

Termination/Discipline Checklist

****NOTE: THIS CHECKLIST SHOULD BE USED INTERNALLY AS A GUIDE, AND IS NOT A “POLICY” OF THE COMPANY. SPECIFIC FACTS/CIRCUMSTANCES (e.g. WORKPLACE VIOLENCE) MAY REQUIRE IMMEDIATE TERMINATION AND ASSISTANCE OF COUNSEL**)**

Step 1: Information Required Prior to Termination/Discipline Decision

The following steps should be taken prior to making a final termination decision:

1. Review Personnel file
 - a. Is there sufficient documentation in the file to substantiate your reasons for termination? Examples include written warnings, performance reviews and attendance records.
 - b. Is there anything in the file that might be evidence of an illegal termination? For example, a supervisor may have written a warning notice to the employee that her pregnancy was causing her to be absent too often. Legal counsel should be consulted if there are concerns.
2. Review separate drug/medical file (to determine if employee is in protected category. See below)
3. Review unofficial “local” or “field” files or documents maintained by supervisors relating to employee performance.
4. Review personnel files for other employees who have similar problems. This comparison can point out potential discrimination issues. For example, could a female employee being terminated for attendance problems show that a male employee had the same number of absences but was not terminated?

Step 2: Identify Potential Exceptions to “At Will” Employment

1. Is there a written employment contract or a union contract? If so, what limits does it place on the employer’s right to terminate the employee?
2. Was the Company’s progressive discipline policy (i.e., oral/written warnings, suspension) followed in this case?
 - a. If so, was the process of progressive discipline well documented? [**Attach relevant documents**]
 - b. If not, can the company show a valid reason for its failure to follow its own policy? For example, an employer might terminate a violent employee without warnings or suspensions in order to protect other employees from harm.
3. If the company has an internal dispute resolution system, was the employee given a fair chance to resolve problems under that internal system?
4. Does the company have an unwritten policy the employer has established by having given employees notice or termination in the past?
5. Will this termination breach an oral contract of employment?
 - a. An oral contract may have been created if the employee was told her job was secure, or that he/she would always have a job if she did a good job, or some other similar guarantee of employment.
 - b. An oral contract can be created by anyone in the company with authority over the employee. This means that the company may be held to a supervisor’s promise to an employee of secure employment, even if the supervisor did not have the company’s authorization to make such a promise.
 - c. Have other employees been given more chances before being terminated for the same or similar reasons as this employee?

- d. Will this termination breach an implied contract of employment? An implied contract of employment may have been created by a combination of these factors:
 - (i) Long-term employment (although there is no specific number of years considered “long term,” many attorneys use five years as a guideline)
 - (ii) Promotions
 - (iii) Commendations
 - (iv) Lack of criticism of the employee’s performance (review performance evaluations)
 - (v) Other indicators of job security

Step 3: Identify “Red Flags” that Increase Potential liability

1. Protected Categories.
 - a. Is the employee in a protected employment category (race, color, creed, gender, religion, marital status, age, national origin or ancestry, physical or mental disability, medical condition including genetic characteristics, sexual orientation, or any other consideration made unlawful by federal, state, or local laws)
2. Americans with Disabilities Act/Fair Employment & Housing Act
 - a. Is the employee physically or mentally disabled? If so, were attempts made to reasonably accommodate the employee’s disability?
 - b. Were reasonable accommodation measures well documented?
3. Medical Absences
 - a. Has the employee been recently absent (within 180 days) due to a medical condition?
 - b. Has the employee provided the employer with any medical releases, notes, etc. within the last 6 months?
4. Pregnancy
 - a. Is the employee pregnant? Employees are entitled to four months off for pregnancy-related disabilities.
5. Workers Compensation/Recent Injuries
 - a. Has the employee filed a workers’ compensation claim in the last 12 months?
 - b. Has the employee returned to duty after a worker’s compensation injury in the last 12 months?
 - c. Has the employee testified or provided evidence in the worker’s compensation claim of any other employee in the last 12 months? (Terminating an employee who has filed a claim, intends to file a claim, or has testified in a worker’s compensation hearing could be considered workers’ compensation discrimination).
 - d. Has the employee complained of any injuries (work-related or not) in the last 6 months days?
6. Whistleblowers. Has the employee reported any illegal activity of the company to a state or federal agency? (Even if the company is not in fact acting illegally, the termination could be seen as retaliation for “whistle-blowing”). Potential whistleblower complaints could include, but are not limited to, the following:
 - a. OSHA violations
 - b. Accounting Issues
 - c. Discrimination/Harassment
 - d. Safety Violations
 - e. Wage and Hour violations
7. Has the employee participated in any official investigation of the employer (i.e., wage or safety

violation) or testified against the employer in an unemployment insurance or other hearing?

8. Is the termination in retaliation for the employee's exercise of protected personal rights, such as freedom of speech or political activity?

Step 4: Consider the Employee's Eligibility for Unemployment Insurance

A terminated employee may be eligible for unemployment insurance unless the termination is for refusal to perform suitable work or for misconduct. Mere inability to perform the duties of the job is not considered misconduct. Employee may be willing to resign if Company does not contest unemployment benefits (see Step 6 (1)(b) below).

Step 5: Consider Legal Ramifications of Not Terminating the Employee

1. Failing to terminate an employee who has been violent or threatened violence could result in harm to other employees and lead to employer liability.
2. Termination of an employee who has sexually harassed other employees may be necessary to fulfill an employer's legal obligations under sexual harassment laws.

Step 6: Consider Legal Alternatives to Terminating the Employee

1. Is there an opportunity to obtain a voluntary resignation? Consider the following:
 - a. Offer of severance payment in exchange for release/waiver agreement
 - b. Agreeing not to contest unemployment benefits in exchange for release agreement
 - c. Alternative discipline including, but not limited to, transfer, "last chance" agreement, unpaid suspension, etc.