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SEPARATION OR TERMINATION PROCEDURES

BEFORE MAKING THE DECISION TO TERMINATE

When considering termination of an employee, serious consequences may result, including EEOC complaints, lawsuits, adverse publicity and other undesirable consequences. The termination process can be broken down into three basic components:

- I. Evaluation of the potential termination before the decision is made,
- II. The actual termination encounter or conference,
- III. Post-termination issues and tasks.

As you might imagine, the processes before and during the termination are the most important. Highlighted considerations and tasks which we advise should be taken are set forth below:

- A. Review your Employment Policies Handbook and Guidelines and make sure you, as the employer, have complied with all of the procedures set forth in your Policies.
- B. Review the employee's personnel file to make sure the documentation is there to support your decision to terminate. Documentation should include any warnings or counseling sessions that outlined the concerns or performances issues and any policies that were violated as well as any conditions placed on continued employment. Documentation regarding any annual reviews should reflect the employee's actual performance or lack of performance.
- C. Review the personnel files for other employees who have or have had similar problems or concerns. This comparison can point out potential discrimination issues. For example, could a female employee being terminated for attendance problems show that a male employee had the same number of absences, but was not terminated? Can a minority employee show he/she was never counselled about a concern, but the Caucasian employees were?
- D. Investigate any matters which are vague or uncertain and make certain you have your facts straight. If you have a question about the reliability of some of the facts, do not rely on them to terminate an employee.
- E. Make sure the reasons for termination have been discussed on prior occasions with the employee and that the employee has been given an opportunity to correct those problems or concerns. For example, do not fire an employee because they are late one time or if they are late several times if the problem has not been pointed out to them and documented as a real issue. Fairness is crucial. If an employee has not been

specifically advised of a problem and given the opportunity to correct the concern and improve performance, it is not fair to first broach the concern at the time of termination. Also, the counselling may result in the improved performance of the employee. Do not ever assume the employee is aware of any performance issues.

- F. Consider the legal ramifications or potential legal problems of terminating the employee. Be sure to consult legal counsel prior to proceeding with any termination action to avoid these potential problems. Also, insurance carriers may require consultation to afford you coverage should suit result from the termination.

N.B. Some first time offenses may be so egregious to warrant immediate termination. Such offenses include, but are not limited to, instances of workplace violence, fighting, theft, dishonesty, gross insubordination and the like.

EVALUATE

- A. Employees are oftentimes members of a "protected class." Therefore, first evaluate the possibility of a discrimination or wrongful discharge claim which may result from an adverse employment action to a particular employee. In this regard, the following are some helpful questions to ask yourself when termination or an adverse employment action is being considered:
- How old is the employee?
 - Is the employee pregnant?
 - How many minority employees are currently employed or will remain with the employer following the termination?
 - Who will replace the employee?
 - How long has the employee been with the employer?
 - Was the employee hired away from a previous long-term employer?
 - Has the employee recently filed a worker's compensation claim or any other type of claim with a federal or state agency?
 - Is the reason for termination something which has been used to terminate employees in the past or is this the first time?
 - Has the employee complained about alleged wrongful or discriminatory behavior by the employer such that the disciplinary action/termination can be viewed as "retaliatory?"

- Does documentation in the personnel file support termination?

N.B. The possibility of a discrimination or wrongful discharge claim should not be an excuse to avoid conflict. While the questions of a "protected class" are to be carefully considered, this does not mean you are precluded from terminating any employee. Members of a protected class are not exonerated from customary and fair job performance and expectations.

B. You also want to evaluate the practical considerations of the termination which may also have legal implications. Some considerations are:

- If the termination is challenged, will adverse publicity affect the employer?
- Has the employer failed the employee such as lack of training, evaluations, failure to previously note the concern?
- If the employee is not terminated, can the employer continue to deal with the problem?
- Is the employee the type who will file a lawsuit?
- Will the termination or failing to terminate affect other employees' morale or the employer's credibility?
- Is there some other place this employee can work within the organization?
- Has the employee tried to improve after being told of the concern?

C. Prior to allowing the termination process to proceed, obtain another manager's or supervisor's opinion about the possibility of termination of the particular employee. Again, ensure that in addition to this step, you have consulted with the legal counsel.

D. Consider your company policies and documents. Review the employer's handbook for policies which may limit the company's right to terminate. If the employee has a written contract with the employer, that will usually limit the termination rights of the employer. Therefore, consider these policies and issues that may be at issue due to specific language provisions in the Employee Handbook or the specific contract between the company and the employee:

- Employment at-will policies,
- Discipline policies requiring written warnings,

- Internal dispute or mediation policies,
- Termination policies requiring "just cause" or "with cause."

N.B. The one thing worse than having no employment policies, is not following or adhering to the policies in place!

TERMINATION CONFERENCE

- Critical Point:
- The termination conference is a critical part of the termination process and can make or break an employee's potential case.
- Problems often arise when a termination conference is handled improperly.
- Many times illegal or damaging statements are made to the employee.
- These conferences can make the employee angry and plant the idea of filing a lawsuit or EEOC charge.
- General Guidelines:
- At least two representatives of the employer should be present during the termination conference. These should be individuals in authority with the employer. They should be organized and prepared for the interview with an outline of what is going to be said. It may help to rehearse what to say and to anticipate questions from the employee and prepare a response to the employee.
- When the conference begins, do not delay, but tell the employee that he or she is being terminated and provide the key reason(s) why he/she is being terminated. This makes the reason for the meeting very clear.
- Explain the termination decision briefly and clearly. **DO NOT** DO ANY OF THE FOLLOWING:
- **DO NOT** argue with the employee to justify the decision to terminate.
- **DO NOT** counsel the employee. This should have already taken place, but the employee has not improved resulting in termination.
- **DO NOT** fail to give an explanation for the termination.

- Fully explain the benefits to which the employee is entitled. Be prepared to direct the employee immediately to the proper individual with the correct benefits information such as accrued vacation, insurance, pension, etc. Tell the employee when the benefits will be received. If the employee is not entitled to certain benefits, explain why not.
- Give the employee an opportunity to have his/her say. Again, this is not to be an argument or counselling session but a time for the employee to provide feedback to the employer or simply to "vent."
- Remember, anything said can and may be used against the employer in a court of law or EEOC hearing, so be careful of what is said.
- If an employee is in a "protected class," such as an employee over the age of 40, minority employee, a pregnant employee, or an employee with a disability, DO NOT make any reference to any of these "conditions" or say anything which can be considered discriminatory to the employee.
- Similarly, never include references to sex, age, race, religion, retirement, or disability.
- Briefly review the employee's history with the employer; comment on specific problems with the employee; and, review attempts made by the employer to correct the problems with the employee.
- THIS IS VERY IMPORTANT: In listing instances or events leading to termination, attempt to obtain the employee's agreement concerning these problems and concerns which have been previously addressed with the employee and the employer's attempt to resolve these problems, the poor job performance by the employee and the continued dissatisfaction with the employee's problem even after the employer's attempt to resolve the problem or help the employee improve. This allows the employer to have information which can be used in the event a suit or claim is brought and to be able to say these problems were reviewed and the employee agreed that these were problems. While an employee may not agree there were problems, or claim it was not his/her fault, or attempt to offer excuses or an explanation for the inadequate performance (e.g. I was late ten minutes this month due to childcare or car problems) the employer can at least get agreement from the employee that the events (repeatedly late or absent regardless of the reason) and that the concerns were previously conveyed to the employee.
- Take detailed notes that are neutral, business-focused and non-discriminatory. Documentation of the termination conference is

important evidence should any legal claim arise post-termination. It is suggested the contemporaneous notes be used to draft a memo of the termination conference after the actual conference takes place.

- Be as courteous to the employee as possible. If the employee disagrees and becomes upset, angry or hostile, do not respond in kind. Quietly terminate the conference and invite the employee to gather his/her personal belongings and leave the premises. Being courteous does not mean being apologetic.
- While the termination conference is taking place, the employee's access to the employer's server, network, electronic devices, computers, software or digitally stored information should also be terminated by the employer and/or its IT vendor/provider.
- Obtain the employee's keys or key cards to terminate his/her access to the building such as the codes to enter the premises.
- Collect any company-issued credit or debit cards.
- Arrange a convenient time for the employee to gather any personal belongings and avoid the "perp walk" scenario!
- Documentation:
 - As soon as possible after the termination conference concludes, a detailed summary of the termination conference should be prepared by the employer representatives in attendance with neutral, business-focused, and non-discriminatory notes.
 - Include what the employee was told.
 - Include what the employee said, with particular emphasis on what facts the employee did not dispute regarding job performance, the attempts by the employer to help the employee improve, etc.
 - Any representatives of the employer present at the conference should sign and date the post- termination conference.

POST-TERMINATION

Following termination, be sure that all monies or benefits due to the employee are handled as quickly, correctly and expeditiously as possible so that the terminated employee does not become more dissatisfied or angry due to a failure to receive the benefits to which he/she is entitled.

Immediately following the termination, the employee should be accompanied to his/her office, workstation, desk or workplace and allowed to remove any personal items. No company laptops, phones, computers, iPads, files, notebooks, paperwork, etc., should be taken by the employee. The employee has no right to take or keep any information on the employer's equipment or computers. There is no expectation of privacy for "personal" items on the company's computer, laptop or cell phone. However, employees inevitably download or place personal notes, photographs or records on company devices despite employer policies advising that not be done. Oftentimes, employees object to the company retrieving or keeping company devices or equipment holding "personal" matters or items. If such an objection is raised, tell the employee that a company representative/IT vendor will review and/or download the employee's personal information to a thumb drive which will be delivered to the employee as soon as possible.

POST-TERMINATION RELEASE OF INFORMATION

No information about a former employee should ever be released orally, whether in person or by phone. If any information is sought concerning a former employee, the employee must sign a release authorizing the release of specific information, state that the release of that information will not subject the employer to any liability, and agree to indemnify and hold the employer harmless due to the release of the employee's information. The HR Department can provide a form for this purpose.

While not providing an oral recommendation or commenting on former employee may be a disadvantage to former good employees and deny them a good recommendation, the information can very easily be provided, and potential liability can be avoided if any employee requesting the information signs the requisite employer release. The request for information and any information provided by the employer should also be specific to the inquiring prospective employer and clearly note that nothing is to be inferred by not giving any information without a written release but that it is simply the employer's policy. In this day and time, anything said can be used in litigation. Thus, not providing any oral comments or discussion of a former employee eliminates any misunderstanding or mischaracterization of what was said. With the written form, not only does an employer have the employee's permission to release information, the employer also has the employee releasing the employer from any liability associated with the giving of the employee's information to a third party.