Termination Decision Review

1. Overview:

All employment relationships end at some point, and how the end of an employment relationship is handled is one of the most emotionally charged and legally risky actions for employers. Claims for unlawful termination have increased in recent years. To protect yourself against potential claims, there are strategies you can put in place that help ensure that you are complying with all laws and avoid possible misunderstandings. No procedure guarantees you freedom from exposure to wrongful discharge liability, or prevention of the filing of a wrongful discharge action by an employee. Your best defense against such claims is an ongoing, proactive approach that includes well-articulated personnel policies and procedures that are consistent with California and federal law, and fair and consistent application of those policies and procedures. Your Cal Work Safety HR Consultant can assist you with complying with the law, as well as help you create a strategy for employee management.

Although there is no way to guarantee an employee won't sue, using this Termination Decision Review can alert the employer to potential legal problems. These problems can then be discussed with your Cal Work Safety HR consultant and/or legal counsel before terminating the employee. It is important to understand the different types of separation from employment, as mislabeling a separation from employment could have unintended consequences.

Types of Separation from Employment:

- **Voluntary Separation (Quit).** When an employee quits, either with or without notice.
- **Discharge (Involuntary Termination).** When the employer decides to end the relationship. Sometimes called "firing" the employee.
- **Job Abandonment**. When the employee is missing, such as "no show and no call". The employer can establish a policy that limits the number of days an employee can be gone without contacting the employer, after which the job is considered to have been abandoned, and the employee is classified as having "quit".
- **Refusal to Accept Available Work**. When an employee has refused to perform work that is (1) appropriate to the individual's health, safety, morals and physical condition; (2) consistent with the individual's prior experience and earnings; and (3) a reasonable distance from the individual's residence or prior assigned work place.
- **Layoff**. A "layoff" occurs when available work ends, either temporarily or permanently, through no fault of the employee.
- **Change of Employment Status**. A change in status can be an altering of the employment relationship in a number of ways, such as – suspension with or without pay; demotion; reduction in hours; reassignment to different work location or shift; change from employee to independent contractor (should only be done with proper advice from your HR Consultant with Cal Work Safety and/or legal counsel).

2. Pre-Termination Questions to Review

The following items should be considered prior to the termination of an employee, other than "Voluntary Separation (Quit)". Not all items will apply to all employees or circumstances. If you have questions regarding why these areas are important, contact your Cal Work Safety HR Consultant and/or legal counsel.

- Determine if the termination is the fault of the employee or the system. If the latter, termination may not solve the problem and may lead to litigation, lowered morale and employee and customer defection.

- Review the employee's personnel file. Is there proper documentation supporting the termination decision, including investigation, warnings and witness statements?

- If the decision to terminate is based on the employee's performance, has the employee received performance reviews, promotions, or commendations?

- Has the employee been subjected to appropriate discipline where warranted?

- Are any company policies and procedures violated by the employee reasonably related to the operation of the business or the employee's job performance?

- Have other employees been treated similarly under the same or similar circumstances?

- If the employee is within a protected class (over 40, female, minority, disabled, etc.), have discriminatory motives have been ruled out?

- If a layoff will occur, what criteria will be used to select those employees who will be laid off?

- If the employee is being terminated for absenteeism, is the absenteeism related to a condition or status that may be protected? (Consider FMLA/CFRA, paid sick leave, school/child care activity leave, etc.)

- Does the employee have an open or unresolved Workers Compensation claim or issue?

- Have all of the employee's complaints been fully investigated and the recommended termination is not the result of retaliation for communicating any grievance, claim or complaint (including discussing wages or working conditions)?

- Has the employee participated in any official investigation of the company (I.e., wage or safety violation) or testified against the employer in an unemployment insurance or other hearing?

- Before recommending termination, have you considered: restructuring the job; moving the employee's work relocation; a demotion; a transfer; new supervision; leave without pay or suspension; referral to an employee assistance program; voluntary resignation; or other alternatives?

- Are there any implied, written or oral contracts (including union contracts) with this employee governing the termination decision, such as termination policies requiring "just cause"? If so, what limits does it place on the employer's right to terminate the employee?

- If moving forward with termination, has a separation release agreement been considered? (see separate Separation Agreement Overview Document for more information.)

- Has the termination been independently reviewed and approved by your Human Resources Department and/or another third party with objectivity and employment law experience?

3. **Review Documentation**

Review the employee's personnel file.

- Is there sufficient documentation in the file to substantiate your reasons for termination? Examples include written warnings, performance reviews, and attendance records.
- Is there anything in the file that might be evidence of an illegal termination? For example, a supervisor may have written a warning notice to the employee that her pregnancy was causing her to be absent too often.
- Review personnel files for other employees who have similar problems. This comparison can point out potential discrimination issues. For example, could a female employee being terminated for attendance problems show that a male employee had the same number of absences but was not terminated?

4. Notification of the Termination Decision

If you have decided to move forward with Termination, it is important to consider how you will deliver the termination. Notifying an employee that his or her employment has been terminated is a delicate task, the circumstances of which should be thought through carefully before taking action.

Who

Typically, the employee's direct supervisor and a person responsible for the day-to-day personnel functions attend a termination meeting. This approach helps avoid a situation in which it is one person's word against another's as to what occurred during the meeting. Generally, an employee should not be allowed to bring a co-worker, family member or attorney to the meeting.

What

Individuals in charge of termination should always plan in advance what to say in a termination meeting. It is important to remain calm and empathetic, yet firm, with your discussion, and to assert you're your decision is final.

Essential topics to cover include the following:

- That a decision has been made to terminate employment.

- The reason(s) and key facts supporting the decision.
- The effective date of separation.
- Separation package and benefits. In California, final pay is due on the employee's last day of employment for involuntary separations. See "Paying Final Wages" section below for more information.
- A review of the policy and procedures for giving references.
- A review of applicable post-termination restrictions, such as noncompetition or nondisclosure agreements.
- What will happen immediately following the meeting (e.g., cleaning out the employee's office, returning organization property, escorting from the building).
- Other exit activities (e.g., outplacement meetings).
- Whom to contact about post-termination issues.

When

There is no "right" day of the week or time of day for every discharge. A Friday afternoon termination may allow the employee to cool off over the weekend and make it more difficult to immediately contact an attorney, but it may also give the employee an entire weekend to stew with a spouse, friends or attorney-acquaintances. A midweek termination may permit the employee to take immediate constructive steps, such as seeing a counselor or outplacement advisor, revising a resume, applying for unemployment benefits or networking to find a new job. Recent data indicate that Tuesdays are the most popular choice for termination meetings.

Termination at the end of the day may make sense if the employer has reason to believe the employee may be disruptive or threatening. Termination midday may allow the employee time to say goodbye to co-workers and clean out his or her office. A termination first thing in the morning may relieve managers from worrying about the meeting all day long, but it may leave the employee feeling as though the employer wasted his or her time by making the employee come to work unnecessarily.

Where

Termination meetings are best held in a neutral, private setting such as a conference room. Terminating managers should select seats that minimize the risk that an angry or violent employee will be able to block the exit.

How

Employers should be prepared in advance to do the following:

- Block computer system access.
- Change pass codes.
- Remove the employee's name as a signatory to bank accounts or post office boxes.
- Collect keys, identification badges and organization property.
- Obtain adequate personal security if the situation becomes hostile.

Paying Final Wages

Employees who are discharged must be paid all wages due at the time of termination. We recommend using the "Final Paycheck Worksheet" located within this toolkit in order to assist with calculating what must be included in the final paycheck. "All wages" include any earned, but unused vacation pay, paid time off, or personal/floating holidays that are not specified for a specific time period. There is no requirement to pay accrued sick leave upon termination. An employee who resigns without giving prior notice must be paid within 72 hours, and if the employee gives at least 72 hours' notice, final wages are due on the last day worked.

The final paycheck must be provided at the location that the employee is being discharged, or if the employee resigns with 72 hours' notice, at the office location. An employee who resigns without 72 hours' notice may have their final paycheck mailed to a designated address, and the date of mailing would be considered the date of payment.

We recommend providing the employee with the "Final Paycheck Acknowledgement" document, located within this toolkit, to obtain receipt (and proof) of the final paycheck. However, it is nice but not always practical or possible to give the final paycheck in person and obtain a receipt. Some employers mail the final paycheck to the employee, but if the employer cannot prove that the employee agreed to having the final paycheck mailed, it will be hard for the employer to prove when final payment was made.

Post-Termination Interactions

Employers should prepare for a variety of post-termination communication challenges, including inquiries from other employees, government agencies, prospective employers and the former employees themselves.

The employer should consider creating a communication that can be used to notify employees and customers when an employee is no longer with the organization. The communication should not go into detail as to the reason why, but state "Effective [date] [employee] is no longer with [company name]. Please contact [company representative] if you have any questions." The failure of the employer to notify remaining employees and customers leaves dissemination of this information solely up to the discharged employee and the "rumor mill."

Discharged employees are justified in expecting to be treated professionally and courteously in post-termination communications concerning their employment, including having telephone calls returned promptly.

Reference inquiries about the discharged employee from prospective employers should be handled in accordance with the organization's reference policies and procedures.

Employment records relating to former employees should be retained as required by applicable laws. When records are no longer needed to satisfy legal retention requirements or business needs, they should be destroyed to prevent misuse of the sensitive information they contain, some of

which could be used to perpetrate identity theft. Employers should be careful to thoroughly destroy electronically stored information as well as paper records.

5. Frequently Asked Questions about Termination:

Q. Does an employee need to be present to be fired?

A. While there is no California or Federal requirement for an employer to bring an employee into the workplace to be terminated, it is recommended that any termination be facilitated in a face-to-face meeting. If the employee is located at another facility other than the main office, the termination could be handled via conference call with the local manager present with the employee and the HR or upper management officer conducting the conference call from the main office. If the employee cannot be present, be sure to have all materials ready to be sent immediately to the employee after the message is delivered. Explain that his/her employment is being terminated, and how the final paycheck can be obtained.

It is essential that the final paycheck be ready at the time of termination. Failure to pay immediately upon termination may result in "waiting time penalties" All wages due, including any accrued but unused vacation pay, must be paid upon termination.

If an employer waits until an employee reports for work to terminate the employee, then the terminated employee must be paid "reporting time pay" for that day, which is one-half of the employee's regularly scheduled shift, with a minimum of two hours and a maximum of four hours.

Q. Can I fire an injured or ill worker?

A. Both injured and ill workers are protected under the Federal ADA law and California's Fair Employment and Housing Act, and it is essential that employers use care in making any employment decisions regarding such persons. First, it is unlawful to take action or discriminate against an employee because of a work injury or non-work injury or disability. Second, the employer has an affirmative duty to interactively engage these employees about what accommodations may be needed so they can perform essential functions of their job or otherwise perform other available jobs for the employer. This duty applies to all employees, both those with normal illnesses, and those with work- related injuries on workers' compensation benefits.

An employer may make decisions based upon the necessities of the business, but must also be prepared to demonstrate that any action was not in any way based on the disability of any employee being terminated, and only then should be done after consulting experienced human resources counsel.

Q. Can I fire someone while they are on workers' compensation?

A. As noted above, it is illegal to discharge or discriminate in any way against an employee because they have filed a workers' compensation claim or received a workers' compensation award. Damages include penalties, reinstatement with back pay and reimbursement for lost benefits.

An employee who is on workers' compensation may be terminated only if the termination is clearly unrelated to the workers' compensation claim. Section 132(a) of the California Labor Code prohibits discrimination based on an employee having a workers' compensation injury or filing a

workers' compensation claim. Such discrimination claims are not covered by a workers' compensation insurance policy.

Q. Can I let an employee go immediately once they have given notice?

A. If an employer lets an employee leave earlier than the date the employee has given for ending his/her employment, whether to avoid any difficulties or for other reasons, the "voluntary quit" now becomes a "discharge (involuntary termination)". Then, the employee' last paycheck must be provided immediately, and the employee may be entitled to unemployment benefits. To avoid this impact, the employer can either allow the employee time off with pay but still remain employed until the announced ending date, or have the employee work through the resignation date.

Q. May I fire someone for complaining about working conditions?

A. No. Employees have the right under California Labor Code Sec. 232.5 to discuss working conditions with fellow employees and others and are protected from discipline or termination. Working conditions can include unsafe work environments, pay differences, meal and rest breaks and more.

Q. May I fire someone based on at-will status?

A. It is not always the best practice to rely on California's Labor Code provision which states: "an employment, having no specific term, may be terminated at the will of either party on notice to the other."

Many California Court decisions have made it abundantly clear that at-will status needs to be backed up by 1- carefully written employment applications; 2- a well written employee handbook with an "integrated at-will clause"; 3- consistent practices by the employer in keeping with the policies of the handbook.

Further, any question of termination due to discriminatory reasons such as race, sex, failure to protect against harassment in the workplace, retaliation for making complaints about discrimination and violations of public policy (so called whistle blowing activity) and the protections of the at-will provisions will not help at all.

The best practice is to follow the **Pre-Termination Questions to Review** discussed in #2 above.

Q. May I terminate an employee for absenteeism?

A. Before terminating an employee for absenteeism, it is vital that you review why the employee may have missed work and any legal protection that may apply to him/her. For example:

- Disability under Fair Employment and Housing Act
- Rights under California Family Rights Act or Federal Family Medical Leave Act
- Pregnancy disability leave
- Sick leave protected as "kin care"
- CA Paid Sick Leave law
- Drug or alcohol rehabilitation
- Workers' compensation injury or illness
- Attending children's school activities or suspension from school

- Jury duty or witness duty
- Victim of crime or of domestic violence
- Military leave, military spouse leave, leave to care for family member injured in military service or leave due to Qualifying Exigency arising from family member's military active duty status or call.

If the absence relates to a disability (whether work or non-work related), the employer should offer to meet with the employee to discuss any possible accommodations which could be made so the employee could perform the essential functions of the job within the reasonable needs of the employer. This "interactive process" is an affirmative and ongoing duty of employers under California law and the failure to do so is in and of itself a violation and exposes the employer to significant liability.

Also, has the company established a clear and consistent policy regarding attendance and absenteeism as well as job abandonment or "no show-no call"?

Q. When do I have to give my employees information about COBRA?

A. Notification about rights to continuation of health coverage is an obligation under the Consolidated Omnibus Budget Reconciliation Act (COBRA), and notice is required both at the time an employee becomes covered by a plan subject to COBRA and at the time of a "qualifying event". A "qualifying event" occurs when an employee or dependent loses coverage under an employer provided health plan.

Federal COBRA covers employers who provide a group health plan and have 20 or more employees. Cal-COBRA applies the same requirements to employers with 2 to 19 employees. (The California Continuation Benefits Replacement Act.)

So, when the employer health plan coverage ends, COBRA notice must be given. Many employers give COBRA notice at the time an employee is terminated, even though health coverage may continue for some time longer, such as until the end of the current calendar month. It may be easier to give the COBRA notice at the time of termination.

Q. What rules may apply if I have a mass layoff or plant closing?

A. The federal Worker Adjustment and Retraining Notification (WARN) Acts require you to issue notice when a business with more than 100 full-time workers (not counting workers who have less than 6 months on the job and workers who work fewer than 20 hours per week) is laying off at least 50 people at a single site of employment, or employs 100 or more workers who work at least a combined 4,000 hours per week, and is a private for-profit business, private non-profit organization, or quasi-public entity separately organized from regular government. A WARN notice is also triggered if a covered employer reduces the hours of work for 50 or more workers, by more than 50% for each month in any 6-month period. Thus, a plant closing or mass layoff need not be permanent to trigger WARN.

California's WARN Act expands on the requirements of the federal WARN Act and covers employers with 75 or more full-time or part-time employees.

Both the federal and state WARN Acts have other requirements and exclusions, so please contact your Cal Work Safety HR Consultant if this type of situation(s) may apply to your company.