

CHECKLIST | BEST PRACTICES FOR CONDUCTING EMPLOYEE TERMINATIONS

Presented by Bitner Henry Insurance Group

Employee terminations are often complicated and, if not conducted properly, employers can open themselves up to costly legal challenges and negatively affect their business or reputation. Establishing procedures for employee terminations can help employers ensure that employee terminations are conducted in a manner that minimizes legal risks and accounts for various business considerations.

This checklist outlines key steps when conducting employee terminations. However, it only addresses considerations with respect to an involuntary termination of a single employee. This checklist does not consider specific state or local laws or terminations of more than one employee (e.g., group terminations or reductions in force). Therefore, this checklist should be used as a guide, and the steps in this list should be modified to meet the unique needs of each organization. Employers are encouraged to work with local counsel to carry out any specific terminations.

PRE-TERMINATION CONSIDERATIONS

Prior to terminating an employee, employers should first decide whether termination is an appropriate and lawful course of action or whether the employer would prefer to take any other interim steps. The list below sets forth some of the initial steps an employer may consider before carrying out an employee termination. Failure to properly assess an employee's rights and an employer's obligations prior to the termination could expose an employer to legal liability or negatively impact employee morale.

Decide Whether Termination Is Lawful and Appropriate	Completed
<p>Establish the reason for the termination. As an initial matter, employers should set forth the reason for the employee termination. Although employers may terminate an at-will employee for any or no reason, it is considered best practice to have a clear, legitimate and non-discriminatory reason for the termination. Some examples of termination reasons include:</p> <ul style="list-style-type: none">• Performance-related issues;• Attendance issues;• Inappropriate behavior or conduct in violation of company policy;• Cost-saving measures; or• Position elimination.	<input type="checkbox"/>
<p>Confirm that the reason for the termination is lawful. Regardless of whether an at-will employment relationship exists, employers may not terminate an employee for any unlawful reason, including:</p> <ul style="list-style-type: none">• Due to an employee's protected characteristic, such as those protected under the following laws:<ul style="list-style-type: none">○ Title VII of the Civil Rights Act (Title VII), which prohibits discrimination on the basis of race, color, sex (including pregnancy and related medical conditions), national origin and religion;○ The Americans with Disabilities Act (ADA), which prohibits discrimination on the basis of an employee's disability;○ The Age Discrimination in Employment Act (ADEA), which prohibits discrimination on the basis of age (40 or older);○ The Genetic Information Nondiscrimination Act (GINA), which prohibits discrimination on the basis of genetic information; and○ The Uniformed Services Employment and Reemployment Rights (USERRA), which prohibits discrimination on the basis of past, current or prospective military service.	<input type="checkbox"/>

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<ul style="list-style-type: none"> • Because an employee seeks or takes protected leave, including: <ul style="list-style-type: none"> ○ Family and Medical Leave Act (FMLA) leave; ○ USERRA military leave; ○ Workers’ compensation leave; ○ ADA disability leave; or ○ Temporary or short-term disability leave (including on the basis of pregnancy). • Because an employee seeks or obtains a disability, pregnancy or religious accommodation; • In response to protected whistleblowing activities; • In response to union organizing activity as protected by the National Labor Relations Act (NLRA); or • In response to an employee who sought to enforce their wage rights, including those under the Fair Labor Standards Act (FLSA). <p>Some states or municipalities may impose additional restrictions on employee terminations, so employers should confirm that the reason for termination is lawful under relevant state and local laws.</p>	
<p>Confirm that termination is appropriate. Even if an employee is at will and the reason for termination is not unlawful, employers may want to confirm that termination is appropriate under the circumstances. In assessing whether termination is appropriate, employers may consider a variety of factors, including but not limited to:</p> <ul style="list-style-type: none"> • Whether the termination could cause reputational damage that would outweigh the benefits of termination; • Whether the employee received appropriate notice of any performance deficiencies or misconduct and had an opportunity to correct them; • Whether the employer is treating employees consistently; • Whether the employer or the employee’s supervisors are partially at fault for the circumstances causing the proposed termination; • Whether the employer adequately communicated company policies or expectations to the employee; or • Whether the employer has properly documented employee issues. 	<input type="checkbox"/>
<p>Confirm whether the employee is an at-will employee. In almost all states, employees are considered “at will” absent an agreement to the contrary. Employers may terminate an at-will employee at any time for any or no reason unless the reason for termination is unlawful.</p> <p>Employers should carefully review any existing agreements with the employee, including offer letters, handbook agreements or any other contracts, to ensure that there is no language that indicates employment is not at will (e.g., an employment agreement that indicates a specific term of employment that not explicitly provide for termination by the employer other than for cause). If employment is not terminable at will, employers should confirm that they will be able to meet all applicable requirements to carry out the termination.</p>	<input type="checkbox"/>
<p>Evaluate other legal risks of termination. Finally, even if termination is both lawful and appropriate, employers may still be at risk of employee claims. Specifically, employees may take legal action against an employer in connection with a valid or lawful termination when other circumstances could reasonably suggest the employee was terminated for unlawful reasons. Such circumstances may include but are not limited to:</p> <ul style="list-style-type: none"> • The employee recently requested or received an accommodation for a disability, pregnancy or related condition or religious beliefs; • The employee recently complained of discrimination, retaliation, unfair labor practices, inadequate wages or similar complaints; or • The employee has engaged in union organizing activity. 	<input type="checkbox"/>

Even if any of the above circumstances apply, employers may still terminate an employee for valid, lawful reasons. However, given the greater risks, it is even more imperative that employers adequately document the reason for termination when these circumstances exist.	
Consider Alternatives to Termination	Completed
<p>Consider alternatives to termination for performance issues. Employers may consider taking steps to correct or improve an employee’s performance before terminating them. For example, an employer could:</p> <ul style="list-style-type: none"> • Place the employee on a performance improvement plan (PIP) to correct an employee’s performance issues; or • Provide additional training or coaching. 	<input type="checkbox"/>
<p>Consider alternatives to termination for misconduct. Employers may consider progressive discipline rather than termination to correct an employee’s misconduct, inappropriate behavior or violation of company policy. Such progressive discipline may include:</p> <ul style="list-style-type: none"> • Employee coaching; • Verbal or written warnings; or • Suspension with or without pay. 	<input type="checkbox"/>
<p>Consider alternatives to termination due to job elimination or other cost-saving measure. Employers who are eliminating a position or taking some other cost-saving measure may consider alternative steps to reduce costs, including:</p> <ul style="list-style-type: none"> • Furlough; • Temporary reduction in hours or pay; or • Transferring the employee to a different position. 	<input type="checkbox"/>

PREPARE FOR EMPLOYEE TERMINATION

After reviewing the proposed termination, employers may consider the following best practices in preparing for the termination. These best practices may help employers satisfy their legal obligations and ensure a smooth transition for the company, the terminated employee and other personnel.

Compile and Review Relevant Documentation	Completed
<p>Compile all applicable documents related to the employment relationship. When preparing to terminate an employee, employers may first want to collect all of the documents related to the employment of such individual. These documents may include:</p> <ul style="list-style-type: none"> • Personnel records (e.g., performance reviews and attendance and disciplinary records); • Employee handbooks and other employer policies; • Offer letters or employment agreements; • Restrictive covenant agreements (e.g., confidentiality, noncompete and nonsolicitation agreements); • Equity and incentive compensation plans (e.g., bonus plans, stock options, restrictive stock, restricted stock unit or other employee stock plans and deferred compensation plans); • Bonus plans; • Benefit plan documents; • Immigration-related documentation (including work authorizations and immigration petitions, sponsorships or applications); • Collective bargaining agreements; and • Any other documents related to the employment relationship (e.g., internal complaints made by or about the employee, investigations and leave or accommodation requests). 	<input type="checkbox"/>

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<p>Review all documents relevant to the employment relationship to confirm rights and obligations. Employers should review all relevant documentation for provisions that confer any rights or responsibilities on the employer.</p> <p>For example, the documents may include provisions related to the following employer rights:</p> <ul style="list-style-type: none"> • <i>Clawbacks, forfeitures and recoupments</i>—Employers should assess whether they may recover any compensation (e.g., bonuses, tuition reimbursement or relocation payments) under the terms of an agreement or policy; • <i>Confidentiality, non-compete and non-solicitation covenants</i>—Employers should confirm whether the employee will be subject to any post-termination restrictive covenants; or • <i>Outstanding debts</i>—Employers should confirm whether the employee owes the employer any outstanding debts or unpaid loans (e.g., loans taken out pursuant to an employee retirement plan). <p>The documents may also include provisions related to the following employer responsibilities:</p> <ul style="list-style-type: none"> • <i>Notice obligations</i>—Offer letters, employment agreements or other employer policies may require employers to provide a certain amount of advanced notice, typically in writing, prior to terminating an employee. Employers should determine whether such notice is required and ensure they will be able to satisfy such obligations. • <i>Pay in lieu of notice</i>—Employers who wish to terminate an employee immediately but who are subject to an advanced notice requirement may consider whether they can provide payment in lieu of advanced notice. Some agreements may explicitly provide for such an alternative or allow employers to provide pay in lieu of notice with the employee’s written consent. • <i>Severance</i>—Employees may also be eligible to receive severance benefits in connection with certain terminations. Employers should confirm whether a terminated employee may be eligible to receive severance in connection with the proposed termination. • <i>Collective bargaining obligations</i>—If an employer is considering terminating an employee that is covered by a collective bargaining agreement, it is important that the employer carefully review the relevant provisions of such collective bargaining agreement to confirm whether it is subject to any additional requirements before terminating the employee. 	<input type="checkbox"/>
<p>Steps to Prepare for Employee Termination Completed</p>	
<p>Document the termination decision. When conducting an involuntary employee termination, it is important to thoroughly document the termination decision. Specifically, employers should clearly note the lawful and valid reasons for the termination and collect any relevant and objective supporting documentation, such as performance reviews or disciplinary actions.</p>	<input type="checkbox"/>
<p>Select the termination date. In some cases, such as following serious employee misconduct, employers may wish to terminate employees immediately. However, in most instances, employers may wish to carefully plan the termination to cause the least disruption to the organization. In selecting a termination date, employers may consider the following factors:</p> <ul style="list-style-type: none"> • Required minimum notice periods under an agreement or policy or required by state or local laws; • The time needed to transition the work and information to other employees; • Other business considerations (e.g., the employee is playing a critical role in a large project that would be difficult to transition); and • Whether the employee poses any immediate risks related to workplace safety, 	<input type="checkbox"/>

information security or litigation if they remain at the organization.	
<p>Plan the termination meeting. Employers should take steps to plan out the process for communicating the termination decision to ensure the smoothest possible experience for both the employer and employee. In planning the meeting, employers may consider the following:</p> <ul style="list-style-type: none"> • The timing and location of the discussion (e.g., in-person at the office or remotely over video call); • Which personnel will attend the meeting (e.g., a supervisor, human resources personnel or other appropriate employees); and • How to effectively deliver the termination decision, including by preparing talking points to address both the reason for the termination and responses to any anticipated employee questions or concerns. 	<input type="checkbox"/>
<p>Prepare for the transition. After establishing the termination date, employers should take steps to prepare for the transition. Such steps may include hiring a replacement or transferring the employee’s duties and current projects to existing employees.</p>	<input type="checkbox"/>
<p>Consider immigration issues. If the departing employee is a foreign-sponsored worker, the employer may have additional considerations, including:</p> <ul style="list-style-type: none"> • Whether the employer must notify any relevant government agencies (such as the U.S. Citizenship and Immigration Services or the U.S. Department of Labor); or • Whether the employer is required to pay the reasonable cost of return transportation. 	<input type="checkbox"/>
<p>Review employee benefit plan documents for termination provisions. Before terminating an employee, employers should review the plan documents and summary plan descriptions for any employee benefit plans in which the employee participates, including:</p> <ul style="list-style-type: none"> • Group health plans (e.g., medical, dental and vision); and • Life insurance plans. <p>Specifically, employers should determine when the employee’s coverage will end and whether the employee is entitled to any continued benefits coverage.</p>	<input type="checkbox"/>
<p>Review retirement plan benefits for employee rights upon termination. Employers should also review any employer-sponsored retirement plans in which the employee participates to determine the employee’s rights under such plans upon termination. Retirement plans may include but are not limited to 401(k) plans, 403(b) plans, employee stock ownership plans, profit-sharing plans and defined benefit pension plans.</p>	<input type="checkbox"/>

SEVERANCE CONSIDERATIONS

Another major consideration in terminating an employee is whether an employer is obligated or desires to pay severance to the departing employee. Employers may refer to the following list when making such an assessment.

Severance Considerations	Completed
<p>Determine whether the employee is entitled to severance. Employers should review all relevant employment documents, including employment agreements and employer policies, to confirm whether the employee is entitled to severance in connection with the proposed termination.</p>	<input type="checkbox"/>
<p>If the employee is not entitled to severance, elect whether to pay discretionary severance. Even if the employer is not required to provide severance, some employers may choose to pay severance on a discretionary basis. Employers may choose to do so for a variety of reasons, including:</p> <ul style="list-style-type: none"> • As a showing of goodwill; 	<input type="checkbox"/>

<ul style="list-style-type: none"> • To obtain a release of claims; or • To impose additional post-employment obligations on the employee. <p>However, employers who choose to offer severance on a discretionary basis should aim to treat all employees consistently to avoid potential disparate treatment or retaliation claims.</p>	
<p>Select the amount and manner of severance. Employers who choose to pay discretionary severance will then need to establish the amount of severance to be paid and the manner of payment. Some considerations include:</p> <ul style="list-style-type: none"> • <i>The form of severance</i>—Employers may pay severance in a variety of forms, such as salary continuation, pro rata bonus payments, employee benefits continuation coverage or payments, accelerated vesting of equity awards or some combination of the foregoing; • <i>The amount of severance</i>—Employers must also decide how much severance to pay. Often, employers pay severance in an amount equal to a number of weeks or months of an employee’s base salary or benefits continuation; • <i>The manner of payment</i>—Finally, employers must decide whether severance will be paid in a lump sum, through continuation payments, in installments or some other manner. 	<input type="checkbox"/>
<p>Prepare a separation agreement and release of claims. One of the main benefits of providing severance is that it allows employers to obtain a release of claims from the employee (typically, employers may only obtain a release if they provide adequate consideration to the employee). In general, if an employee enters into a release of claims, they are agreeing not to file certain claims against the employer. While some claims are not waivable, a release can substantially reduce the risk of future litigation.</p> <p>In addition, some employers may be able to impose certain post-employment obligations on the employee in exchange for the severance agreement, including confidentiality, nondisparagement, noncompetition or nonsolicitation restrictive covenants.</p> <p>Some states and municipalities have their own legal requirements with respect to separation agreements, releases of claims and the enforceability of restrictive covenants. Therefore, employers should work with local counsel to draft such agreements.</p>	<input type="checkbox"/>

STEPS FOR CARRYING OUT THE EMPLOYEE TERMINATION

After taking steps to prepare for the termination, employers may refer to the following list of best practices for carrying out the termination.

Steps to Carryout the Termination	Completed
<p>Communicate the decision to the terminated employee. When communicating the termination decision, employers may consider the following:</p> <ul style="list-style-type: none"> • Ensuring that the employer is direct and professional in delivering the message; • Focusing the meeting only on the legitimate, non-discriminatory business reasons for the termination decision; • Providing information regarding final pay and benefits, such as <ul style="list-style-type: none"> ○ Timing of their last paycheck; ○ Termination of employee benefits coverage; ○ Notice of benefits continuation rights under the Consolidated Omnibus Budget Reconciliation Act (COBRA) if applicable; • Providing any information regarding the services available to the departing employee, including: 	<input type="checkbox"/>

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<ul style="list-style-type: none"> ○ Contact information for state unemployment agencies; ○ Available resources through the employer’s employee assistance program; or ○ Outplacement services. <p>Additionally, employers should bring the following documents to the meeting, if applicable:</p> <ul style="list-style-type: none"> ● A termination letter that documents the lawful reason for termination; ● Severance agreement; and ● A letter documenting any post-employment obligations and copies of any relevant agreements (e.g., confidentiality, noncompetition, nonsolicitation or nondisparagement agreements). 	
<p>Arrange for the return of company property. Employers should also establish when and how company property and records must be returned. Typically, such property should be returned on or before the termination date. Company property may include the following:</p> <ul style="list-style-type: none"> ● Desktop or laptop computer; ● Computer accessories; ● Cell phones and other electronic devices; ● Building key cards, passes or electronic key fobs; and ● Documents and files in both physical and electronic format. 	<input type="checkbox"/>
<p>Disable access to company systems. Upon the employee’s termination, the employer should take action to restrict the departing employee’s access to employer systems, including email, phone, intranet systems and remote access.</p> <p>Employers may also wish to set up automatic replies for the employee’s email and voicemail accounts to notify senders that the employee is no longer with the organization.</p>	<input type="checkbox"/>
<p>Retain employer-owned social media accounts. If the employee maintained a social media account, employers should communicate the company policy with respect to accessing such accounts post-employment.</p>	

POST-TERMINATION CONSIDERATIONS

Following the termination, employers may consider the following best practices to ensure a smooth transition and satisfaction of their legal obligations.

Issue Final Pay and Benefits Documentation	Completed
<p>Pay final wages on time. In general, state and local laws may govern when and how final wages must be paid. Therefore, employers should review the laws in the state or municipality to determine when an employee must receive their final paycheck.</p>	<input type="checkbox"/>
<p>Include all required payments in the employee’s final paycheck. In addition to paying out any earned but unpaid wages, employers should consider whether any of the following payments must be included in an employee’s final paycheck pursuant to applicable state and local laws and employer policies:</p> <ul style="list-style-type: none"> ● Accrued but unused paid time off; ● Earned but unpaid bonuses; ● Commissions; or ● Business expense reimbursements. 	<input type="checkbox"/>
<p>Offer group health plan continuation coverage. In many cases, employers are required to offer group health plan continuation coverage under COBRA. If so, employers must notify the plan administrator of the employee’s termination and notify the employee of their COBRA continuation rights.</p>	<input type="checkbox"/>

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<p>Issue any applicable employee benefits documentation. Employers should also collaborate with employee benefits plan sponsors (including group health plan and retirement plan sponsors) to provide any other required notices to employees. For example, employees may be eligible to receive a notice of their right to rollover retirement plan funds into a new employer’s plan.</p>	<input type="checkbox"/>
<p>Additional Post-Termination Considerations</p>	<p>Completed</p>
<p>Maintain necessary records. Employers are required to maintain a number of records even after an employee terminates their employment. Some of the records employers must maintain include:</p> <ul style="list-style-type: none"> • Records of time worked and wages paid under the FLSA; • Records of workplace injuries under the Occupational Safety and Health Act; • Forms I-9 demonstrating the employee’s right to work in the United States; and • All personnel or employment records. <p>This list is not exhaustive, and states and municipalities may have more expansive recordkeeping requirements.</p>	<input type="checkbox"/>
<p>Establish a plan for responding to reference check requests. Employers should ensure that they have established protocols for how they will respond to future reference checks with respect to the departed employee. For example, if an employee is terminated for poor performance, the employer may wish to only verify the employee’s job title and dates of performance in response to a reference check request.</p>	<input type="checkbox"/>
<p>Notify employees, clients and other relevant persons of the termination. Employers should establish a plan for communicating the employee’s termination with relevant individuals. Employers may need to notify fellow employees with whom the departing employee worked or supervised as well as customers or business partners with whom the employee worked. In general, employers may wish to err on the side of caution and provide only the necessary information rather than divulging information regarding the employee’s performance or behavioral issues.</p> <p>In preparing such communication, employers may wish to determine:</p> <ul style="list-style-type: none"> • Who will make the announcement (e.g., the departing employee, a human resources representative or a manager); and • How the announcement will be made (e.g., in-person, over email or in one-on-one conversations). 	<input type="checkbox"/>