Employee Termination: Best Practices

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This Note addresses employee termination best practices, including termination protocols and practical tips. This Note addresses federal law. For information on state law requirements, see the State Q&A Tools under Related Content.

Employers often face claims by former employees that their employment was terminated for an unlawful reason. Whether or not they have merit, wrongful discharge claims can result in lengthy and expensive legal battles, adverse publicity and damaged morale in the remaining workforce.

This Note addresses key issues for employers to consider when terminating an employee. It also provides best practices to minimize claims of wrongful discharge by former employees and maximize employers' ability to defend against claims filed. Specifically, it provides guidelines on how employers can:

- Establish legitimate reasons for termination.
- Assess potential legal risk.
- Create and maintain relevant documents, including policies and performance reviews.
- Deliver the termination message appropriately.
- Protect the employer's trade secrets and other legal and professional interests in the termination process.

This Note assumes that the employee is employed at-will and is not subject to rights created by a unionized workplace or public employment.

Before Termination

Planning for termination decisions helps employers justify their decision and defend against potential litigation. To do so, employers should:

- Understand applicable employment-related laws (see Understand Applicable Laws).
- Develop and consistently apply appropriate policies, procedures and handbooks (see Develop and Consistently Apply Policies).
- Document performance and disciplinary issues fully and objectively (see Document Reasons for Termination).

Understand Applicable Laws

The general practice and default rule for private employers in the US is at-will employment. Managers often mistakenly believe that at-will employment allows them to terminate anyone for any reason. However, this assumption ignores basic anti-discrimination laws and other legal limits on discharging employees. At the same time, employees protected by these laws are not insulated from termination on legitimate grounds (such as poor performance).

Although it is impossible to list every cause of action that might arise out of the termination, some of the most common grounds on which employers face litigation risks include termination:

- Due to discrimination, retaliation or harassment (for more information, see Practice Notes, Discrimination: Overview, Retaliation and Harassment) or seeking to enforce related rights, including:
    - Title VII of the Civil Rights Act of 1964 (Title VII) (42 U.S.C. §§ 2000e-2000e-17), prohibiting discrimination on the basis of race, color, sex (including amendments by the Pregnancy Discrimination Act and the Civil Rights Act of 1991), national origin and religion;
    - Title I and Title V of the Americans with Disabilities Act (ADA) (42 U.S.C. §§ 12101-12117), prohibiting discrimination on the basis of disability (including amendments by the Civil Rights Act of 1991 and the Americans with Disabilities Act Amendments Act (ADAAA));
    - Age Discrimination in Employment Act (ADEA) (29 U.S.C. §§ 621-634), prohibiting discrimination on the basis of age (40 and over);
    - Genetic Information Nondiscrimination Act (GINA) (42 U.S.C. §§ 2000ff-2000ff-11), prohibiting discrimination on the basis of genetic information;
    - Uniformed Services Employment and Reemployment Rights Act (USERRA) (38 U.S.C. § 4311), prohibiting discrimination on the basis of past, current or prospective military service;
    - Section 1981 of the Civil Rights Act of 1866 (Section 1981) (42 U.S.C. § 1981), prohibiting discrimination on the basis of race, color and ethnicity in the area of contracts; and
    - additional prohibitions enacted under state or local law (for examples of additional protected classes recognized under state or local law, see Anti-discrimination Laws: State Q&A Tool: Question 1 and Standard Document, Equal Employment Opportunity Policy: Drafting Note, Laws Prohibiting Discrimination: State and Local Considerations).
- Because an employee seeks or takes protected leave, including:
    - Family and Medical Leave Act (FMLA) (29 U.S.C. §§ 2601-2654), protecting covered employee rights to take up to 12 weeks of leave for most authorized medical and family medical care purposes (there are some exceptions, for example, 26 weeks for covered medical care of a family member serving in the military) (for more information on FLMA leave, see Practice Note, Family and Medical Leave Act (FMLA) Basics);
    - USERRA military leave (for more information on military leave, see Practice Note, Military Leave Law);
    - workers' compensation leave (for more information on workers' compensation leave, see Practice Note, Workers' Compensation: Common Questions: Are Employers Required to Provide Workers Compensation Leave?);
    - ADA disability leave (see Disability Leave: Best Practices Checklist); and
    - temporary or short-term disability leave on the basis of, for example, pregnancy (see Practice Note, Pregnancy and Parental Leave).
- In response to protected whistleblowing activities, including whistleblowing activities protected by:
    - Sarbanes-Oxley Act (SOX) (18 U.S.C. § 1514A) and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act or DFA) (see Dodd-Frank), prohibiting termination because of reporting covered corporate wrongdoing (for more information, see Practice Notes, Whistleblower Protections under Sarbanes-Oxley and the Dodd-Frank Act and State Whistleblower Laws: Beyond Federal Protections); and
    - Occupational Safety and Health Act (OSH Act) (29 U.S.C. §§ 651-678), prohibiting termination for exercising rights protected by federal health and safety law, including whistleblowing (for more information, see Practice Note, Health and Safety in the Workplace: Overview).

- In response to union activities, as governed by the National Labor Relations Act (NLRA) (29 U.S.C. §§ 151-169), prohibiting termination related to protected organizing or union activity (for more information, see Practice Notes, Employee Rights and Unfair Labor Practices Under the National Labor Relations Act and Labor Law: Overview).
- Because an employee sought to enforce wage rights, including those protected under the Fair Labor Standards Act (FLSA) (29 U.S.C. §§ 201-219), prohibiting termination for exercising wage and hour rights (for more information, see Practice Note, Wage and Hour Law: Overview).
- That contravenes exceptions to at-will employment recognized in some states, including:
    - public policy exceptions, for example, termination because an employee refused to break the law or filed a claim for workers' compensation;
    - implied contracts exceptions, when an employer enters into an unwritten (and likely inadvertent) employment contract by making representations about the security of the job or pre-termination procedural requirements; and
    - covenant of good faith and fair dealing exception, recognized in a minority of states, that prohibit either bad faith, malice or termination without just cause.

Termination can include voluntary resignation under extreme circumstances. Many employment laws, such as Title VII, interpret termination to include constructive discharge, meaning that the terms and conditions of the workplace were so intolerable that they made it impossible for the employee to remain with the employer (see for example, Pennsylvania State Police v. Suders, 542 U.S. 129, 143 (2004)).
There are additional protections specific to federal contractors. For more information on issues specific to federal contracting, see DOL: Compliance Assistance, Federal Contractors.
For related practical considerations, see Box, Practical Tips: Understanding Legal Risks.

Develop and Consistently Apply Policies

Proper documentation and implementation of an employer's policies and procedures are central to an employer's success in avoiding or defending against wrongful discharge claims. Where wrongful behavior leads to an employee's termination, employers can often undercut an employee's burden to prove that he was fired because of unlawful conduct by using a clear and concise policy prohibiting the relevant behavior. For example,

- IT Resources and Communications Systems and Social Media Policies help employers defend termination decisions based on inappropriate use of technology. For model policies, see Standard Documents, IT Resources and Communications Systems Policy and Social Media Policy.
- A Standards of Conduct Policy helps employers defend termination decisions related to inappropriate personal conduct. For a model policy, see Standard Document, Standards of Conduct Policy.
- An Anti-harassment Policy helps employers defend against termination decisions based on an employee's engaging in harassment. For a model policy, see Standard Documents, Anti-harassment Policy and Equal Employment Opportunity Policy.

For additional policy examples, see Employee Handbook Toolkit.

Obtain Employee Acknowledgment

Most employers have replaced hard copies of an employee handbook with electronic policies accessible on the employer's intranet. While there are sound reasons for doing so, this often fails to support the most important reason for the policies: to ensure that employees read and understand them. Companies with electronic handbooks should require each employee to sign and date a printed acknowledgment that he received, reviewed and understood the handbook. Without this acknowledgement, an employee may be able to claim that he was unaware of the particular policy for which he was fired. For a sample stand-alone policy acknowledgment, see Standard Document, Stand-alone Policy Acknowledgment. For a handbook acknowledgment, see Standard Document, Employee Handbook Acknowledgment.

Apply Policies Consistently

Policies are only useful to employers if they are actually followed consistently. Employers that impose severe discipline on one employee for a specific infraction and little or no discipline on another employee for the same infraction increase their risk of litigation. Employees subject to inconsistent and unduly harsh consequences can allege that the employer followed the policy in a discriminatory manner or that the employer should not be believed when claiming that a particular practice was standard operating procedure.

Document Reasons for Termination

Court decisions favoring employees on wrongful termination claims are often based on a lack of documents showing lawful reasons for termination or a lack of objectivity in those documents. Employers regularly face challenges to their legal defense based on their shortcomings associated with documentation, as described below.

Failure to Create Documents

Employers commonly fail to effectively document the issues that may ultimately lead to termination, such as shortcomings in employee performance. Typically, juries are suspicious of a lack of relevant documents, which can indicate to them that discrimination or other unlawful motives are the actual basis for the employment decision. Documents are critically important to employers because their burden in a discrimination case is to offer a facially nondiscriminatory reason for its employment decision. An employer must be able to support its termination decision through:

- Written performance evaluations.
- Minutes of management meetings at which the terminated employee was discussed.
- Disciplinary or poor attendance records (for a Checklist on employee discipline, see Best Practices for Employee Discipline Checklist and for a model employee counseling form, see Standard Document, Employee Counseling Form).
- Demonstration of a clear violation of specific employer policies.
- Other documentary evidence of the company's dissatisfaction with the employee.

Failure to Exercise Objectivity

Terminations should be documented in an objective and professional fashion. In a worst case scenario, performance reviews may be overtly discriminatory (for example, "employee is too old to grasp new technology"). More commonly, documents that include any of the following may undermine a company's defense in a wrongful termination case:

- Personal comments.
- Overstatements.
- Speculation or assumptions.
- Emotionally charged language.
- Incomplete documents.
- Incorrect documents.

The more an employer makes these documentation mistakes, the more likely a jury is to find the termination based on something other than lawful business-related motives.

Failure to Give Honest Criticism

Supervisors reviewing employees are often reluctant to be critical, preferring to describe only the positive aspects of performance. This reluctance not only prevents an employee from improving, but it also prevents an employer from defending against a termination claim by citing to that employee's performance problems. Although employers should be courteous and thoughtful in their review of employees, they must be honest about employee shortcomings. By recording genuine performance issues accurately and in a timely fashion, employers preserve a legal argument that performance, rather than an unlawful motive, was the reason for the termination.

Failure to Maintain Documents

Some employers may create a sufficient written record, but fail to maintain it. For example, employers that fail to keep records about attendance problems will have a more difficult time justifying a termination based on excessive absenteeism. Organized and properly maintained files bolster litigation defenses for lawful terminations.

Failure to Be Timely

Employers should not delay excessively before making and communicating a termination decision. If there is an extended delay between the problem behavior and the termination itself, a jury may be persuaded that the connection between that behavior and the termination decision is too tenuous. In that situation, an employee may be able to argue effectively that the true reason for termination is unlawful discrimination,

retaliation or other prohibited conduct. For an example of what can happen when the reasons for termination are not timely and appropriately documented, see Box, Nero v. Industrial Molding Corp.

Failure to Train Reviewers

Reviewers who are not aware of legal risks in termination may inadvertently subject the employer to litigation (for examples of litigation risks, see Understand Applicable Laws). All employees who review others should be made aware of legal risks and best practices to avoid them (see Departing Employee Checklist).

Failure to Conduct Adequate Internal Investigations

Although employers of at-will employees can terminate the employment relationship for any reason not otherwise prohibited by law, some termination decisions are made only after a more formalized internal investigation. For example, allegations of sexual harassment or criminal conduct generally require investigation. For a collection of resources to assist with internal investigations that may result in termination decisions, see Conducting Internal Investigations Toolkit.

Termination Protocols

Once an employer makes a decision to terminate an employee, notification should be prompt and appropriate to the circumstances. Employers should deliver the termination message in a private termination meeting, as further explained below. As a rule, there is no need to conduct an exit interview with an employee who is involuntarily terminated. Timely notice may help avoid mixed messages from the employer or unforeseen complications that may undermine the company's decision.
Ensure that employees on leave whose positions are eliminated are promptly notified of the termination and any related rights and benefits offered them. For information on the risks related to terminating employees on leave, see Practice Note, Conducting Layoffs and Other Reductions in Force: Employees on Medical Leave.

Gather and Assess Relevant Information

Ensure that all resources relevant to the termination have been assembled and assessed. Any performance reviews or disciplinary records should be fully reviewed so that the termination message is clear, consistent and supported by a written record. Employers should review all agreements and policies associated with the employment relationship as well. For example, employees working subject to an employment agreement may be entitled to benefits as described in the contract. Employees who have entered into restrictive covenants, like non-compete or confidentiality agreements, may have obligations that survive the end of the employment relationship and may need to be reminded of this obligation. For additional examples of resources to review and assess before a termination meeting, see Departing Employee Checklist: Best Practices at the End of the Employment Relationship.

Best Practices For Delivering the Termination Message

To effectively communicate an employment termination message, the message itself should be documented and carefully worded. Managers, supervisors and human resources personnel who may be involved in terminations should be trained on these general rules that apply in most circumstances:

- **Time the decision to allow for privacy.** The actual termination meeting should be planned to occur at a time when there will be few interruptions, possibly before or after the normal work day. Choose a private meeting location out of the view of office traffic.
- **Prepare for and rehearse delivery of the message.** The message to the employee should be well prepared and, if possible, rehearsed before the actual meeting with the employee. A written outline or list of talking points can help ensure that the employer fully explains important points.
- **Have a witness.** Invite an additional member of management (a human resources representative is a practical choice) to assist in note taking and to act as a witness to any comments or questions that arise at the meeting. This allows the person in charge of the meeting to focus full attention on getting the message across effectively.
- **Be direct.** Make the necessary points without making excuses or minimizing the reason for the decision, but avoid personal attacks or derogatory generalizations. Ensure that the employee understands that employment has been terminated.
- **Avoid arguments.** Do not enter into any argument regarding the decision, but be open to concerns and questions. Answer questions honestly and as fully as possible, but without condescension or evasion. If additional information is necessary to answer a question fully, provide the relevant information as soon as possible.

- **Be prepared for a negative response.** In situations in which an extreme response is anticipated, prepare in advance by notifying security or requesting advice from the company's legal department regarding an appropriate reaction. For more information, see Workplace Violence.
- **Do not interject personal statements.** Be sensitive to the employee's anger without agreeing that the employer has made any mistake or has acted inappropriately. For example, avoid the following comments that may encourage litigation by highlighting inconsistency in the employer's motive:
    - "This is not my decision."
    - "I would not have fired you if the decision had been mine."
- **Outline the status of available employee benefits.** Briefly explain any benefits to which the individual is entitled or provide information on how the employee can obtain this information promptly.
- **Discuss references.** Fully explain the type of reference, if any, that will be provided by the employer. If the employer has a reference or employment history letter prepared, provide a copy to the employee to avoid future confusion or disagreement.
- **Be sensitive.** Termination is a difficult and emotional matter. The fairness and professionalism that company representatives exhibit at a termination meeting can minimize chances an employee will sue the employer. If the employee does sue, a sensitive approach can support the company's position in a future lawsuit that it acted for lawful business reasons and was at all times fair and reasonable in its decisionmaking.

Document the Termination

Create a written record of why, how and under what circumstances the employee was terminated. Check state and local law to determine whether any notice is required.

Additional Considerations

In addition to simply communicating the termination message, employers should take steps to:

- Protect and collect sensitive information (see Protect Sensitive Information).
- Limit legal risks by having the departing employee execute a waiver and release of claims (see Waiver and Release Agreements).
- Limit potential exposure to workplace violence (see Workplace Violence).
- Consider potential damage to employee morale (see Employee Morale).
- Limit damage to the employer's public image (see Public Relations).

Protect Sensitive Information

Whether the information is stored electronically or otherwise, employers should proactively protect their valuable trade secrets, confidential information and other property. For more information about protecting sensitive employer information, see Practice Note, Protection of Employers' Trade Secrets and Confidential Information.

Disable Electronic Resource Access

Employers can protect their sensitive information and dissuade departing employees from misuse of employer electronic communications systems by disabling the terminated employee's access to:

- E-mail.
- Voicemail.
- Passwords.
- Remote log-ins.

Collect Employer Property

Often, separation agreements or confidentiality agreements specifically require employees to return employer property under specified terms and conditions. For sample language describing this obligation and the resources that may be requested back from the employee, see Standard Document, Employee Confidentiality and Proprietary Rights Agreement: Security. If specific contractual language has been created, ensure compliance with it. If not, ask that the terminated employee return or destroy (if the resources are outdated or duplicated) all resources described in the agreement. Once the departing employee has returned all resources, require that the employee sign a sworn affidavit or acknowledgment confirming that they have returned all the resources.

Waiver and Release Agreements

Employers often present terminated employees with a severance or separation agreement that includes an explicit waiver and release of legal claims in exchange for adequate consideration. Consideration is a financial incentive that is not otherwise due to the departing employee. Although the payment of consideration adds to the cost of termination, it creates an additional layer of legal protection. However, not all claims can be released and some claims require specific written terms to be valid and binding. In addition, employers must comply with relevant sections of the tax code. For more information about the legal requirements of a severance or separation agreement, see Practice Note, Conducting Layoffs and Other Reductions in Force: Severance Packages or Plans and Departing Employee Checklist: Consider Entering into a Severance Agreement with a Departing Employee. For a model separation agreement, see Standard Document, Separation and Release of Claims Agreement.

Employers should have a draft of this agreement prepared in advance of the termination. Employers may present the severance or separation agreement to the departing employee in the termination meeting.

Workplace Violence

Violent responses to termination are relatively rare, but incredibly disruptive. There is no single, all-purpose appropriate response to workplace violence, and state and local law vary on the issue. There is no federal law regulating employer responses to workplace violence. However, the Occupational Safety and Health Administration (OSHA) provides information about best practices for preventing workplace violence (see OSHA: Workplace Violence). For more information, see Practice Note, Workplace Violence and Minimizing Workplace Violence Checklist. For a model policy, see Standard Document, Workplace Violence Policy.

Employers should be aware that OSHA has issued employers citations for workplace violence under the OSH Act's General Duty clause (for more information, see Practice Note, Health and Safety in the Workplace: Overview: Safety Requirements and Obligations Under the OSH Act).

It is always prudent to be prepared for workplace violence. Employers should assemble a designated response team to create a functional plan of action well in advance of the need to respond to an actual violent situation. Employers facing violence or credible threats of it should not hesitate to contact law enforcement for assistance. For more information, see Minimizing Workplace Violence Checklist.

For more information on investigations into workplace violence, see Practice Note, Handling Employment-Related Internal Investigations: Types of Workplace Issues Warranting Investigations.

Employee Morale

Employees in the remaining workforce will likely speculate about the termination of a co-worker. Employees may believe that the employer acted unfairly or plans additional cutbacks. If the separation was amicable or not indicative of larger problems, employers may want to communicate that message to supervisors and managers who can speak to the employees directly or answer employee questions if asked.

Public Relations

High profile terminations may damage an employer's public image. Employers should consider the impact a high profile termination may have on its standing in the community and consider consultation with a public relations specialist to minimize the impact of the decision.

Nero v. Industrial Molding Corp.

Poor timing and a lack of supporting documents for an otherwise appropriate termination by an employer can lead to legal liability. A commonly cited example of this is *Nero v. Industrial Molding Corp.,* 167 F.3d 921 (5th Cir. 1999).

During a restructuring, Industrial Molding Corporation decided to lay-off a manager based on his substandard management skills and general poor performance. For unspecified reasons the company delayed informing the employee of the termination decision until the end of the month. Immediately before the company planned to inform him of the decision, the manager suffered a heart attack and underwent open-heart surgery. When he returned to work, the manager was given the choice of demotion or termination with severance. He chose,

instead, to file a lawsuit in which he ultimately convinced a jury that his termination was based, not on his performance, but on his medical condition and increased medical benefits.

The jury's decision was based on discrepancies in the documents regarding the manager's employment. In essence, the jurors did not believe that the company's decision to terminate employment was made before the employee's heart attack. Before those medical problems, all written evaluations of the employee indicated that he was performing "up to expectations." The clear lack of documents explaining the specific reasons for the company's decision to terminate the individual ultimately ended in legal liability for the employer.

Practical Tips: Understanding Legal Risks

Attorneys advising employers should advance the following tips:

- Train managers, supervisors and other decisionmakers in the basics of applicable employment-related laws.
- Advise decisionmakers to coordinate termination decisions with the human resources department (HR) and, when necessary, a legal adviser.
- Create procedures that offer supervisors and HR professionals more than one method of obtaining advice about upcoming termination decisions.
- Before making termination decisions based on absenteeism, evaluate employee eligibility for job protected leave, such as leave under the FMLA.
- Ensure that no termination decisions are made in retaliation for legally protected activity, such as filing a discrimination claim. For more information on retaliation, see Practice Note, Retaliation.
- Evaluate employer trends concerning termination decisions to avoid claims that protected class members are disproportionately targeted for discharge. For more information on discrimination, see Practice Note, Discrimination: Overview.