

ANDERSON KILL EMPLOYMENT LAW INSIDER

ALERT

10 Things to Consider When Terminating an Employee

By Bennett Pine

Back to school, back to work, back to serious decisions — now is a good time to recall key considerations before terminating an employee or employees.

1. Consider the Reason: Position Elimination vs. Performance Issues

As a fundamental proposition, the employer must be able to articulate the reason for terminating an employee. A good exercise for employers is to summarize the reason for the action in a paragraph.

Is the decision economically motivated as a position elimination or reduction in workforce, or is it based on the employee's poor performance? If based on the employee's less-than-acceptable performance, the employer hopefully can establish a paper trail in terms of performance evaluations and prior warnings to support the decision.

Will the employee be replaced? Generally speaking, position eliminations (i.e., no replacements) may be easier to defend. However, if there are multiple employees in the position, the employer should be prepared to justify the employee's termination, e.g., seniority, performance, etc.

2. Consider Whether the Employee Falls Under Protected Status

The employer should consider whether the affected employee falls into a category that is protected by federal, state or local law. Employees may not be discriminated against on the basis of race, religion, age, citizenship, sex, sexual orientation, national origin, marital status, disability and certain other factors. Essentially, all employees except for white males under the age of 40 likely fall into some class that is protected by law.

Of course, this is not to suggest that such protected employees are insulated against employer action. Rather, the employer should be cognizant of a potential discrimination claim, underscoring the need to be able to articulate the legitimate business reason for taking action against an employee in a protected classification. Employers should also consider whether a termination or series of prior terminations has a disparate impact on a particular group.

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3. Consider Any Applicable Collective Bargaining or Individual Employment Agreements

Most employees are employed "at will," meaning they are not guaranteed a job for any fixed period, and may be terminated at any time for a good reason, a bad reason or no reason at all, as long as it is not an illegal reason, such as discrimination. Many employers have employment handbooks or other written policies that reiterate such employment-at-will status. Two very notable exceptions to "at will" employment status are collective bargaining and individual employment agreements. Union agreements typically limit a termination to a showing of "cause" or "misconduct." Economically motivated actions may be strictly limited on the basis of seniority and create "bumping" rights for affected employees. Individual employment contracts may limit terminations without a showing of "cause," and/or impose significant severance payments. Employers must always take into account the presence of a union or individual employment agreement before acting.

4. Consider Possible Retaliation Allegations

Employers are often annoyed when an employee voices concerns or files a written complaint about discrimination, harassment, wage-hour violations, or requests an accommodation for a disability or religious belief and related issues. Their first instinct sometimes is to "get rid of" the problem employee. Be careful: A myriad of laws protect employees who have either "opposed" discrimination or "participated" in some sort of proceeding. Even where the underlying claim of discrimination or other employment violation lacks merit, the employee may indeed have a bona fide retaliation claim if terminated or subjected to other negative employment action soon after lodging a complaint. While such employees are not necessarily insulated from termination, employers should be aware that they may assume an additional burden to justify their decisions against a possible retaliation claim, especially if taken within approximately six months of an employee's complaint.

5. Consider the Need for Advance Notice of Group Actions

If the employer's action constitutes a plant closing or mass layoff under the Worker Adjustment and Retraining Notification (WARN) Act and parallel state mini-WARN laws, the employer should be aware of strict rules requiring advance written notice before the employment terminations can be implemented. Under the federal WARN Act, 60 days advance written notice generally is required where the action affects 50 or more full-time employees. Limited exceptions may apply, e.g., natural disasters or unforeseen business circumstances. State laws may require longer advance notice (e.g., 90 days) or provide broader protections (e.g., actions affecting 25 or more employees.)

6. Consider the Need to Protect Confidential Information

Certain employees may have particular access to confidential and sensitive information about the employer and/or its clients. It may be harmful to the employer if the employee is able to remove or utilize such information post-employment. The employer should take care to ensure that the employee has returned all confidential information



and company property, and has not downloaded confidential and sensitive information. Employers may, for example, wish to consider disabling the employee's access to its computer systems and other property just as the termination is being implemented.

7. Consider the Competition and the Need to Protect Clients

Employers are well advised to review and analyze any restrictions already in place to prevent the employee from soliciting clients (and employees), and/or from engaging in a competing business following employment termination. Such "restrictive covenants" typically are found in employment agreements, or separate confidentiality and non-competition agreements. These may have been created at the commencement of or during the employment relationship.

If such restrictions do exist, we believe it is advisable to write the employee a letter providing a gentle reminder of these post-employment restrictions on solicitation and/or competition. Alternatively, such a non-compete provision may be negotiated at the time of separation in exchange for a severance payment or other consideration.

8. Consider Final Compensation and Vacation Pay Due

As a general proposition, employees must receive payment for work performed through the termination date regardless of the reason for termination. Sometimes, employers may elect, for reasons of security or employee morale, to pay the employee "through the end of the month," although the employee will neither be expected nor required to report to work after the notice of termination is delivered. Employers also need to be mindful of whether the employee is owed any compensation for overtime worked. In California, for example, failing to provide for loss of accrued time is strictly forbidden.

Similarly, employees are generally entitled, under the employer's policy and/or most state laws, to receive payment for accrued but unused vacation pay through termination date. Some states, such as New York, allow that employers may lawfully adopt "use it or lose it" vacation policies, which provide that unused vacation time is not payable upon termination. By contrast, in California, for example, a policy or practice

providing for forfeiture of accrued time is strictly forbidden.

It also should be noted that final termination pay and accrued but unused vacation pay typically must be paid promptly, generally by the next regular payroll date.

9. Consider Unemployment Benefits

In most states, terminated employees are eligible to receive unemployment insurance benefits for an extended period of time unless they (1) leave employment voluntarily or (2) are terminated for misconduct. Conversely, loss of employment due to layoff, lack of work or economic retrenchment typically qualifies the individual for benefits. If the termination is the result of misconduct, employers are encouraged to oppose the claim for unemployment benefits in order to control their "experience rating" and tax rate.

10. Consider the Use of Releases

Because of the potential of liability and associated litigation costs to an employer associated with its termination of an employee in one of the protected classifications, employers should strongly consider requiring employees to sign releases in exchange for receiving severance pay and/or other benefits and consideration in connection with their termination. Although regulations take care to protect employees who agree to waive their rights (i.e., releases must be "knowing" and "voluntary"), when designed and executed carefully, release agreements can provide a valuable protection to employers. The cost can be more than offset by the avoidance of litigation.

What You Can Stipulate: A release agreement usually stipulates that employees will not sue their employers for discrimination or any other claim related to their employment and termination. In addition, employees are typically asked not to disclose confidential information about the employers, not to disparage the employers, or not to disclose the details of the release to anyone other than their spouse, attorney, and financial advisor.

The release agreement should also contain a clause that says the employer, by entering into the release agreement, has not conceded liability in any way. In addition, there should also be provisions whereby employees will forfeit the enhancements from the agreement if they breach it.



Consideration/Enhancement: To make the release agreement binding, employees must be offered some type of consideration. The typical consideration is severance pay over and above what may already be required. For example, if the employer has no severance policy, any severance should suffice; if the employer has a policy that pays one week's severance for each year any employee works, then the consideration for the release has to be in addition to that. Severance is typically paid out either as a lump sum or salary continuation. Other types of consideration could include directly paying or reimbursing the employee for COBRA (Consolidated Omnibus Budget Reconciliation Act) health care continuation coverage, outplacement counseling, an agreement not to contest unemployment benefits or allowing the employee to keep the company car.

The Over 40 Crowd

The Older Workers Benefit Protection Act (OWBPA) has added safeguards for workers over age 40 when it comes to release agreements. First

and foremost, OWBPA requires that the release be "knowing and voluntary." In other words, the release has to be in clear language and has to spell out exactly what the employee is receiving. In addition, it must tell employees that they have the right to consult an attorney before they sign the agreement.

Employees over 40 also have a minimum of 21 days to consider the release agreement, and even after signing it, they still have a seven-day revocation period.

Conclusion

Overall, the most important thing employers can do to avoid liability and protect themselves when terminating an employee or employees is to plan ahead and be aware of the potential legal implications of their decision, particularly for legally protected employees. The key point to remember: terminations are not accidents, but planned events. Hopefully the 10 considerations outlined above will help to guide employers and help to protect them from liability. ▲

