

Blog Post

Minimizing Exposure for Employee Termination Claims

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Assessing whether to terminate an employee and how best to deliver the news are challenges every employer faces. Whether it's a low-performing employee who shows no sign of improvement or an employee who egregiously violates a company policy, having policies and procedures in place and following them will help minimize exposure to claims.

In the absence of a collective bargaining agreement or a contract for a definite term of employment, most employees in the U.S. are employed on at-will basis. That means either the employer or employee can terminate the employment for any reason or no reason, so long as it is not an unlawful reason. Despite the at-will nature of most employment relationships, employers can face claims that a termination was unlawful because it was based on discrimination or retaliation.

Employers contemplating terminating an at-will employee should first consider these five things:

1. **Document, Document, Document!**

Employers should make sure they have documentation to support any decision to terminate. With that in mind, supervisors should be trained to document issues with employees as they arise. Not all documentation needs to be formal; if it's an isolated minor incident, an email

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may be enough. If an employee has continuing performance or misconduct issues in violation of a policy, the supervisor and HR manager should review the conduct, remind the employee of the policy the employee violated, and document that they have done so.

If the employee has been counseled for similar conduct in the past, that, too, should be documented. All such counseling and disciplinary measures should be reviewed with the employee, and maintained in the employee's personnel file. If two or more employees are being laid off as part of an exit incentive program, layoff, or reduction in force, and employers are offering severance in exchange for a release, there are additional documentary considerations. Employers should ensure they have documentation that identifies the class, unit, or group of individuals covered by the exit program, the eligibility factors considered in determining who would be terminated or retained, and the job titles and ages of all individuals selected for the program. A back-up ranking tool and data analysis will help ensure that the position elimination is objective and does not disproportionately affect a protected class.

Employers should consult experienced employment counsel well in advance of a layoff that will result in two or more position eliminations with severance. Counsel can help to develop the additional documentation required and ensure that the severance agreement complies with the Older Workers Benefit Protection Act and includes the required disclosures.

2. Determine If There Are Sufficient Grounds To Terminate An Employee.

Prior to deciding to terminate an employee, employers should ensure that the decision is objective and supported with appropriate documentation. If an employee is in any protected category, employers should be especially careful

to assess the reasons for the termination to make sure there is no discriminatory or retaliatory motive. Documentation reflecting a legitimate non-discriminatory reason for terminating the employee is key.

Even if the employee's job performance is clearly sub-par, consider how a jury would see the situation. Did the supervisor discuss the employee's performance and give him/her an opportunity to correct the deficiencies before terminating the employee? Is there documentation supporting the employer's position that the performance was poor? Juries believe what they see on paper; they are less certain if there is no documentation.

If the employee is being terminated for failing to comply with a company policy or procedure, is it clear that the employee was aware of the policy? A signed and dated copy of an acknowledgment that an employee has received, reviewed, and understood a handbook can be very compelling evidence that the employee knew or should have known what was expected. Has the company consistently required that other employees comply with the policy? Be prepared to show that other similarly situated employees who engaged in the same behavior were treated the same way.

3. Ensure The Personnel File Contains All Necessary Documents.

In preparation of an employee's termination meeting, the employer should review all documents relating to performance and ensure they are placed in the employee's personnel file. Supervisors sometimes keep "desk" files; such files should be sent to HR and appropriate documents incorporated into an employee's personnel file when the decision to terminate is made. Medical information, should as information relating to reasons for an employee's medical leave, should not be included in the personnel file; all such information should be separately

maintained. Prior to a termination meeting, HR should review all documents in the personnel file to ensure it is complete. Checklists are useful tools to ensure all appropriate documents are gathered and maintained in the personnel file. Such documents may include, but are not limited to: attendance records, performance reviews, disciplinary records, signed employee acknowledgment of company handbook and other policies, offer letters, employment agreements, restrictive covenants, and incentive compensation plans.

4. Procedures For The Termination Meeting.

Companies should have standard procedures for conducting a termination meeting and consult their state and local laws to determine if there are particular requirements on termination. Employers should be prepared to review documents regarding job performance issues, evaluations, and prior disciplinary measures with the employee in the termination meeting.

Terminations are sensitive and understandably emotional for an employee. Management should have two persons present for the termination meeting; one will serve as a witness, so that there can be no dispute later on as to what was said. The person conducting the termination meeting should bring a list of bullet points concerning the reasons for the termination and any other issues that need to be discussed, such as post-termination covenants. If the employee wishes to defend his or her performance, management should listen. However, if the employee offers no evidence indicating that the decision was motivated by unlawful animus, management should explain that the decision has been made and conclude the meeting. Once the meeting has been concluded, the manager's list of bullet points and the witness' notes should be retained in the employee's file as notes from the termination meeting.

5. Post-Termination Considerations.

Upon terminating an employee, employers should ensure there are procedures in place for collecting and protecting confidential company information. Employers should be proactive in protecting their trade secrets and other confidential information by immediately disabling the employee's access to email, voicemail, passwords and remote log-ins. If a claim is anticipated, the employer should have an IT professional preserve all potentially relevant information, including Electronically Stored Information. The employer should take immediate steps to ensure no potentially relevant information is altered, deleted or destroyed.

employers also should ensure that departing employees return all company property in their possession. If a separation agreement or other employment agreement contains language regarding the return of company property, employers should follow up to ensure the departing employee complies with that agreement.

Conclusion

While carrying out a termination may be uncomfortable and difficult for all parties involved, it is a necessary reality of the workplace. Having appropriate documentation and following standard policies and procedures can help minimize exposure to claims that a termination was unlawful. If you are facing a difficult termination decision and are unsure whether or how to proceed, consult your Akerman labor and employment counsel for guidance.

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