to employees concerning the loss of such benefits upon termination, you must pay terminated employees their earned

and unpaid vacation pay. Consult your employment attorney if you do not know the rules in your jurisdiction.

14. Retain Records

Be sure to keep all records relating to the employee and the termination. In general, an employee has 180 days after the taking of adverse action against him/her to file a charge with the EEOC. However, many state law claims have statutes of limitations that allow the employee to file his/her claim three years or more after the termination. Records of personnel actions, including terminations, may also be needed to establish employment practices and procedures over a period of time. In addition, federal and state wage and hour laws require employers to retain employment records for specified periods, as long as three years or more. Although storing large amounts of personnel data may be inconvenient, the benefits far outweigh the disadvantages.

15. Arrange for Notification Regarding Post-Termination Benefits

The Consolidated Omnibus Budget Reform Act ("COBRA") provides that terminated employees may continue their group healthcare insurance coverage at their expense for a period of 18 months after termination of their employment. Under the American Recovery and Reinvestment Act of 2009 (also known as the "federal stimulus package"), for a limited period of time, certain individuals whose employment has been involuntarily terminated may qualify for a 65% subsidy for COBRA continuation premiums for themselves and their families. The employer is responsible for sending terminated employees notice of their rights under COBRA and seeing that the employee has the opportunity to make the insurance continuance election. Consult your employee benefits attorney for more information regarding employees' rights and employers' responsibilities under COBRA.

Remember, although terminating employees is never pleasant, careful planning and forethought will make the process much easier and will pay off in limiting the company's exposure to litigation.

For more information on the topics addressed in this newsletter, contact Diane Tindall at dtindall@wyrick.com, Mary Williams at mwilliams@wyrick.com or Kellam Warren at kwarren@wyrick.com.

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