

# **BREAKING UP IS HARD TO DO: What to Do When It's Time to Fire**

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## **Breaking Up is Hard to Do: What to Do When It's Time to Fire.**

This paper is intended to provide managers, decision-makers, and legal counsel with guidance in handling the termination of an individual's employment. Even in an at-will employment environment, the investigation, decision-making, and documentation process are crucial to defending an employer against claims raised under the employment discrimination statutes, constitutional claims, and Whistleblower attacks that seem to follow many termination decisions.

Despite the widely-held belief that employers can fire any employee for any legal reason, the reality is that an employer must be able to provide and support a legitimate non-discriminatory, non-retaliatory, basis for the termination decision or face a long and expensive legal battle. The best defense to a potential wrongful termination claim is pre-decision preparation. While each decision is unique, there are some basic precautions that can help to avoid or defend against a legal attack on the employment decision.

I have divided terminations into three basic areas for purposes of this paper. Terminations come in many shapes and forms but most can be categorized as (1) adversarial, (2) friendly, or (3) medical. In some instances these categories may overlap but the basic premise remains the same. Documentation and fair treatment are keys to minimizing the risk of a wrongful discharge claim. The action may be necessary but understand that you are dealing with a person's sense of self-worth and livelihood. Keep in mind when you make the termination decision that you may someday have to explain it to a jury.

Following these checklists will not guarantee a hassle free termination but it will place employers in a better position to defend wrongful discharge claims that may arise. They will also help to insure that the pertinent issues are well thought out before any action is taken. Knee-jerk reaction firings provide immediate relief but the end result may not be worth that temporary satisfaction. Losing one's job is a major catastrophe in a person's life. The reaction is generally anger, blame, and embarrassment. Employers must be careful, even when the provocation is great; to make a fair, informed and reasonable decision that can be defended to the employee and to a jury of the employee's peers if necessary.

## **ADVERSARIAL TERMINATION**

The adversarial termination is generally the most difficult termination to prepare and defend. This termination is the most likely of the three categories to lead to a civil lawsuit or discrimination charge. The action is generally based on serious violations of policy or gross incompetence. A pre-disciplinary investigation of some type is highly recommended and is mandated by statute for some employees. Peace Officers and Firefighters, civil service or not, have a statutory right to some specific process prior to the imposition of discipline.

Given the many legal limitations on “at-will” employment it is imperative that employers establish a legal non-discriminatory basis for a termination decision before taking action. Title VII, the ADA, the ADEA, the Pregnancy Discrimination Act, the Whistleblower Act, the U.S. Constitution, the FMLA, and the FLSA are just a few of the major causes of action that can be raised against an unwary or unprepared employer. An ambiguous or undocumented basis for the termination decision is an invitation for a claim under one or more of these causes.

The best defense to a potential wrongful discharge claim is a clear and well documented basis for the termination that is presented to the employee. An employee presented with factual and well-supported allegations against him is less likely to create a sinister reason for his termination that leads to a discrimination complaint or a lawsuit. Even if the employee chooses to ignore reality, a well-supported termination letter will help to avoid a negative finding in an EEOC investigation and will dissuade a good Plaintiff’s attorney from taking on the case.

Additionally, before using allegations against an at-will employee as grounds for termination, the employee should be provided notice of the allegations, an opportunity to respond, and the allegations should be fully investigated. A full and fair investigation provides a solid defense to any later claim of a wrongful discharge. The basis for a termination should be consistent with prior decisions, reasonable under the circumstances, and a clearly tied to the termination decision.

## **Adversarial Termination Checklist**

- Well documented allegation of policy violations or performance problem.
- Proper investigation of the allegations or paper trail of performance issues.
- If a peace officer or firefighter, review additional state law requirements.
- Notice to the employee of the allegations and preferably a written response.
- Insure consistency with past treatment of similar violations or performance.
- Review and recognize the risk of potential legal attacks.
- Determine position on an unemployment claim and document accordingly.
- Address any appeal procedure and name clearing issues.
- Plan the termination meeting to lessen confrontation/embarrassment.
- Remind those involved about policies on employment references.
- Document the basis for the action and serve the employee.
- Notify co-workers of the action in a neutral/factual statement and only on an as needed basis.

## **FRIENDLY TERMINATION**

This category contemplates a less adversarial break in service than the first category but also has some problems. Usually this is a situation where there is no readily apparent basis for the termination but for business or other reasons, the employer has decided to move on. In order to avoid a stain on the employee's record and to avoid potential litigation and negative public attention on the action, the two parties may reach an amicable agreement to separate. There are still potential pitfalls even in a "friendly" arrangement so great care must be taken in drafting the agreement.

This category also includes situations where an employee has broken rules or acted in a manner that the employer feels should result in his termination but due to practical reasons, a termination may be a legal risk or a public relations nightmare. In these cases, it may be to the employer's advantage to reach an agreement with the employee to depart on mutually agreeable terms. Those terms should be laid out as specifically as possible in a Release agreement.

The information that can be contained in such an agreement will vary based upon the situation. An employee that will be seeking other employment will be very concerned about employment references, breaks in service, and other written or verbal comments upon their job performance prior to the separation. Because we are public employers such agreements are subject to an open records request and thus the language should be carefully chosen and should be reached by agreement. Employees leaving the workforce entirely may be more concerned about pension issues, consulting contracts, health insurance continuation, and their legacy.

These agreements are sometimes like settling a lawsuit and it generally helps when the employee has an attorney representing them. The attorneys can then discuss language of the agreement and avoid many of the emotional and unproductive discussions that would otherwise be necessary to iron out an agreement. There are certain statutory requirements that should be included in this release if all potential claims against the employer are being waived. The goal of this agreement is to remove the employee from employment and provide protection to the employer from all potential legal claims and circumstances.

## Friendly Termination Checklist

- Prepare a Release Agreement.
  - Consideration
  - Release of all claims
    - Beware the ADEA
  - Consider need for post-employment relationship
    - Consultant
    - Available for infrequent advice
    - Assistance in ongoing litigation or other projects
    - Paid hourly or part of a lump sum agreement
  
- Address tax and confidentiality issues.
  
- Document agreement on employment references.
  - Neutral reference without release.
  - Documentation included if provided a full release.
  - Limited to documentation or include personal reference.
  - Be aware that there are special rules for peace officers and firefighters.
  
- Include documentation of any special agreements on case-by-case basis.
  
- Be aware of the potential for an unemployment claim.
  
- Generally notify co-workers of the action in neutral/factual statement.
  
- Consider a press release with agreed language.

## **MEDICAL SEPARATION**

The FMLA and ADA are major considerations in the decision-making process for employees who are no longer physically able to perform the essential functions of their job. The twelve weeks of protected time for an employee with a serious medical condition or caring for qualified family members with a serious health condition must be honored. Once the twelve weeks of protected leave has passed (additional time allowed under the FMLA for the care of an injured or ill military) the employer can evaluate if additional time off is reasonable. If the employee cannot return to work in a reasonable time or cannot perform the essential functions of their job with or without a reasonable accommodation, then the employer can consider a non-disciplinary medical separation of employment procedure.

The Americans with Disabilities Act is one of the most popular causes of actions with Plaintiff's attorneys today. The risks in these lawsuits are great because of the jury's sympathy with the Plaintiff. The stated goal of the legislation is to provide employment opportunities and protect the employment of disabled individuals. The legislatures' action in opening many more impairments to the protection under the ADA has forced employers to look more closely at any employment decision made on the basis of an employee's impairment.

The key to avoiding liability in a disability claim is to insure that no reasonable accommodation was available or that a reasonable accommodation was offered but refused by the employee. An employer can insist upon reasonable "attendance" and the ability to perform the essential functions of the job. "Reasonableness" is the crux of the matter and is the issue that will be litigated the most in this area of law. Once the employee's absenteeism goes beyond reasonableness or the employee can no longer perform the essential function of the job, even with a reasonable accommodation, then the medical separation option is available to the employer.

This decision, many times, will be opposed by the employee who feels that they can still perform their job and who may be desperate to remain in the workforce. The ADA mandated accommodation discussions and their doctor's input may help to convince the employee of the necessity of the action but remember that you are dealing with a life-changing decision.

## Medical Separation Checklist

(Can this be made into a “Friendly Termination.”?)

- Obtain doctor’s evaluation of the employee’ return to work date or reasonable accommodation request.
- Document written and/or verbal discussions with the employee regarding reasonable accommodations.
- When possible, obtain the doctor’s review of a suggested reasonable accommodation by providing a job description and summary of problems experienced by the employee on the job.
- If unreasonable, provide rationale for the decision that the return to work date was unreasonable or that the accommodation necessary to allow the employee’s return was unreasonable.
- Offer assistance in obtaining LTD or Federal Disability benefits.
- Prepare a removal from employment letter including the following:
  - Note specifically that it is not a disciplinary letter.
  - Cite the time off from work, exhaustion of all leave, or documented inability to perform the job
  - Describe the steps taken to attempt to accommodate the condition and that those efforts unfortunately were unsuccessful.
  - Describe the need to have someone fill the position so that the service can continue and/or relieve the burden caused to co-workers by the situation.
  - Include an offer to consider the employee for reemployment if the employee recovers sufficiently to return to work and is qualified for an open position.
  - Thank the employee for their service to the employer.