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# Your Host



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# Employee Terminations: Best Practices



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# Termination Risk Analysis

- Before terminating an employee, an employer should consider:
  - Potential for lawsuit or administrative claim
  - Whether there is a justification for termination
  - Whether a jury would agree that termination was justified

# At-Will Employment

- “At will”: the employment relationship is terminable at the will of either party for a good reason, a bad reason, or no reason at all, with or without notice

# At-Will Limitations

- Statutory Exceptions:
  - You cannot terminate an employee for an illegal reason
  - Age, race, sex, gender, disability, etc.
  - Retaliation
- Employment contracts:
  - If an employee has an employment contract, the terms of the contract must be followed.
  - e.g., 30-days' written notice or immediate termination for cause

# At-Will Limitations

- Implied Contracts:
  - Oral assurances by a supervisor
  - Handbooks, policies or practices

# Considerations in Every Termination

- Appropriate documentation to support termination?
  - Has the employee received prior discipline?
    - Documented coaching, counseling, or other corrective action?
  - Has an investigation been conducted (if appropriate)?
    - If so, was it conducted fairly and objectively?
    - If so, is there adequate documentation to support the reason for termination?
  - Are there prior performance evaluations that reflect concerns that relate to reason for discipline or poor work performance in general?

(cont'd)



# Considerations in Every Termination

- Is the employee in a protected category?
  - Every employee is in a protected category; the key is identifying which are relevant to the issue at hand
- Is the employee receiving an accommodation for a disability?
- Is the employee on leave under the FMLA?
- Has the employee recently engaged in protected conduct?
- How has the employer treated similarly situated employees?

# Review Company Policies and Procedures

- Policies and procedures should be followed consistently:
  - Inconsistent application may result in a finding of improper motive for adverse employment action
- Particular attention should be paid to:
  - Progressive discipline policies
  - Internal dispute resolution policies
  - Termination policies requiring “just cause”

# Time the Termination Correctly

- If shortly after filing an internal complaint, an employee is disciplined or terminated for an unrelated event, it may appear to be a retaliatory action
- Employees who file complaints can still be disciplined, but the supervisor's documentation of misconduct must be very clear and consistent with past practice before proceeding with discipline

# Is the Termination Legally Defensible?

- To ensure termination decisions will be defensible if challenged, employers should:
  - Follow a standardized procedure
  - Potentially hold the organization to a “just cause” standard
  - Treat all employees in a fair and consistent manner

# The Seven Tests of Just Cause

1. Reasonable Rule or Order
2. Notice
3. Investigation
4. Fair Investigation
5. Proof
6. Equal Treatment
7. Appropriate Discipline

# Issues to Address Prior to the Termination Meeting

- Required documentation
- The last paycheck
- Vacation and sick time
- Separation Agreements
- Future references
- Bonuses and commissions
- Stock options and retirement benefits
- COBRA

# Required Documentation

- NY Labor Law Section 195(6)
  - Terminated employees must be provided a written notification that includes:
    - The date of termination
    - The date of cancellation of employee benefits
  - Must be within five (5) business days of termination

# The Last Paycheck

- Must be delivered on or before the next regularly scheduled pay day
- Do not condition receipt of final paycheck upon agreement not to sue
- Additional deductions from final paycheck are almost never permissible
  - Exceptions include repayment of advances in compliance with NYSDOL regulations



# Vacation and Sick Time

- Payment for vacation/sick time is governed by employer policy/agreement
- Employers may impose restrictions on payout of vacation pay at termination
- Employers must provide notice in writing of their policy on vacation/sick time
- Where there is no written forfeit policy and an employee has accrued but unused vacation/sick time, the employer must pay at termination

# Separation/Severance Agreements

- Severance agreement/release of claims
  - An employee agrees to take something of value to which he or she is not otherwise entitled in exchange for a release and other conditions
- When to offer a severance package?
  - Employment policies regarding severance
  - Consider whether there is a potential risk of legal claim
  - Consider the reason for employee's termination

# Separation/Severance Agreements

- Common clauses:
  - Consideration (what is the severance or other benefits being offered?)
  - References
  - Release
  - Legally required disclosures
  - Non-disclosure
  - Non-disparagement
  - Confidentiality
  - Restrictive covenants
  - Return of employer property

# Future References

- Establish protocol for post-employment reference requests
  - Limit the information shared to job title, dates of employment, final salary
- Consistently follow protocol
  - Respond in the same neutral manner in all cases
- Designate a human resources employee to respond to reference requests

# Bonuses and Commissions

- Bonuses (incentive compensation) are not typically wages
  - May be forfeited upon termination if the bonus plan allows
- Commissions are wages
  - May not be forfeited upon termination
- Pay close attention to the language of all bonus and compensation policies

# Termination Meeting

- Where to hold the meeting?
  - Consider on-site/off-site, and privacy implications
  - Certain times when termination by phone is appropriate
- When to hold the meeting?
  - After information is clearly documented and facts are known
  - Morning/afternoon
- Who should be at the meeting?
  - Direct supervisor and HR representative

# What to Cover in the Termination Meeting?

- Provide concise reason for termination
  - Tone should be respectful and professional
  - Make clear that the decision is final
- Address severance and any outstanding contractual obligations
- Briefly run through benefits
- Explain job reference policy
- Collect company property
  - Shut-off of computer/email access

# Questions



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# Thank You

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