

[The Resource] Termination Tips

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Termination is a necessary, if sometimes unpleasant, part of the employment relationship. While there is no way to prevent an employee from making a claim for wrongful termination or discrimination, employers faced with an employee termination can take certain steps to minimize the risk of a claim and to limit the employer's exposure if a claim is filed. This issue of The Resource will provide some useful tips for employers planning for and conducting employee terminations.

Do Your Homework

Before considering termination, review the employee's personnel file. Check to see if there is a written contract that provides for a specific term of employment, a period of notice prior to termination or a severance obligation. If the agreement defines termination with or without "cause" or resignation for or without "good reason," be sure that you understand the employee's rights and the employer's obligations under the particular circumstances. Many employees have no written agreement or guarantee of continued employment and are employed "at will," meaning either the employer or the employee may terminate the relationship for any legal reason. Look for "at will" language in the employee's offer letter or in your employee handbook.

Be sure to review your written policies. If your handbook provides for warnings or "staged" or "progressive" discipline, be sure to follow your policies. Negative performance reviews or other notices of performance or disciplinary problems can help justify the termination. However, also avoid "loading up" the file with negative input just prior to termination; belated attempts to "paper" the file may be seen as evidence of an ulterior motive.

If there is no written documentation of performance problems, consider delaying the termination and placing the employee on a written performance improvement plan. The plan should establish specific and objective goals and a timeline that is reasonable for the

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employee to show improvement. The plan should also spell out the consequences, such as demotion or termination, if the improvement goals are not met. Be sure that the goals and timeline are reasonable, and the employee is not just being set up to fail. An employee who is given a fair chance to correct performance issues and who does not improve will have a much harder time claiming an illegal motivation for his termination.

Also, review the entire record to ensure there is no pattern of terminations over the past months or years that could be evidence of bias against a protected class of employees. The termination should also be consistent with past treatment of similarly-situated employees. Make sure there are no grounds to support a claim for retaliation, such as the employee's recent report of unsafe working conditions, recent use of FMLA leave or recently-filed workers' compensation claim. If you are terminating a large group of employees (a "mass lay off" or "plant closing"), there may be statutory notice requirements under the Worker Adjustment and Retraining Notification Act ("WARN") or comparable state laws.

Plan Ahead

To ensure consistency, a trained HR professional should prepare for and conduct the termination. In the termination meeting, another person should be present to take notes and provide corroboration should there later arise a dispute over what transpired at the meeting. Unless a member of a labor union, the employee has no specific legal right to an attorney or a witness in the meeting. If your company has a policy prohibiting workplace recordings, the employee also should not be permitted to record the conversation. If the employee is permitted to record, the employer's representatives should also record the discussion for the company's own records.

Plan to take steps during or immediately after the termination to avoid possible retribution by the employee. Change the employee's computer password, collect all keys and access cards, company credit cards and company-owned items and escort the employee to his workspace to collect his personal belongings (or have the belongings sent to the employee's home). Do not let the employee take time to send out emails or to commiserate with co-workers during working time or on work premises.

Conduct the termination in a private place, away from others in the office. If possible, plan the meeting when fewer of the employee's co-workers will be present and aware of the termination. To the extent possible, try to preserve the employee's dignity and self-respect. Be careful about what is said publicly about the termination and how it is presented to the rest of the workforce. Try to be neutral in any

announcement of the departure and be respectful of the terminated employee's privacy.

Consider Getting a Release

If you are willing to provide severance pay, have the employee sign a written release. If the employer has 20 or more employees, and the employee is 40 years of age or older, the Age Discrimination in Employment Act ("ADEA") requires that the release be written in understandable language; that the employee be advised, in writing, to consult with an attorney; that the employee have 21 days to consider whether to sign the release; and that the employee have seven days after signing to change his mind. If the termination is part of a program offered to a group, under the ADEA, employees 40 and older must be provided 45 days to consider the offer and must also be given information about the job titles and ages of all employees in and outside the group. Some states have additional requirements for a valid employee release.

Follow Through

If you are terminating an employee for unacceptable performance, act swiftly once you have the facts. Be honest. Do not try to make the termination easier by dodging the truth. 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 them.

Consider the employee's temperament and past behavior, and likely reaction to the termination. If necessary, provide for security services to ensure the safety of the workplace or contact the appropriate law enforcement agency. Do not allow the employee to argue with you. Calmly inform the employee of the termination decision and do not become embroiled in a debate. If the employee becomes angry, escort him out the door and have his belongings delivered to his home.

Provide Final Pay

Be sure to check and follow state wage and hour laws for the required timing for payment of a terminated employee's final wages. Most states have specific rules about when and how an employee must be paid upon termination of employment. Some states allow employers to wait until their next regular pay day to provide a final paycheck to a terminated employee. Other states require payment on the date of termination. Unless you have a specific written policy otherwise, you must pay terminated employees for their earned and unused paid time off such as vacation. In some states, no accrued vacation may be forfeited on termination.

Keep records relating to the termination for the appropriate time period. Under federal discrimination laws, an employee must file a charge with the EEOC within a specified period after the termination. In many states this deadline is 180 days; however, some states provide a longer period in which the employee may file. The employee might also file a claim under state law. Many state law claims have statutes of limitations that allow employees to file suit three years or more after the termination. A good rule of thumb is to retain employment-related documents for a period of six years following the later of the employee's termination of employment or the final conclusion or resolution of any claims filed by the employee.

Under the Consolidated Omnibus Budget Reform Act ("COBRA"), most terminated employees may continue their group healthcare insurance coverage for up to 18 months after termination. The employer (or its plan administrator) is responsible for sending terminated employees a notice of their rights under COBRA.

Conclusion

Although employee terminations are never pleasant, careful planning and execution will make the process easier and will limit your business's exposure to litigation.