

# HR COMPLIANCE BULLETIN



## Legal Considerations for Employee Terminations

Employee terminations are often complicated, and if not conducted properly, employers can open themselves up to costly legal challenges and negatively affect their business or reputation. Understanding the legal obligations of employee terminations can help employers ensure this process is conducted in a manner that minimizes legal risks and accounts for various business considerations.

Employers should carefully consider their obligations at each stage of the termination process, including:

- **Pre-termination Considerations**
  - Establishing a lawful reason for termination; and
  - Considering alternatives to termination.
- **Preparations for and Conducting the Termination**
  - Reviewing relevant documentation;
  - Considering severance benefits;
  - Carrying out the termination; and
  - Ensuring the return of company property.
- **Post-termination Considerations**
  - Distributing final pay and benefits;
  - Complying with recordkeeping obligations; and
  - Notifying relevant parties and issuing reference checks.

### Action Steps

This Compliance Bulletin provides guidance to employers to mitigate legal risks when conducting employee terminations by ensuring compliance with legal obligations and protecting business interests. However, this Compliance Bulletin only addresses considerations with respect to an involuntary termination of a single employee. It does not consider specific state or local laws or terminations of more than one employee (e.g., group terminations or reductions in force).

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### Highlights

To avoid employee claims, employees may want to establish practices at each stage of the termination process to mitigate legal risk, such as:

- Establishing a lawful reason for termination;
- Considering alternatives or interim steps before termination;
- Reviewing contractual obligations;
- Providing severance benefits;
- Establishing a protocol to carry out the termination;
- Ensuring the return of company property;
- Issuing final pay and benefits;
- Complying with recordkeeping requirements; and
- Implementing a policy for notifying relevant parties and issuing reference checks.



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## Pre-termination Considerations

Prior to terminating an employee, employers should establish whether termination is appropriate and lawful or they prefer to take interim steps. Failure to properly assess an employee's rights and an employer's obligations prior to the termination could expose an employer to legal liability and negatively impact employee morale.

### Establishing a Lawful Reason for Termination

#### *At-will Employment*

In almost all states, employees are considered “**at will**,” absent an agreement to the contrary. Employers may terminate an at-will employee at any time for any lawful reason. Employers should carefully review any existing agreements with the employee, including offer letters, handbook agreements or other contracts, to ensure that there is no language that indicates employment is not at will (e.g., an employment agreement that indicates a specific term of employment that does not explicitly provide for termination by the employer other than for cause). If employment is not terminable at will, employers should confirm that they are able to meet all applicable requirements to carry out the termination.

#### *Lawful Reason for Termination*

Even if an employee is at will, it is considered best practice to have a **clear, legitimate and nondiscriminatory reason** for the termination. Valid termination reasons may include performance-related or attendance issues, inappropriate behavior in violation of company policy, cost-saving measures and position elimination.

Regardless of whether an at-will employment relationship exists, employers may **not** terminate an employee for any unlawful reason, including:

- Due to an employee's protected characteristic, such as those protected under the following laws:
  - Title VII of the Civil Rights Act prohibits discrimination on the basis of race, color, sex (including pregnancy and related medical conditions), national origin and religion;
  - The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of an employee's disability;
  - The Age Discrimination in Employment Act prohibits discrimination on the basis of age (40 or older);
  - The Genetic Information Nondiscrimination Act prohibits discrimination on the basis of genetic information; and
  - The Uniformed Services Employment and Reemployment Rights (USERRA) prohibits discrimination on the basis of past, current or prospective military service.
- Because an employee seeks or takes protected leave, including:
  - Family and Medical Leave Act leave;
  - USERRA military leave;
  - Workers' compensation leave;
  - ADA disability leave; or
  - Temporary or short-term disability leave (including on the basis of pregnancy).
- Because an employee seeks or obtains a disability, pregnancy or religious accommodation;
- In response to protected whistleblowing activities;
- In response to union organizing activity as protected by the National Labor Relations Act; or
- In response to an employee who sought to enforce their wage rights, including those under the Fair Labor Standards Act (FLSA).



Employers may also want to confirm that termination is **appropriate** under the circumstances. Doing so can help ensure that termination practices are applied consistently and protect employers in the event of a wrongful termination claim. In assessing whether a termination is appropriate, employers may consider a variety of factors, such as whether:

- The termination could cause reputational damage that would outweigh the benefits of termination;
- The employee had proper notice of performance deficiencies or misconduct and the chance to correct them;
- The employer is treating employees consistently;
- The employer is partially at fault for the circumstances causing the proposed termination;
- The employer adequately communicated company policies or expectations to the employee; and
- The employer has properly documented employee issues.

### ***Additional Legal Risks of Termination***

Even if the employer has established a lawful and appropriate basis for termination, employees may take legal action against employers in connection with a valid or lawful termination when other circumstances could reasonably suggest the employee was terminated for lawful reasons. Such circumstances may include:

- The employee recently requested or received an accommodation for disability, pregnancy, childbirth or a related medical condition or religious beliefs;
- The employee recently complained of discrimination, retaliation, unfair labor practices or inadequate wages or made similar complaints; and
- The employee has engaged in union-organizing activity.

### **Alternatives to Termination**

In some instances, employers may determine that the legal or business risks of terminating the employee outweigh the benefits of such termination. In such cases, employers may wish to consider preliminary measures before termination depending on the reason for the termination, including:

- **Performance issues**—Employers may consider placing the employee on a performance improvement plan to correct an employee’s performance issues or providing additional training or coaching;
- **Misconduct**—Employers may consider progressive discipline, such as employee coaching, verbal or written warnings, and suspension with or without pay; and
- **Job elimination or cost savings**—Employers may consider other cost-saving measures, such as furlough, temporary reduction in hours or pay, and transferring the employee to a different position.

## **Preparations and Conducting the Termination**

### **Review Relevant Documentation**

Before conducting a termination, employers should gather and review all relevant documentation related to the employment relationship, including:

- Personnel records (e.g., performance reviews, attendance and disciplinary records);
- Employee handbooks and other employer policies;
- Offer letters or employment agreements;
- Restrictive covenant agreements (e.g., confidentiality, noncompete and nonsolicitation agreements);
- Equity and incentive compensation plans;

- Benefit plan documents;
- Immigration-related documentation;
- Collective bargaining agreements; and
- Any other documents related to the employment relationship (e.g., internal complaints made by or about the employee, investigations, and leave or accommodation requests).

Certain documents, such as personnel records, can help support an employer's reason for termination. Other documents may impose contractual requirements (e.g., notice or severance obligations). In other instances, documents may confer rights to the employer, such as the rights to recover certain compensation (e.g., tuition reimbursement or relocation payments) or outstanding employee debts (e.g., loans taken from an employee retirement plan) and impose post-termination restrictive covenants. Therefore, it is imperative that employers carefully review all relevant documentation and understand their rights and obligations thereunder.

## Consider Severance

In some cases, employers may be required to provide severance benefits to a terminated employee. Severance may take a variety of forms—including salary continuation, pro rata bonus payments, employee benefits continuation coverage or payments, accelerated vesting of equity awards or some combination of the foregoing—and is often paid either in a lump sum, continuation payments or installments. Severance obligations may be set forth in various documents, including employment, equity award or bonus agreements and employer policies. Therefore, employers should review all relevant documentation to confirm whether the employee is entitled to severance in connection with the proposed termination.

However, even if an employee is not contractually entitled to severance, employers may still offer the employee a discretionary severance payment. One benefit of providing severance is that it allows employers to obtain a release of claims from the employee (typically, employers may only obtain a release if they provide adequate consideration to the employee). In general, if an employee enters into a release of claims, they agree not to file certain claims against the employer. While some claims are not waivable, a release can substantially reduce the risk of future litigation.

Employers may also be able to impose post-employment obligations on the employee in exchange for the severance agreement, including confidentiality, nondisparagement, noncompetition or nonsolicitation restrictive covenants. Some states and municipalities have their own laws regarding separation agreements, releases of claims and the enforceability of restrictive covenants. Therefore, employers should work with local counsel to draft such agreements.

## Carry Out the Termination

To prevent or mitigate employee claims related to the termination, employers may establish clear protocols for conducting terminations. For example, when communicating the termination decision, employers may wish to consider the following measures:

- Ensure that the employer is **direct and professional** in delivering the message;
- Focus on the **legitimate, nondiscriminatory business reasons** for the termination decision;
- Provide **information regarding final pay and benefits**, such as the timing of the employee's last paycheck, termination of employee benefits coverage, and a notice of Consolidated Omnibus Budget Reconciliation Act (COBRA) benefits continuation rights;
- Provide any **information regarding the services available** to the departing employee, including state unemployment agencies, employee assistance program resources and outplacement services;



- Provide **relevant termination documentation**, including, if applicable, a termination letter stating the lawful reason for termination, a severance agreement, a letter documenting any post-employment obligations and copies of any relevant agreements; and
- **Document the termination meeting.**

Employers should also check state and local laws to confirm whether they are subject to advance notice or other legal obligations prior to carrying out the termination.

## Company Property Considerations

Employers may also wish to implement measures to protect sensitive company information, including trade secrets, and ensure the return of company property prior to the employee's departure.

The procedures for returning company property are frequently addressed in handbook policies, employment agreements or separation agreements. However, if there is no such policy, employers should ensure that all company property (e.g., computer, cell phone, key cards or documents) is returned prior to the employee's departure and may wish to obtain a signed acknowledgment from the employee.

Further, employers should disable the departed employee's access to employer systems (including email, phone, intranet systems, social media accounts and remote access) upon or prior to departure to prevent the departed employee from accessing sensitive business information or otherwise misusing the employer system.

## Post-termination Considerations

### Final Pay and Benefits

#### *Final Paycheck*

State and local laws may govern when and how final wages must be paid. Therefore, employers should review the laws in the applicable state or municipality to determine when an employee must receive their final paycheck. Additionally, employers may be required to provide additional payments in addition to any earned but unpaid wages pursuant to applicable state and local laws and employer policies, including:

- Accrued but unused paid time off;
- Earned but unpaid bonuses;
- Commissions; and
- Business expense reimbursements.

#### *Benefits Notices*

In most cases, employers are required to offer group health plan continuation coverage under COBRA. If so, employers must notify the plan administrator of the employee's termination and notify the employee of their COBRA continuation rights. Employers should also collaborate with employee benefits plan sponsors (including group health plan and retirement plan sponsors) to provide any other required notices to employees. For example, employees may be eligible to receive a notice of their right to roll over retirement plan funds into a new employer's plan.



## Record Retention

After an employee's separation from employment, employers are also subject to certain recordkeeping requirements under federal, state and local laws. Some of the records employers may be required to maintain under federal law include but are not limited to:

- Records of time worked and wages paid under the FLSA;
- Records of workplace injuries under OSHA;
- Forms I-9 demonstrating the employee's right to work in the United States; and
- All personnel or employment records.

Employers should also carefully review state and local laws for additional record retention requirements.

## Notifications and Reference Checks

Finally, from a business perspective, employers may also want to establish a plan for notifying employees, clients and other relevant personnel regarding the termination. In general, employers may wish to err on the side of caution and provide only the necessary information rather than divulging information regarding the employee's performance or behavioral issues.

Employees may also consider how they will respond to future reference checks for the departed employee. The approach will likely depend on the reason for the termination. For example, if an employee is terminated for poor performance, the employer may wish to only verify the employee's job title and dates of performance in response to a reference check request. Some departing employees may also negotiate for a neutral reference check in their separation agreement.

## Key Takeaways for Employers

Employer terminations can be fraught and require compliance with a myriad of legal requirements. To minimize risk, employers should establish clear and consistent policies regarding employee terminations, including disciplinary policies and documentation practices. Employers may also wish to train managers, supervisors and other HR personnel on compliance with such policies and their obligations under relevant employment laws.