



EMPLOYEE TERMINATION CONSIDERATIONS

I. Before Termination

- A. Understand applicable employment-related laws
 - 1. Discrimination, retaliation or harassment?
 - 2. Protected leave?
 - 3. Whistleblowing activities?
 - 4. Union activities?
 - 5. Exceptions to at-will employment (e.g., against public policy, implied contracts, covenant of good faith and fair dealing)?
- B. Develop and consistently apply appropriate policies, procedures and handbooks and obtain employee acknowledgment
- C. Document performance and disciplinary issues fully and objectively. Avoid wrongful termination claims based on these challenges:
 - 1. Failure to Create Documents
 - a) *Written performance evaluations*
 - b) *Minutes of management meetings at which the terminated employee was discussed.*
 - c) *Disciplinary or poor attendance records*
 - d) *Demonstration of a clear violation of specific employer policies.*
 - e) *Other documentary evidence of the company's dissatisfaction with the employee.*
 - 2. Failure to Exercise Objectivity
 - a) *Personal comments.*
 - b) *Overstatements.*
 - c) *Speculation or assumptions.*
 - d) *Emotionally charged language.*
 - e) *Incomplete documents.*
 - f) *Incorrect documents.*
 - 3. Failure to Give Honest Criticism
 - 4. Failure to Maintain Documents
 - 5. Failure to Be Timely
 - 6. Failure to Train Reviewers
 - 7. Failure to Conduct Adequate Internal Investigations

II. Termination Protocols

- A. Gather and Assess Relevant Information
- B. Carefully Plan Delivery of Termination Message
 - 1. Time the Decision to allow for privacy.
 - 2. Prepare for and rehearse delivery of the message.
 - 3. Have a witness.
 - 4. Be direct.
 - 5. Avoid arguments.
 - 6. Be prepared for a negative response.
 - 7. Do not interject personal or ambiguous statements.
 - a) *"This is not my decision. I wouldn't fire you if it were up to me."*
 - b) *"We never should have hired you."*
 - 8. Outline status of available employee benefits.
 - 9. Discuss references.
 - 10. Be sensitive.
- C. Document the Termination
- D. Consider Obtaining a Waiver and Release Agreement

III. Other Tips to Avoid Wrongful Termination Claims

- A. Train managers, supervisors and other decision-makers in the basics of applicable employment-related laws.
- B. Advise decision-makers to coordinate termination decisions with the human resources department and, when necessary, a legal adviser.
- C. Create procedures that offer supervisors and HR professionals more than one method of obtaining advice about upcoming termination decisions.
- D. Before making termination decisions based on absenteeism, evaluate employee eligibility for job protected leave, such as leave under the CFRA/FMLA.
- E. Ensure that no termination decisions are made in retaliation for legally protected activity, such as filing a discrimination claim.
- F. Avoid claims that protected class members are disproportionately targeted for discharge.