



TERMINATING EMPLOYEES

IT'S AN ART AND A SCIENCE!

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*Judith Moldover, Sr. Staff Attorney, Lawyers Alliance for New York
with*

Angela Ortiz, Chief Talent Officer and General Counsel, Row New York



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OVERVIEW

- Legal Risk
- Types of Terminations
- Why do People Sue their (former) Employers?
- Reducing Legal Risk
- Processing the Termination



TYPES OF TERMINATIONS: VOLUNTARY

- Resignations
 - New job
 - Self-employment
 - Health
 - Caregiving
 - “Pursue other interests”
- Retirement
 - Really a resignation with benefits



TYPES OF TERMINATIONS: INVOLUNTARY

- Discharge
 - Performance
 - Behavior
 - Aggressive
 - Uncooperative (???)
 - Bullying
 - Misconduct
 - Violation of sexual harassment policy
 - Fraud/dishonesty
 - Theft/crime
 - Violence
 - Insubordination
 - Disloyalty



TYPES OF TERMINATIONS: INVOLUNTARY Cont.

- Reorganization
 - Department
 - Organization-wide
 - Merger
 - Outsourcing
- Downsizing
 - Reduction in force
 - Layoff
- Advance written notice



Legal Claims

- Discrimination (terminations/constructive discharge)
 - Failure to accommodate
 - disability/pregnancy/religion/victim of domestic violence, sex offense, or stalking
- FMLA/PFL/Other leaves (during and after)
- Retaliation
 - Adverse consequences for protected activity
 - Every employment law has a retaliation provision
- Whistleblower laws
 - Nonprofit Revitalization Act
 - Medicaid
 - NYS statute
- WARN
 - State and federal notice requirement for RIF's



Legal Risk: Why Do People Sue?

- Get job back
- Money
 - unrealistic expectations
- Pride
- Anger
 - At supervisor
 - At organization
 - *How the termination was conducted*
- Sense of injustice



Legal Risk

- How likely?
- What kind of legal claims?
- How bad can it be?
 - Damages
 - economic
 - compensatory
 - punitive
 - Reputational cost
 - Operational impact



Reducing Legal Risk: Employment Practices

- Internal Policies – and Practices!
- Evaluations
 - “Grade inflation”
 - Incomplete, inaccurate
 - None at all
 - Self-serving
- Prompt, thorough investigation
- Consistent treatment of similarly situated employees
- Progressive Discipline
 - How many steps?
 - How long is improvement period?
- Notice period
 - Working or nonworking?



Reducing Legal Risk: Employee Relations

- “Hire slowly, fire quickly”
- Avoiding termination increases risk!
 - Intervening events
 - Claims by other direct reports, co-workers
 - Poor morale
 - Credibility
- Expectations/consequences
- Consistency/fairness
- Communications
 - With the employee
 - With other employees



Reducing Legal Risk: Making the Decision

- Review employee's history
 - Personnel file
 - Evaluations
 - Prior and current warnings
 - Requests for leave/accommodations
- Gather all relevant facts re: incident/performance
- Review relevant policies/practices
- Analyze similar situations with similar employees
- Mitigating circumstances/lesser discipline?
 - Inadequate training
 - Poor supervision
- Get buy-in of senior management/Board



Reducing Legal Risk: Termination Meeting

- Things to think about:
 - When [day/time] should you have it?
 - Where should you have it?
 - Should it be in person?
 - Who should be in the room?
 - What is the tone of the meeting?
 - How should it be documented?
 - *Are you being recorded?*
- Three things to remember:
 - Be respectful
 - Don't apologize or become emotional
 - Give the employee benefits, pay and other exit information in writing



Reducing Legal/Financial Risk

- Severance Agreements
 - Includes a release
 - Consideration
 - Legal requirements
 - ADEA (if at least 20 ee's)
 - Time to consider!
 - Nondisclosure clauses
 - cannot use with sexual harassment claims unless employee consents
 - *Get legal help!*
 - Unemployment Insurance
 - Waiting period
- Employment Practices Liability Insurance
 - Watch out for high deductibles



Procedures for All Terminations

- Termination letter (legal requirement)
- Notify employees of unemployment insurance rights
- Final paycheck (NYS: next regular payday)
- Unused accrued vacation (legal requirement; policy)
- COBRA
- Retirement Plan
- References
- Records retention
- Company property
- Personal property



Takeaways

- Don't delay a necessary termination
- Don't rush to judgment
- Thoroughly investigate the facts
- Make sure you have documentation
- Apply policies fairly and consistently
- Use sound business judgment
- Assess legal risk
- Consider using a severance agreement
 - *get legal help!*
- Employment Practices Liability Insurance



QUESTIONS?

Judith Moldover, Senior Staff Attorney

jmoldover@lawyersalliance.org

212-219-1800 ext. 250



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