



## 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.