

LABOR & EMPLOYMENT ALERT

NAVIGATING EMPLOYEE TERMINATIONS IN TURBULENT TIMES

This is the second installment in our two-part series on navigating employee terminations in turbulent economic times. The first part, which covers reductions in force, may be accessed by clicking [here](#).

INDIVIDUAL TERMINATIONS

When the employer decides to terminate an individual employee, as opposed to implementing a reduction in force (RIF), it is still equally important that the employer methodically document and implement the termination in a manner that minimizes any legal liability. Outlined below are several key issues that employers should consider in individual termination situations.

Maintaining a Proper Evidentiary Record

An employee who feels blindsided by his or her termination is more likely to pursue litigation. Giving the employee advance written notice of problems (preferably in writing), providing measurable performance goals, and allowing him or her the opportunity to meet those goals or correct deficiencies by a certain deadline (without altering his or her at-will status) can go a long way toward minimizing negative feelings. Further, advance notice of deficiencies, whether in written warnings or formal performance reviews, plays an important part in documenting the employer's legitimate business reasons for the termination to courts and administrative agencies. If the employer places the employee on a performance improvement plan, the employee's supervisor should diligently record any progress and document any shortcomings.

The employer should also retain all relevant documentation and information related to a potential termination. Where the employee's written work product is involved, the supervisor should save draft writings in order to document substandard performance. Other relevant documentation may include expense reports, timesheets, video recordings, building entry/exit records, voicemail recordings, e-mails, BlackBerry messages, computer and internet usage records, and other computer data.

Consider Other Potential Legal Issues

As we explained in Part I of this client alert, the employer should consider the employee's status before terminating him or her to make sure there are no potential claims lurking. For example, terminating an employee who is on a protected leave of absence under the Family and Medical Leave Act or the Uniformed Services Employment and Reemployment Rights Act may lead to a retaliation claim or a claim for failure to reinstate. Discharging an employee who is on other protected leaves of

absence or who is considered a protected “whistleblower” or employee engaged in protected, concerted, union activity may also lead to retaliation claims. The employer should carefully consider both the likelihood of such possible claims and the potential consequences before deciding to implement the termination.

Communicating the Termination

The employer should inform the employee of his or her termination in person and in a private location. The termination meeting is one of the most difficult tasks an employer faces. As such, there is a strong temptation to “sugarcoat” or give false reasons for the termination. However, doing so is risky and may lead to a finding that the employer’s reasons for the termination were pretexts for an unlawful motive. For this reason, a prepared “script” may be helpful.

During the meeting, the employer should allow the employee to “vent” for a reasonable time but should not engage in a debate with the employee about the underlying reasons for the termination decision. Having a witness present and making contemporaneous notes may help rebut any future accusations and resolve factual disputes between the employee and supervisor or human resources representative. A written letter of termination should be presented at this meeting or immediately afterwards.

Removal from the Workplace

Consider in advance whether the employer will ask the employee to leave immediately or within a certain amount of time. In some instances, there may be concerns that the employee will become physically violent, steal confidential information, or otherwise disrupt the workplace. In such cases, the employer should take appropriate precautions to protect the safety of its employees and others and to protect the integrity of its property and information.

For example, it may be prudent for the employer to escort the employee off the premises immediately after the termination meeting and have a company representative inventory, pack up and send the employee his or her personal belongings. In other instances, it may be appropriate to have a company representative assist the employee in boxing up any personal belongings to ensure that he or she does not take any company property, perhaps at the end of the workday when there are fewer employees present. However the departure is implemented, the employer should handle it in a way that avoids unnecessarily humiliating the employee and triggering the hard feelings that may lead to litigation.

Access to Confidential Information

Another important consideration is the discharged employee’s continued access to confidential information. Upon notice of termination or after the employee’s last day of work, whichever is appropriate, the employer should immediately terminate the employee’s access to the company’s offices, computers, and computer system (including external access and BlackBerry service), voicemail, e-mail, and client and company documents. Such termination will minimize the opportunities for the employee to misappropriate client or company information, destroy information or property, or send the notorious “parting shot” e-mail. If the employee requests computer access to retrieve personal contact information and other electronically stored material, the employer should either have a company representative do it or closely monitor the employee to ensure that he or she does not take or destroy any company material.

In some cases, particularly where wrongdoing is suspected or there is a high risk of litigation, employers should preserve the employee’s hard drive, network files, e-mails, and BlackBerry. This is also useful in the event there are later suspicions regarding the misuse of confidential information and trade secrets. Where litigation is likely, the employer should consider performing some basic review of the preserved materials shortly after termination. Such a review may reveal that the employee

misused company information or property or engaged in other misconduct during employment and, in some instances, may provide “after acquired” evidence of misconduct sufficient independently to justify the termination.

Return of Company Property

The employer should also require that terminated employees return all company property, whether at the office, at home, or otherwise, including:

- Keys
- Computers and related equipment
- Credit cards
- Blackberries/PDAs
- Client files and contact information
- Manuals, handbooks, and any other company information
- Badges/passcards
- Disks/thumb drives
- Cellular phones
- Pagers
- Company cars

In certain situations, the employer may consider obtaining written confirmation from the employee that he or she has returned all company property or a “certification of destruction” confirming that the terminated employee has removed all company information from his or her home computers and personal electronic devices.

If an employee fails to retain company property, however, it is important that the employer not respond by withholding payment of any wages owed. Such action may expose the employer to liability and significant penalties under certain state termination or wage payment statutes. However, the employer may condition severance payments on the full return of company property.

In addition, the employer should remove the employee from any accounts that may list the employee as an authorized company representative. Other individuals or entities, such as the employer’s credit card companies, vendors, travel agencies, insurance companies, leasing agents, cellular telephone companies, and internal committees, may also need to be notified.

Communications with Third Parties

To avoid any possible defamation or retaliation actions, the employer should consider setting up a protocol for responding to any background or reference check inquiries. Such a protocol should address who will respond to any inquiries and what he or she will say.

We recommend that employers identify a single point of contact for outside employment inquiries and provide a neutral reference that includes only the dates of employment, position, and job description. With a written release from the terminated employee, the employer may also provide final salary information. The employer may also agree to provide a written letter of reference for any future prospective employers. However, an employee may use a positive reference against the employer in litigation to show that his or her performance was more than adequate. A negative reference, on the other hand, might be used as the basis for a retaliation or defamation claim.

Payment and Benefit Obligations

As described in Part I of this client alert, employers should ensure that it pays any accrued but unpaid wages, bonuses, vacation, pre-negotiated severance, or other compensation owed in a timely manner, with appropriate withholdings, and in accordance with state and local law and any applicable collective bargaining agreement. Employers should also comply with their obligations under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) to provide the employee

with the opportunity to purchase continuation coverage and should comply with the terms of any applicable employee retirement or welfare benefit plans, including any requirements governing the withdrawal from such benefit plans. The failure to do so may result in substantial liability under ERISA.

Release or Waiver of Claims

Given the threat of potential lawsuits, employers should seriously consider obtaining a waiver or release of all claims against the company in exchange for additional severance pay or other benefits beyond what an employer is already obligated to give the employee. Employees will often waive or release claims against the company for an insubstantial amount of money.

The law governing releases is constantly changing. Therefore, it is important that employers consult employment counsel to develop and finalize such agreements in order to maximize the likelihood that courts will enforce them.

One important consideration in drafting valid releases is the Older Workers Benefit Protection Act (OWBPA), which sets forth several rigid requirements necessary for a release or waiver of any age discrimination claim to be valid. These requirements include, among other things, that the release: (1) be written in a clear and understandable manner; (2) specifically refer to rights or claims arising under the Age Discrimination in Employment Act (ADEA); (3) apply only to ADEA rights or claims that arose before the execution date of the release; and (4) advise the employee to consult with an attorney prior to executing the severance agreement. In addition, the employer must give the employee consideration over and above that to which the employee is already entitled and provide the employee with a period of at least 21 days (45 days in the case of a RIF) to consider the agreement and seven days to revoke it. Employers must also give employees involved in RIFs 45 days to consider certain statistical data associated with the layoff that employees are required to provide.

An employer should request that the employee release all claims stemming from past events relating to his or her employment, whether those claims are known or unknown to the employee at the time he or she signs the release. However, a request that an employee release any future claims arising from events that occur after the execution of the release is generally invalid and unenforceable. Because state law may impose additional requirements, employment counsel should be consulted in drafting releases.

Conclusion

With the current economic downturn, more employers are forced to resort to layoffs and individual terminations to help boost the bottom line. Although such actions create the risk of litigation, careful advance planning can assist in preventing lawsuits and minimizing or eliminating corporate liability.

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