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Ten Practical Tips for Terminating Employees

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Often, employers are faced with the difficult task of terminating an employee. Sometimes, a good termination meeting can mean the difference between a clean break and years of expensive employment litigation. Here are some practical tips that may help to minimize the probability of such litigation:

Tip #1: Create a Paper Trail

One of the most important things an employer can do is to make sure that its files contain the information supporting the reasons for termination. Unfortunately, employers often forget to document the performance and behavioral issues of their employees. It is therefore important to use the performance and disciplinary tools available to an employer including documented verbal warnings, write-ups, performance improvement plans, last chance agreements, suspensions and performance reviews. Employers should be especially careful with performance reviews. Supervisors often think they are doing the employee a favor by giving a good review to get them a better raise, but this is not a favor to the company. The problem comes when those reviews are later scrutinized by the employee's attorney who is questioning the rationale for the termination with a conflicting performance review. Also, if a warning is given, it should include language like "continued behavior will result in further discipline, up to and including, termination," so the employee cannot claim they were not on notice that they could be terminated for that behavior.

Tip #2: Have a Reason for the Termination

Although California is an "at-will" employment state and most employee handbooks are filled with references to at-will employment, having a reason for the termination is always best. Juries are usually comprised of individuals who have had jobs and cannot or will not accept the concept of at-will employment. They want a reason and you should be able to explain that reason.

Tip #3: Make the Termination Meeting Quick

The termination meeting should be quick – 10 to 15 minutes. An employer should make sure that the employee understands that they are being terminated, but should avoid getting into an argument with the departing employee. Although an employer can allow the employee to speak their mind, an employer should not to allow the situation to escalate into workplace violence or say anything that will later be used against them.

Tip #4: Do Not Lie or Place Blame

Employers often believe that they need to soften the blow to an employee. Most commonly, an employer will tell their employee that they are being laid off instead of saying it was performance or behavior related. Although you may believe you are sparing your employee's feelings, it is difficult to explain later when you have already hired someone to replace them. Also, never place blame – do not say something like "I did not want to do this" or "Bob made me do it." Although it is sometimes difficult to be the bad guy, creating confusion or putting doubt into a departing employee's head can result in the employee going to an attorney looking for answers.

Tip #5: Remember the Final Check

An employer must provide the final check to the employee on the day of termination. The final check should include any pay through the day of termination and any accrued but unused vacation, paid time off and floating holidays. If an employer fails to provide the final check, then under California Labor Code Section 203, an employee may be entitled to a day of wages for every day the final pay is late, up to 30 days.

Tip #6: Provide All Required Notices

Under California Unemployment Code section 1089, an employer must

provide a terminated employee with a notice of the change in their employment and a copy of the information for unemployment benefits. Also, if there are other benefits forms (e.g. COBRA) that need to be provided, then employers should provide them or let the employee know that they will be mailed to them.

Tip #7: Consider Severance

Severance is not required under the law and rarely required under company policy. Accordingly, a well-worded agreement that waives any legal claims against the company in exchange for the payment of severance can be a worthwhile defensive tool. An employer should however consult counsel when considering a severance agreement as there are specific legal issues that must be considered and certain legal requirements that must be complied with, especially if the employee is 40 years of age or older.

Tip #8: Get the Company's Property Back

At the time of the termination, employers should request a return of all company property including any keys, parking passes, credit cards, uniforms, tools, computers, phones, tablets, or any other company property or equipment. Also, any company or client documents that have been provided should be returned. Importantly, if the employee has been using their personal cell phone, computer or tablet, then the IT department should either remotely wipe company information or be on-call for the termination so that company information can be removed from the employee's personal devices. Further, employers should turn off the employee's access to the company's computer system. If the employee claims they have pictures or personal emails or other information contained on their company computer, arrange a separate day for them to return and review the computer with an IT person or member of management to ensure that only personal information is returned.

Tip #9: Provide a Confidentiality Reminder

If the employee has had access to confidential information or trade secrets, then the employer should provide the employee with a written reminder of their legal and any contractual obligations to protect and not disclose the company's proprietary information. If the employee previously signed a confidentiality agreement, then a copy should be provided at this meeting.

Tip #10: Create a Checklist

One of the simplest things an employer can do to help make a termination go more smoothly is to create a checklist of what information and documents need to be provided to the employee. This helps the employer stay organized during the termination and makes sure that the employer complies with any legal obligations.

Conclusion

Though terminating an employee is never pleasant, by following the tips above employers can reduce their risk of litigation.

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