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Tips: Employee Terminations

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Terminating a person's employment can be a traumatic experience for everyone involved. Below are tips to help human resource professionals and other company leaders (like managers and supervisors) prepare for and implement an employee termination.

Review the Facts

Ask the following questions as part of your review:

Is the termination justified? In other words, is there a reason for the termination that comports with company policy and is not illegal? While every U.S. state except Montana is an at-will employment state, there are many limitations and exceptions to the at-will doctrine that an employer can fire an employee at any time for any reason. As such, we caution employers against relying solely on the basis that the employment was at-will to justify a termination.

Is the termination fair? For example, if relevant, was a full and fair investigation conducted, including an opportunity for the employee to tell his or her side of the story? Was the rule that was violated reasonable and well-communicated? Was progressive discipline undertaken for all situations except those involving very serious misconduct?

Is the termination consistent with past practices? Inconsistencies with respect to policy violations are a fast route to the wrong (i.e., losing) end of an employment discrimination claim. Enforcement agencies almost invariably ask for comparative information showing the treatment of others for the same or similar policy violations.

Is the termination consistent with the documentation in the employee's file?

Has the employee who is about to be terminated recently engaged in any protected activity, like raising a concern or complaint about a policy or legal violation?

Note that such employees are not immune from discipline, but in these situations it becomes more important than ever to have strong documentation to support the termination decision.

Was the decision made when you and other company leaders were not in the heat of the moment?

Consider presenting a severance agreement that includes a release of legal claims to employees being terminated in high-risk situations. Ensure that your severance and release agreements are enforceable and not subject to legal challenges by the Equal Employment Opportunity Commission and other agencies that enforce employment and labor laws.

Prepare for the Termination Meeting

Preparation begins with identifying a clear and understandable rationale for the decision to terminate the employee; i.e., the real reasons for the termination.

Prepare a written outline of what you will say. Avoid using legal conclusions, criminal terms, or other labels that might impugn the employee's character. Focus strictly on the facts; e.g., what the employee did or didn't do that failed to meet company expectations, violated established company policies, and so on.

Anticipate things that are likely to come up when you meet with the employee as well as how you might appropriately respond. For instance, if the employee becomes angry and starts yelling, your response might be, "I know you're upset and angry, but the decision is final."

Don't just think about legal risk. Being terminated is likely one of the worst moments of the terminated employee's life. Thus, plan ways to sympathetic. A potential bonus to showing sympathy is that it may also decrease the chances that the employee will file a legal claim. How you handle the termination can also make an impression on remaining employees; i.e., it can either breed better morale and loyalty, or produce the opposite, negative results.

Carefully Plan and Conduct the Meeting

Arrange the termination meeting in a private, neutral place. For example, the Human Resources office or a conference room. Choose a place as well as a day and time that minimizes disruption to your business and other employees and results in the least embarrassment and trauma for the employee who is to be terminated. Many experienced practitioners recommend avoiding such meetings on Fridays, which leaves the employee in limbo for a few days and unable to quickly move on to the next step of seeking other employment. Also, don't fire someone on their birthday or other important personal date if you can help it.

With very limited exceptions, have an additional person (such as a human resources representative or other management official) present as a witness.

Be short, to the point, and sensitive. Begin by informing the employee that his or her employment is being terminated. Explain the company's real reasons for the termination without attacking the employee as a person. Be as honest as you can without being brutal. Respect the employee's dignity and self-esteem as much as possible.

Also, control and minimize your own possible emotional reactions to what may be said by the terminated employee. It is critical that you maintain control so as to avoid unnecessary hostility or other problems. Don't be drawn into an argument with the employee about what did, did not, or should have happened. If necessary, clarify any misunderstandings, but be firm: the decision to terminate the employee has been made. It may be appropriate to indicate your regret that things didn't work out better, if done without appearing condescending or insincere.

Handle Ancillary Matters Appropriately

While some states give you a few days' allowance, we recommend that you deliver the employee's final paycheck at the termination meeting, including accrued leave time if required by applicable law. Also deliver any other required notices.

Be prepared to discuss other accrued benefits, health insurance, and more, including transition assistance if available. It may be necessary to arrange additional meetings with or other support from other human resources staff. Make sure termination-related benefits are outlined in writing to avoid misunderstandings.

Be Prepared to Discuss Applicable Agreements and Ongoing Requirements

Present the severance and release of claims agreement if you've decided to offer one.

If applicable, remind the employee about any noncompete, confidentiality, nondisclosure, non-solicitation, or other similar types of agreements he or she signed. Provide copies.

Get company property back. To help you do so, prepare a checklist before the meeting of equipment or property to be returned by the employee, including laptop, cell phone, company keys, credit cards, customer lists and other confidential information. If the employee does not return company property, contact legal counsel before you make any deductions from the employee's final paycheck, as many state laws restrict such deductions.

Take Care of Logistics

Have a plan to exit the employee from the premises. Consider whether the employee should be supervised in cleaning out his or her office right then or whether to arrange for the employee to come in after hours. Some circumstances warrant that the employee be escorted directly from the premises. Determine whether security personnel need to be available to provide assistance.

Arrange for transfer of projects the employee was working on, changing security passwords on the computer system, changing door locks, and auto-forwarding of emails.

Limit Your Liability

Keep the termination reasons as confidential as possible. An employee termination should be treated as private company business. Improper disclosure can expose the company, as well as individuals, to potential liability for defamation and more. This is particularly true for public employers. Make certain only those persons with a legitimate "need to know" are informed about the details and then only tell them what they truly need to know. Determine in advance what other employees, customers, and prospective employers will be told about the termination.

We are here to help you with these emotional situations every step of the way. Our legal team can help prepare documents and evaluate your termination rationale, as well as conduct risk assessments with respect to claim defense and claim avoidance. Our human resources experts can walk you through conducting the termination. Our organizational development and learning specialists assist with critical items, like how to conduct the conversation. Our investigative teams can evaluate the adequacy of your investigation or conduct them on your behalf. Don't hesitate to reach out! And, one final note, if your termination is part of a reduction in force where two or more employees are being laid off, that situation presents unique challenges beyond the scope of this article. Employers Council is here to help with those situations as well.