

## SUCCESSFUL TERMINATIONS - PART 2

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In our April 2004 issue of the Employment Law Reporter, we discussed internal procedures that minimize the risks associated with terminations and special considerations for potentially sensitive terminations. In this second part, we will address employee handbooks and other contractual considerations.

### **III. The Employee Handbook and Other Contractual Considerations**

As with any termination, it is highly recommended that the employer consult its employee handbook and other employment documents to determine what policies and procedures relate to employee terminations. A well-written handbook will state that the employer reserves the right to revise, supplement or discontinue any of the policies, procedures or benefits described, with the exception of any at-will and/or arbitration policy that may be contained in the handbook. Nevertheless, it is a good idea to act in compliance with the procedures found in the handbook at the time of the termination. Then, if the termination is challenged, compliance with the handbook's provisions will underscore the fairness of the employer's actions. In any event, what follows is a list of handbook policies and other documents that should be reviewed in connection with any termination.

#### **A. Employment At-Will**

The handbook should provide that employment is "at-will" and may be terminated at any time, with or without advance notice and with or without cause. This provision puts employees on notice that there are no promises for continued employment.

#### **B. Performance Evaluation**

Handbooks frequently refer to performance evaluations of employees. Such evaluations should be considered in termination decisions.

#### **C. Progressive Discipline**

Many handbooks, particularly those serving larger companies, provide for a system of progressive discipline prior to an employee's termination. Such a system creates a quasi-contract that essentially promises employees several preliminary disciplinary measures prior to being terminated. A violation of a progressive discipline system can lead to a claim for an express or implied breach of contract. For this reason, and because it frequently denies an

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employer the flexibility to deal with employees appropriately, a formal disciplinary system is not recommended. However, if an employer chooses to implement such a system, it should be drafted to allow for exceptions at the employer's discretion, and it should be followed and applied consistently, treating like offenses in like manner.

#### **D. COBRA Continuation of Medical Insurance**

A handbook should state that the employer will provide eligible employees and their eligible dependents the opportunity to continue medical insurance coverage under the Consolidated Omnibus Budget Reconciliation Act ("COBRA"). A termination is a "qualifying event" under COBRA, and therefore the employer should provide each qualified employee and his or her spouse with the appropriate notice.

#### **E. Payment of All Wages Due**

In California, when an employer terminates an employee it must pay the employee all final wages on the day of the termination. Failure to do so exposes the employer to penalties. Many handbooks provide that the employer will pay employees for their accrued vacation upon termination. Accrued but unused vacation is considered a part of an employee's earned wages and must be paid out as part of an employee's final wages. Accordingly, the employer should always coordinate with the payroll department prior to terminating an employee to ensure that the employee's final wages have been calculated in a timely and proper manner.

#### **F. Return of Property**

Handbooks usually require that each employee return all property of the employer that is in his or her possession upon termination. Employers should remind terminated employees that return of company property is required by the provisions of the handbook.

#### **G. Employment Contracts**

If the employer has entered into an employment agreement with an employee, the specific terms of the agreement should be analyzed to determine whether the proposed termination would violate any of its terms.

#### **H. Union Agreements**

Collective bargaining agreements may be violated by a termination. An employer must comply with the terms of any collective bargaining agreement it may have entered into with its employees.

#### **I. Training and Record-Keeping**

The employer should keep accurate records of all factors, along with any documents, that were considered in determining which employees would be terminated. Additionally, the employer should retain records that reflect the employer's commitment to equal employment opportunity. The employer should train its supervisors regarding the company's standards for terminations, including when a termination is appropriate, how to prepare the necessary documentation to process the termination, and how to conduct exit interviews, when applicable.

### **IV. Exit Interviews**

## **A. Preparation and Proper Documentation**

Many employers believe that once they receive notice of an employee's resignation or decide to terminate an employee, the employee can no longer give them value. This is simply not the case. Establishing a policy of exit interviews for all soon-to-be former employees is a convenient way to obtain information that may reduce future turnover, increase employee morale and address sensitive issues such as the return of confidential documents, to protect trade secrets, and to discover any work-related injuries, harassment or discrimination. In sum, the exit interview allows the employer to take a snapshot in time concerning any claims, or the lack of claims, the employee may have against the company, in addition to exchanging important information with the employee.

We recommend that, to get the most out of the exit interview, employers consider the steps discussed below, keeping in mind the underlying goals of: (a) recovering all confidential documents in an employee's possession, including employment handbooks; (b) recovering company property in the employee's possession; (c) reminding the employee of his or her duty not to disclose or use confidential information and trade secrets; (d) learning of any previously unknown injuries, harassment or discrimination; and (e) learning the reason for the employee's resignation, if applicable.

### **1. Have a standard policy for timely interviews.**

Employers should adopt a policy requiring the interview of all departing employees on or before their last day. Making exit interviews a standard policy reduces the chance of any employee feeling that he or she has been singled out by management.

### **2. Determine and review all relevant documentation.**

Most employees have access to confidential business information and trade secrets. Ideally, an employer will have agreements with its employees prohibiting the disclosure of confidential information and trade secrets, in addition to policies found within an employee handbook. Reviewing and creating a list of these agreements and the trade secrets and confidential documents or information that the employee had access to before the exit interview is essential to enable the employer to remind the employee of his or her continuing obligations and duties.

### **3. Consider using a checklist.**

Interviewers can be prepared by using a checklist developed by management specifying the documentation and information to be sought from and reviewed with the employee. If possible, it is best to have two employer representatives conduct the interview, preferably a human resources representative and a supervisor who is familiar with the employee's duties and responsibilities.

### **4. Identify, remind and discover.**

One of the goals of an exit interview is to identify information that will be helpful to the employer's ongoing business. Employers should also use this opportunity to remind employees of their duties and obligations to prohibit the disclosure and use of trade secrets and confidential information. Employers should try to discover any work-related injuries, harassment or discrimination that had not been reported previously. As discussed below, the answers to these questions should be noted in the event they are required to contradict some future

claim brought by the former employee.

**5. Keep the interview friendly and non-adversarial.**

Departing employees may be reluctant to provide information regarding their experiences at the company. Terminated employees tend to be uncooperative. Further, employees are often defensive when reminded of certain obligations. It is therefore very important to keep the interview as friendly and businesslike as possible.

**6. Ask open-ended questions.**

Employers can obtain information regarding a departing employee's co-workers and working environment during an exit interview. Employees may have a lot to say on these subjects when they know they are leaving. An employer should ask open-ended questions when seeking information from departing employees. In addition, employers should determine why resigning employees are leaving. Examples of open-ended questions are: Why did you start looking for another job? What things did you like or dislike about your job? If the employer obtains information regarding any type of harassment or discrimination, the departing employee should be asked follow-up questions to determine when such behavior occurred, other witnesses to the events and whether the employee ever informed anyone of the behavior.

**7. Ask about any new job.**

Obtain information about the resigning employee's new job. Among other things, the employer should ask what type of work the employee will be performing to determine if the departing employee's new position may inevitably require the disclosure of confidential information and trade secrets.

**8. Consider using an acknowledgment form.**

It is a good idea to obtain a departing employee's signed acknowledgment that the employee has been reminded of his or her obligations concerning trade secrets and confidential information, and that all confidential documents and company property have been returned. Employers should also consider obtaining, in either the same acknowledgment or a separate document, an employee's written confirmation regarding on-the-job injuries and/or claims of harassment or discrimination, or lack thereof.

**9. Document the interview.**

In addition to the use of an acknowledgment form, the exit interview should be documented with detailed notes or a memorandum by company representatives who attended the interview. The preparation checklist discussed above could be used as an outline in writing comprehensive notes. An "additional comments" section should be included for detailing any other matters discussed or observations made during the exit interview.

**10. Determine if follow-up action is necessary.  
is necessary.**

At the conclusion of the interview, the employer should determine if any follow-up action is necessary with respect to information provided by the departing employee during the interview. For example, the company may deem it necessary to send a follow-up letter reminding the employee of his or her obligations to maintain the confidentiality of trade secrets and/or certain business information. Employers may also want to notify the new

employer of these obligations. The employer should also investigate any previously unknown claims of harassment or discrimination. Employers should seek the advice of counsel before pursuing any follow-up strategies.

### **B. Consider a Severance Offer**

There are several issues to consider with a terminated employee in order to determine the appropriateness of giving him or her a severance payment. First, severance payments are not required as a matter of law. Rather, a severance is a creature of contract and, therefore, the employer must first consult any applicable employment contract to determine whether some type of severance offer is automatically due an employee as a result of the termination. The employer should also consult the applicable employment handbook to determine whether it provides for payment of severance in certain circumstances or to employees at certain seniority or management levels.

Finally, employers should consider a severance offer, even in the absence of a contractual obligation, for strategic reasons. A severance payment can serve as a goodwill gesture and mollify an employee who may be displeased about his/her termination. It can also be an avenue for obtaining crucial liability releases in exchange for the severance payment. However, employers should remember three essential things about severance: (a) it is considered part of wages and is subject to applicable withholdings and deductions; (b) a severance agreement is a legal document and should always be drafted by employment counsel to ensure that it is enforceable and not in violation of any laws; and (c) a pattern and practice of providing severance to some employees may create implied contractual obligations to other employees and should be invoked with a view to consistency and non-discriminatory practice.

### **V. References For Terminated Employees**

An opinion issued by the California Supreme Court, *Randi W. v. Maroc Joint Unified School District*, 14 Cal. 4th 1066 (1997), underscores the need for employers to institute a job reference policy that will effectively provide prospective employers with little or no information regarding former employees. The Supreme Court has made clear that, although employers are not required to provide job references or disclose information about former employees, once information is provided the employer then becomes obligated to reveal all other facts that may qualify or limit the reference. The failure to do so may lead to various claims, including negligence and fraud.

The lesson for California employers is clear: handle requests for job references with extreme caution. In addition, consider designating one person or department, such as the Human Resources Department, as the only one in the company authorized to respond to such requests. When a reference is provided, leaving out negative information can expose the employer to liability unless the omission is not misleading and does not put the prospective employer or anyone else at risk. On the other hand, full disclosure can expose the employer to an action for defamation brought by the former employee. Under these circumstances, the safer approach is to adopt a job reference policy whereby the employer will confirm only the job title and dates of employment. Such a policy should eliminate any potential liability with new employers or third parties for failing to reveal negative information and may also shield the employer from a claim of defamation brought by the former employee.