

TERMINATION DECISION CHECKLIST

We've provided a checklist to help employers determine whether a termination will likely lead to litigation. Although guaranteeing an employee won't sue isn't possible, using this checklist can alert the employer to potential legal problems. Should these problems arise, they can be discussed with legal counsel before terminating the employee.

DETAILS ABOUT THE EMPLOYEE

- A minority (race, ethnicity, national origin, gender, sex, sexual identity, etc.)
- Did the employee complain about wages, hours, working conditions, or terms/conditions of employment? (Interpret broadly - any complaint might render an employee a whistleblower?)
- Did the employee go out on leave in the last year?
- Does the employee have any accommodations?
- How old is the employee?
- Is the employee non-exempt?
 - What are the hours the employee worked?
 - Did the employee receive meal breaks and rest breaks?
 - What is the timing of paydays (i.e., biweekly, semi-monthly, etc.)
- Did the employee in question violate a policy? If so, which one?
 - Attendance
 - Sexual Harassment
 - Discrimination
 - Retaliation
 - Working off the clock
 - Missing Meal or Rest Breaks
 - Etc.
- Did the employee sign an Arbitration Agreement with a Class Action Waiver?

REVIEW COMPANY POLICIES & DOCUMENTS

- Are policies in the handbook applicable to why the employee is being terminated?
 - I.e., Did the employee violate a specific policy? If so, which one?
- Employment at-will policies
- Progressive discipline policies
- Internal dispute resolutions or arbitration policies
- Termination policies requiring “just cause” (if any)
- Employee or Union contract (if applicable)

PROGRESSIVE DISCIPLINE

- Did the company implement a system or policy of progressive discipline, such as warnings, suspension, etc.?
- Were these actions (warnings, suspension) documented?
- Were there performance reviews?
 - If performance-related, were performance reviews honest?
 - Are there no formal performance reviews? Are there emails showing performance-related issues?
- If so, you can provide evidence should a legal claim arise. If not, the company must show a valid reason for failing to follow its policy.
- Is there a company policy that was violated? Is the policy in writing? Has it been distributed to the employee, and has the employee signed an acknowledgment of the policy?

CONSIDER ORAL OR IMPLIED CONTRACTS OF EMPLOYMENT

- Oral contracts include if an employee were told they would never lose their job as long as they provided good work to the company.
- Oral contracts can be made by anyone above the employee, even if these statements were not approved.
- Note that written contracts or writing noting an oral contract can override oral or implied contracts. Do you have documents that so state?
 - Job application
 - Employee Handbook
 - Policies/procedures
 - Internal emails?

To consider whether this termination breaches an implied contract of employment:

- Long-term employment
- Promotions
- Commendations
- Lack of criticism of the employee's performance
- Other indicators of job security

CONSIDER STATE/FEDERAL LAWS PROTECTING EMPLOYEES

Americans with Disabilities Act

- Does the employee obtain a physical or mental disability?
- If so, did the company accommodate the disability?
- Were these accommodations documented?

Title VII / California's Fair Employment and Housing Act

- Is the employee equally treated as other employees in similar situations?
- Were more chances given to other employees before termination for the same or similar reasons?
- If so, are there non-discriminatory reasons for treating this employee differently?

Also, consider the following:

- Is the employee pregnant (up to four months off for pregnancy-related disabilities are allowed)?
- Was a workers' compensation claim filed? If so, this can be considered workers' compensation discrimination.
- Did the employee or family of the employee report illegal activity of the company either internally or to a local, state, or federal agency? If the company did not perform anything illegal, the termination can still be labeled as "whistle-blowing."
- Did the employee participate in any official investigation of the employer or testify against the employer in unemployment insurance or other hearings?
- Is the termination a result of the employee exercising personal rights, such as freedom of speech or political activity?
- Is the termination a result of discussing wages or working conditions?
- Is the employee being terminated due to absenteeism? If so, consider the following:
 - Absenteeism might be protected under the law for family or medical leave, paid sick leave, leave for victims of certain crimes, and school or childcare activity leave.

REVIEW DOCUMENTATION

- Can you find sufficient documentation to substantiate your reasons for termination (i.e., written warnings, performance reviews, attendance records)?
- Does the file contain evidence of an illegal termination (i.e., the supervisor may have written warning notice to the employee that her pregnancy was causing her to be too absent) - if so, legal counsel should be consulted if there are concerns.
- California law requires the employer to comply with deadlines for providing final paychecks.
 - A discharged employee must be paid all his or her wages, including accrued vacation, immediately at the time of termination. The check must be provided to the employee at the time of termination.
 - An employee who resigns with at least 72 hours' prior notice and quits on the day given in his/her notice must be paid all earned wages at the time of quitting/last day of employment.
 - Final wage payments for terminated (or laid off) employees must be made at the place of termination. For employees who quit without giving 72 hours' notice and do not request their final wages be mailed to them, the location is at the employer's office within the county in which the work was performed.
- Did the employee have company equipment?
 - Phones?
 - Computer(s)?
 - Credit cards?
 - Papers/documents?

COMPILE A LIST OF DOCUMENTS TO PROVIDE TO SEPARATE EMPLOYEES (REQUIRED BY CALIFORNIA LAW)

THIS INCLUDES BUT IS NOT LIMITED TO

- Notice to Employee as to Change in Relationship (required under CA Unemployment Insurance Code 1089)
- For Your Benefit, California's Program for the Unemployed (published by the EDD)
- COBRA and Cal-COBRA notices (TPA Provided)
- Health Insurance Premium (HIPP) Notice (for employers with 20 or more employees, the DHCS requires this)

CONSIDER WHETHER A SEVERANCE AGREEMENT WOULD BE APPROPRIATE

- Severance is not required but can be useful.
 - Recognized service
 - Executive agreement
 - Separation is a high risk, and there is potential litigation the employer wishes to obtain a release of claims to prevent future litigation
 - Did an attorney review the severance agreement to ensure appropriate releases are included?

CONSIDER THE EMPLOYEE'S ELIGIBILITY FOR UNEMPLOYMENT INSURANCE

- A terminated employee may be eligible for unemployment insurance unless the termination is due to refusal to perform suitable work or misconduct.
- The cost to the unemployment insurance reserve account may be far greater than the cost of providing the employee with necessary training or performance counseling.

CONSIDER LEGAL RAMIFICATIONS OF NOT TERMINATING THE EMPLOYEE

- If an employee has been violent or threatened violence and termination was not conducted, this could result in harm to other employees and lead to employer liability.
- If an employee sexually harassed other employees, the termination may be necessary to fulfill an employer's legal obligations under sexual harassment laws.

Disclaimer: Please use caution when executing this checklist. Some forms are required at the time of hiring for some employers and some forms are legally required for all California employers. We do not intend the information above to be legal advice. By providing this information, we are not acting as your lawyer. If you need legal advice you are welcome to contact us or we recommend that you speak to your legal counsel before relying on this information.