

## TERMINATION CHECKLIST

### **Step 1: Before finalizing the decision to terminate an employee, ask if the employee:**

- Could claim to possess one or more protected characteristics, *e.g.*:
  - Race
  - Religion (including religious practices and dress)
  - Creed
  - National Origin
  - Ancestry
  - Sex
  - Gender (including preference or identity)
  - Age (40 or over)
  - Color
  - Physical or Mental Disability (perceived or actual)
  - Medical Condition
  - Marital Status
  - Genetic Characteristics
  - Sexual Orientation
  - Any other basis prohibited by federal, state, or local law
- Has a history of initiating employment-related claims or lawsuits.
- Is receiving or has recently received workers' compensation or disability benefits.
- Is on, or has recently returned from, a statutorily authorized leave of absence (such as pregnancy leave, family or medical leave, or workers' compensation leave).
- Is currently pregnant or is being accommodated for a disability.
- Has a long-term employment history with the company.
- Is under a supervisor who has a history of similar problems with other employees.
- Has recently complained about illegal, unsafe, or unfair treatment. There is no applicable limitations period. The more time that has elapsed, the less likely there will be a connection between the complaint and the adverse employment action.

### **Step 2: If one or more of the factors listed above is present, consider taking additional steps to minimize the risk of litigation:**

- Delay the termination to allow for additional warnings, counseling, and opportunity for improvement.
- Delay the termination to develop a better record of providing the employee a good faith opportunity to improve, such as by offering additional training or a transfer to another position.

- Delay the termination and consider having a different supervisor evaluate the employee, particularly when there is evidence of a personality conflict between the employee and his or her immediate supervisor.
- Delay the termination to ensure that the employee has received, read, and understood all relevant employment policies.
- Consider offering the terminated employee a severance package in exchange for a release of all claims and a promise of confidentiality regarding the terms of the agreement.
- Consider helping the terminated employee with his or her job search through placement assistance, use of a secretary, or other clerical assistance.

**Step 3: Once the decision to terminate the employee has been finalized, the employer should be able to answer each of the following questions affirmatively:**

- Has employment law counsel been consulted about the termination decision?
- Are all managers and supervisors who participated in the termination decision, as well as human resources, in agreement with the grounds for termination?
- Is there credible documentary and testimonial evidence to support the termination decision?
- Is the termination consistent with the way other employees at the company have been treated under similar circumstances in the past?
- Have the company's termination policies (*e.g.*, internal dispute or "just cause" policies) been followed?
- Have all provisions in company policies (*e.g.*, in the employee handbook) that might protect the employee from being terminated for the reasons contemplated by the company been reviewed and considered?
- Can a legitimate business reason for the termination decision be articulated?
- Is the reason for termination non-trivial and related to the needs or goals of the business?
- If there is a progressive discipline policy, has it been reviewed to ensure that all required steps before termination have been complied with?
- If progressive discipline has not been imposed, is there sufficient basis to justify an *immediate* termination, *e.g.*, for theft, falsification of company records (such as a résumé or timecard), or destruction of property?
- Is there documentation to establish compliance with the progressive discipline policy, if any?
- Has the termination been determined not to violate (or potentially violate) any state or federal statutes prohibiting discharge under the present circumstances?
- Was the employee's conduct or performance criticized without regard for and well after resolution of any protected complaint by the employee, such as a complaint about harassment or discriminatory, unfair, unsafe, or other unlawful conditions at work?
- Is the employer's stated reason for the termination consistent with performance or conduct problems that have been discussed with the employee in the past?

- Will discussions in connection with written performance evaluations or disciplinary actions support the termination decision?
- Is the company's stated reason for the termination consistent with documentation of the problem in the employee's personnel file?
- Do ratings on recent written performance evaluations support a termination based on "poor performance"?
- Is the company's stated reason for the termination consistent with the recent conduct of management (*e.g.*, are recent "merit" pay increases or bonuses consistent with termination for "poor performance")?
- Has the employee's explanation of the events leading up to termination been considered? Have witnesses been interviewed? Is there sufficient, credible evidence for rejecting the employee's explanation? Does the weight of the evidence contradict the employee's version of events?
- Is the employment relationship likely to be deemed "at will"? If not, can "good cause" be articulated in light of long-term employment, promotions, commendations, oral assurances, or other indicators of job security that could create an inference of an implied-in-fact contract?
- Do company policies contain at-will disclaimers?
- Has it been determined that company policies or practices do not expressly or impliedly promise employment for a specified duration or promise continued employment as long as performance is satisfactory?
- Were alternatives to termination (*e.g.*, suspension with or without pay or transfer to a different supervisor) considered and documented?
- Was the employee given the opportunity to request an investigation into the facts relied on for the termination?
- Is the employee physically or mentally disabled? If so, were documented attempts made to reasonably accommodate his or her disability (including accommodations for conduct or performance related to the disability)?
- If there are multiple reasons for the termination, has it been determined that none of the reasons are false or a pretext to mask a violation of a state or federal statute, such as state and federal antidiscrimination or retaliation laws?
- Is the termination decision final? That is, does the employee have any right to appeal the termination decision, and if so, has the right been waived or has it elapsed?

**Step 4: A negative answer to any of the questions in Step 3 above should result in a delay of termination until each problematic issue is resolved. Once the answers to these questions are all "yes," the termination process should proceed immediately to a confidential and uninterrupted exit interview that covers the following:**

- The reason for the termination. If employment is at-will, no reason need be stated. If none is given, however, the employee will be free to guess at the reason and is likely to find a reason that violates the law. If a reason is given, it should be stated broadly enough to withstand later attack.
- Procedures to review or appeal the termination decision.

- \_\_\_ The last day of work and the return of any company property (*e.g.*, company keys, credit cards, automobiles, security and parking passes).
- \_\_\_ Any continuing obligations after the termination. For example, if the employee signed an agreement not to disclose confidential company information or not to compete with the company, a copy of the signed agreement should be given to the employee. If no such agreement has been signed and if the employee has had access to proprietary information, counsel for the company should prepare an appropriate agreement covering these matters for the employee to sign.
- \_\_\_ No right of privacy in electronic equipment that may have been provided for the employee's work. During the exit interview, explain that the employee's access to electronic equipment has been terminated. Cancel passwords, disable computers, terminate company credit cards, and otherwise disable access to secured areas. Tell the employee that personal information stored on any electronic device will be downloaded and returned to the employee once the employee identifies what belongs to him or her.
- \_\_\_ How final pay was calculated. Wages and accrued but unused vacation benefits must be paid at the time of the termination if the termination is employer-initiated. If the employee resigned, final wages are due within 72 hours of the last day of work.
- \_\_\_ If severance is being offered, the material terms, *e.g.*, the amount of severance, how the amount was calculated (if relevant), release, confidentiality, time to consider the offer (none need be given, but if the employee is presented with a "take it or leave it" offer without having at least a day to review the decision with family or friends, the employee may later claim duress or unfair treatment vitiating the release). Although the employee should return any severance paid once a release is rescinded, few employees are in a position to return a significant sum.
- \_\_\_ Any complaints that the employee did not previously make about the workplace that the employee believes the employer should know about or investigate.
- \_\_\_ Continuing respect for trade secrets and other proprietary business information. A copy of the signed agreement should be given to the employee. If no agreement has been signed and if the employee has had access to proprietary information, counsel for the company should prepare an appropriate agreement covering these matters for the employee to sign.
- \_\_\_ Post-termination employment assistance, including insurance issues such as unemployment and health benefits.
- \_\_\_ References.
- \_\_\_ Whether the employee is separating "in good standing" and will be eligible for future employment.
- \_\_\_ If the employee becomes argumentative or threatening, leave the room (or call security).
- \_\_\_ At the conclusion of the exit interview, hand the employee the letter of termination and give the employee a copy of the severance agreement and any wages due.
- \_\_\_ Allow the employee to collect his or her personal belongings in private, not under the direction of a security guard or supervisor. Allow the employee to leave the building unescorted. Treat the employee with dignity, not suspicion. It may be advisable to ask the employee to return after hours to avoid embarrassment and disruption.

### **Step 5: Post-Termination**

- \_\_\_ Document what happened at the exit interview.
- \_\_\_ If a witness was present, have the witness document in his or her own words what happened in the exit interview.
- \_\_\_ Review complaints made by the exiting employee and investigate as appropriate.
- \_\_\_ Consider briefing the employee's co-workers while respecting the former employee's right of privacy and right of association. Ask that employees minimize contact with their former colleague during working hours.
- \_\_\_ If the employee was allowed to take a severance offer home for deliberation at the end of the exit interview, follow up to ensure acceptance or rejection of the offer. If the offer is rejected, attempt to find out why and negotiate further.
- \_\_\_ Make arrangements to return personal and private electronic data belonging to the former employee and for the employer to get back any items the employee was unable to return at the exit interview.
- \_\_\_ Review recordkeeping requirements. Determine what records exist in what format, and make arrangements for appropriate retention.