

MANAGER'S PRE-TERMINATION CHECKLIST

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Before terminating an employee, there are certain basic issues and questions managerial personnel should review and resolve in order to minimize legal risks with termination decisions. These include an assessment of potential legal exposures based on: (1) contractual issues; (2) tort issues; and (3) statutory issues.

I. Contractual Issues

- A. Is the worker subject to the “at-will” employment rule? What documentation (offer letter, acknowledgement on job application form, etc.), if any, exists to confirm the worker’s “at-will” status?

- B. Is the employee a party to an oral or written contract?
 - 1. If oral, what does the contract provide? What oral representations were made to the employee about job security, the duration of employment, or the grounds for termination?
 - (a) Would the oral contract prevent the firing?
 - (b) Is the proposed firing consistent with the oral contract?
 - 2. If written, is the contract signed by the worker and the employer?
 - (a) Does the written contract prevent the firing?
 - (b) Is the proposed firing consistent with the written contract?

- C. If there is no oral or written contract, do the employer’s personnel policies or employee handbook invest the worker with quasi-contractual rights? Would the provisions of the personnel policies or employee handbook constrain the employer’s discretion to fire the worker (*i.e.*, constitute a breach of contract)?
 - (a) Does the employee handbook have a disclaimer which states that it is not a contract?
 - (b) Does the employee handbook have language specifying that all workers are employed “at-will”?
 - (c) Is the disclaimer language in bold print or otherwise conspicuous?
 - (d) Has the worker signed any acknowledgement form which indicates that the worker admitted that they could be fired at any time and for any reason, that admitted that they were an “at-will” employee, or that acknowledged that the employee handbook is not an employment contract?

- (e) If there is no signed acknowledgment form, does the employer have proof of the dissemination of the employee handbook or its acknowledgment forms?
- D. Is the termination in a state which recognizes the implied covenant of good faith and fair dealing (listed below)? If so, is the firing consistent with this legal concept -- the employer's decision is made with good faith and its dealings with the worker are fair? If so, to what extent has or can the employer document its good faith and fair treatment of the worker?

[Implied covenant states: Alaska, California, Colorado, Connecticut (only if to avoid paying a bonus), Idaho, Massachusetts (only if to avoid paying earned compensation), Minnesota (only if to avoid paying earned compensation), Montana (by statute), New Jersey, and Wyoming.]

II. Tort Issues

- A. Are there any tort claims which the employee could assert due to the circumstances of the proposed dismissal, such as assault, battery, defamation, intentional infliction of emotional distress, fraud, misrepresentation, tortious interference with contract, or invasion of privacy?
- B. Are there any public policy-based limitations on the employer's right to terminate the worker? Has the worker been involved in refusing to commit an illegal act; refusing to take actions that might endanger the health or safety of the employee, co-workers, or the public; performing civic or military duties; exercising a statutory right such as filing a claim for worker's compensation; reporting or opposing an employer's illegal conduct; refusing to commit illegal acts such as perjury, price fixing, anti-trust violations, kick-back schemes, or falsification of records; reporting safety violations, or violations of state and federal safety and health laws?

III. Statutory Issues

- A. State Law -- Other than state employment discrimination laws, only one state, *i.e.*, Montana, has a law which requires employers to have good cause to terminate an employee.
- B. Federal Law
 - (a) Is the worker protected by Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866 (42 U.S.C. § 1981), the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, or any other federal, state, or local law prohibiting employment discrimination?
 - (b) Is the employee a "whistleblower" protected by safety or environmental statutes that prohibit retaliation against

whistleblowers who assert corporate fraud complaints under the Sarbanes-Oxley Act of 2002 or who disclose alleged safety and health violations under the Toxic Substances Control Act, the Occupational Safety and Health Act, the Federal Mine Safety and Health Act, the Federal Water Pollution Control Act, the Safe Drinking Water Act, the Solid Waste Disposal Act, the Clean Air Act, or the Transportation Assistance Act? Is the alleged violation asserted by the whistleblower made in good faith?

- (c) Does the termination involve an employee who has filed a claim for bankruptcy or who has had their wages garnished such that they may be protected by the U.S. Bankruptcy Code or the Consumer Credit Protection Act?

IV. Is The Termination Decision One Which Passes A Notice And Fairness Test

A. To lessen the risk of lawsuits over terminations, employers should strive to effectuate dismissals that are consistent with the concepts of notice and fairness. In other words, did the employer warn the employee in writing of their problems (put them on “notice”) and did the worker have a sufficient opportunity to improve their performance (did they receive a warning and notice, so that it is clear they were treated with “fairness”). Management personnel should strive to provide workplace due process before firing any employee. In the case of a worker exhibiting poor performance, and especially one protected by federal or state employment discrimination laws, the termination decision is probably premature unless it passes the notice and fairness test.

- (a) Is the termination decision premature?
- (b) Is it more prudent for the employer to impose a “suspension pending investigation”?

B. In the case of a worker exhibiting poor performance, can the employer satisfy the following concerns:

- Does the employer have all the facts pertinent to the worker and his or her particular situation?
- Did the employee know what the company expected in terms of job performance or workplace rules?
- Did the employee have a warning or knowledge of the possible consequences of a failure to improve job performance?
- Has the employee had a fair and reasonable opportunity to improve their performance?

- Does the employee’s seniority or record of past service suggest that he or she should be given “another chance” before being fired?
- Is there adequate documentation of previous discussions between management and the employee so as to show “notice” and “fairness”?
- Has the company treated similarly-situated employees exhibiting poor performance in a consistent fashion in terms of discipline or termination?
- Is there a possible alternative to firing the employee that is more fair or appropriate?
- Has the employer done anything to give the employee any reason to claim that the employer has acted in a discriminatory fashion or that it did not treat the worker fairly?
- Is the proposed termination decision consistent with the company’s personnel policies and employee handbook?

V. Exit Interviews

Has the employer scheduled an exit interview? Does the employer utilize an exit interview form?

VI. Obtaining A Release

Certain costs and benefits should be weighted in determining whether or not to offer a release agreement to a departing employee. Generally speaking, employers should consider the offer of a release to a departing employee if they have a viable legal claim; the reasons for the termination are questionable, open to challenge, or undocumented; or the employer wishes absolute peace of mind regardless of the circumstances of the termination decision.

FOR MORE INFORMATION PLEASE CONTACT:

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