

# THE 3 P'S OF EMPLOYEE TERMINATIONS

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The vast majority of employment-related lawsuits follow the termination of an employee. Employers can minimize their legal liability by considering the “three P’s” of employee terminations: people, procedures and paperwork.

## **People involved in the termination**

When it is time to terminate an employee’s employment, one of the first decisions an employer must make is who is going to communicate to the employee that his or her employment is coming to an end. That person needs to have a working knowledge of the relevant facts and possess the skills and personal qualities to communicate the termination decision in an appropriate manner. Knowing what to say or not to say is critical in this situation.

It helps with the employer’s “same actor” defense if the person making or communicating the termination decision also hired, promoted or provided some positive employment experience for the employee. It can also be helpful if the person making or communicating the termination decision is in the same protected class (i.e., race, national origin, age, sex, etc.) as the employee.

Other people may play a role in this process on behalf of the employer. For example, another trusted person should be present as a witness when the termination decision is communicated. It helps if the decision is reviewed by the employer’s human resources staff or its legal counsel before the impacted employee is told of the termination decision.

## **Procedures to follow before, during and after the termination event**

Following the correct procedures is important before making the decision to

terminate someone. Once workplace issues arise, the employee should be afforded due process and progressive discipline. These procedures help to insulate the employer from claims against the employer. However, neither due process nor progressive discipline may be required by law if the employer is a private, non-governmental, union-free employer and the employee is not subject to any contract that limits the employer's right to terminate the employee.

Before terminating an employee, an employer can first suspend the offending employee and conduct a proper investigation into the suspected misconduct or performance issues. Witnesses should be interviewed and the employee should be given the opportunity to present his or her side of the story. The employer should consider perspectives of the offending employee, witnesses, management and others who may be involved before making any final decisions.

This preliminary review should consider the potential factual and legal issues presented by the situation and what actions could be taken to shore up the employer's position. The employer should consider what disciplinary action was taken against other employees in similar situations and any possible disparate impact on legally protected classes.

Review of the relevant documentation is critical in advance of the termination meeting. Documents relating to the particular employee at issue as well as those relating to other employees in similar situations should be analyzed.

It is also advisable in larger organizations for a single person or a committee to review and approve the termination decision before it is communicated. This process can avoid inconsistencies that may be construed against the employer.

Once the preliminary investigation has been done, the employer needs to develop a detailed plan for the termination meeting and conduct it as soon as practical. There is no magic time to hold such a meeting. It should be conducted in a place and at a time that affords the employee the most dignity. Once the decision has been made, the meeting should be conducted as soon as possible.

The person communicating the termination decision needs to have a planned narrative that gets right to the point without too much explanation. It is helpful to identify a triggering event that precipitated the termination. The reason for the termination should be truthful, succinct and without sugarcoating.

Immediately after conveying the termination decision, severance details and post-termination benefits such as final pay, payment of any accrued but unused vacation pay, conversion of medical or life insurance policies, roll-over of retirement monies and pension benefits should be covered. Arrangements also should be made for the

removal of the employee's personal possessions in the most respectful manner.

Arrangements should also be made to retrieve any of the employer's property that may be in the possession of the employee, such as keys, access or credit cards, vehicles, tools, computers or peripherals, cell phones or PDAs. Arrangements should also be made for immediately securing the employer's electronic and physical assets.

Employers generally have a right to communicate with current employees about how they will be affected by the departure of a terminated co-worker. Such communication may relate to new work assignments or reporting relationships or affirmation of existing employer policies or work rules. However, as a professional courtesy, the specifics of a particular employee's termination should not be discussed. To the extent that the terminated employee may be discussed, the employer should only make truthful, nondefamatory comments. Among other things, the employer should never say that the terminated employee broke any laws or committed any crimes.

### **Paperwork related to the termination**

As mentioned previously, employers should review any documents relating to the termination and similar comparative situations before terminating the employment of an employee. If documents do not exist, the employer should consider what documentation can legitimately be created to reflect the nondiscriminatory reason(s) for the termination.

If appropriate, the employer may consider offering separation pay in exchange for a general release of all claims. Making sure the release complies with all applicable laws is essential to it closing the door to any downstream litigation.

If the employee was subject to any post-termination restrictive covenants, such as non-disclosure, non-solicitation, non-competition or non-piracy agreements, the employer should monitor compliance with such agreements and take action it deems necessary to protect its interests.

The employer will need to determine whether it wishes to oppose any unemployment claims and be thoughtful as to the information it provides in response to such claims. It also will need to make sure it responds to any garnishments or other legal matters involving the terminated employee in a timely manner.

### **Conclusion**

By involving the right people, following the right processes and considering all the

relevant paperwork, employers can effectively minimize their exposure to legal claims that may arise from the termination of employees.

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