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THE TOP 20 MISTAKES EMPLOYERS MAKE WHEN TERMINATING EMPLOYEES

As a continuation of the 20th anniversary of our *Employment Law Reporter*, here is our list of the top twenty mistakes that employers currently make when firing employees. Enjoy!

- 1. Terminating When In The Heat Of Passion.** Making a decision to terminate any employee is a very serious matter. In most situations, there is no need to make the determination decision on a moment's notice, or when one is angry or a situation is inflamed. In these intense situations, mistakes can be made and the termination will probably be handled in a less than perfect manner. The better course of action is to suspend the employee on the spot, cool down, conduct an investigation as to the offense and then make a reasonable determination as to whether to terminate.
- 2. Not Paying Vacation Pay At The Time Of Termination.** Under California law, there is no legal requirement for an employer to provide employees with paid vacation time. However, if an employer does have an established vacation policy, practice or agreement to provide vacation, then earned but unused vacation time is considered wages and must be included in the final paycheck which is sent to the employee at the time of termination.
- 3. Not Conducting An Adequate Investigation.** If a termination decision is based on an incident or series of incidents, it is imperative that you conduct a reasonable investigation before making any termination decisions. Different people have different perceptions of reality, and some people lie. It is important that you have a file that indicates that you did your best to ascertain the truth.
- 4. Not Reviewing The Employee's Entire File.** Termination decisions should not be made in a vacuum. It is essential to review the employee's entire file before making a termination decision. If the employee had received stellar reviews for the five years prior to a single incident, this should be considered as part of the termination decision.
- 5. Failing To Provide The Employee With A Coherent Explanation Of Why He/She Is Being Terminated.** Employers often get into trouble when they have not given thought as to what to say to the person being terminated. As a consequence, employers often provide long-winded and easily disputed termination reasons. While you don't have to provide the employee with a reason for the termination, we recommend that you give one, provided it is well-reasoned, concise and truthful.
- 6. Failing To Talk With Counsel Prior To Terminating Employee.** In many cases it might be overkill to talk to your attorney prior to a termination. There are, however, certain instances where a short conversation with your lawyer will be more than worth the cost of the call, especially if you believe that the employee will file a lawsuit against the company.
- 7. Not Knowing The Details Of Your Handbook Prior To A Termination.** It is imperative that the person making the termination decision understand the provisions of the Handbook that the employee has violated and whether the Handbook provides for a progressive discipline procedure.

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- 8. Letting The Word Get Out.** Termination decisions should remain strictly confidential. If word gets out to the employee that he/she is being terminated prior to the time they are formally advised by the employer, it can create a disruptive situation or lead to actions which will make the termination substantially more difficult. Moreover, each individual being terminated deserves to be treated with the respect and dignity that a forthright communication provides.
- 9. Taking Too Long To Make Your Decision.** If you are planning to terminate someone and continue to wait for the “right time” there are many problems that may arise. First, the employee may get wind of the situation and may become disruptive or file a preemptive claim. Second, if other people in the department become aware of the potential termination, it could result in an unproductive work environment.
- 10. Failing To Adequately Prepare For The Termination Session.** This means not only understanding the details of why the employee is being terminated but also making sure that you have all the paperwork and documents necessary to cover issues of COBRA, vacation pay, and the other issues that arise in the termination process.
- 11. Not Having Proper Evaluations And Reviews In The File.** If in fact your termination is based on performance issues, it is essential to have a history of proper evaluations and reviews in the file. If these reviews are not accurate or up to date, you may want to reconsider your decision to terminate at this time.
- 12. Not Locking The Employee Out Of The Information Technology System.** It is essential that at the time of the termination interview, the employee be locked completely out of your email and information technology systems. Failing to do this puts your entire system at risk. There is also a risk that the employee may misuse customer and trade secret information from the system.
- 13. Not Obtaining Keys From The Employee.** It is essential that your facility remain secure. Often there will still be a need to change the locks after an employee leaves even if you do obtain the keys. Nevertheless, it is important to obtain the keys from the employee in case there are any delays in securing your facility.
- 14. Not Obtaining All Company Equipment And Credit Cards.** The last thing you want is to fire an employee who still has access to company credit cards or equipment. The consequences for failing to recover these items is self-evident.
- 15. Failing To Have A Post-Termination Plan.** It is important to be prepared for what will happen after the employee has been terminated. This means being prepared to fill the job position or reassign the employee’s job responsibilities to other employees so that the operations of the organization are not disrupted.
- 16. Mishandling Communications Regarding The Firing.** After the employee is terminated, you control the message regarding the employee’s obvious absence from the workplace. There are a variety of methods of conveying a positive and dignified message about the employee’s departure. Ultimately, you will need to balance the long term objectives of your organization against the individual employee’s right of privacy. This is often tricky and you may want to talk to your attorney about the best way for these communications to be handled.
- 17. Destroying The Employee’s File Because He/She Has Been Fired.** Under California law you are generally required to maintain the personnel file for at least three years after the date of termination. Destroying documents that you were required to keep can come back to haunt you.
- 18. Failing To Change The Website.** If in fact an employee is listed on your website, you want to immediately remove him/her.
- 19. Joking During The Termination Process.** Nervous human resource employees sometimes attempt to “lighten” the situation by making jokes during the termination process. This is usually a bad idea which will generally be perceived as the employer being callous, uncaring and even happy at the fact that the employee has lost his/her job.
- 20. Talking Too Much.** Too often employers talk too much and say the wrong thing during the termination process. There is nothing wrong with saying you’re sorry, but be very careful regarding anything else you say. Don’t make any promises that you cannot keep, or make any excuses regarding the reasons surrounding the employee’s termination.

If you have any questions regarding this bulletin, please contact Kelly O. Scott, Esq., Editor of this publication and Head of ECJ’s Employment Law Department, at (310) 281-6348 or kscott@ecjlaw.com. If one of your colleagues would like to be a part of the Employment Law Reporter mailing list, or if you would like to receive copies electronically, please contact Brandi Franzman at (310) 281-6328 or bfranzman@ecjlaw.com.