Terminating Employees: A Checklist for Minimizing Risk

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To minimize risk, the decision to terminate an employee requires consideration of multiple factors before action is taken.

1. **Basis for termination.** Assuming that there is no contract governing the employment relationship and the employee is "at-will," there should still be a basis for the termination. Although "at-will" employees can be terminated for any reason, provided it is not an illegal reason (i.e. discrimination, retaliation, etc.), the employer will need to articulate a legitimate, non-discriminatory reason for the termination should the employee file a claim arising from the termination.

2. **Documentation.** The basis for the termination must be documented. For example, if the employee is being terminated for performance issues, the personnel file should reflect poor performance. Often times, supervisors either do not provide performance evaluations or provide inaccurate performance evaluations. This is a problem because when it comes time to terminate, the record may not support the basis for the termination. It is critical to document poor performance or any basis for termination as it occurs.

3. **Consistency.** Consistency in enforcement of policies is imperative. Before terminating an employee based upon a violation of policy, determine whether other employees have violated the same or similar policies. If so, were they terminated for the violation? If not, is there justification for the harsher treatment of the employee about to be terminated? Justification may include factors such as multiple violations, poor performance, insubordination, refusal to accept responsibility? but again, these factors need to be documented in the event the action is later challenged.

4. **Review the Employee Handbook.** Prior to terminating an employee, review the employee handbook to ensure that the termination is consistent with policy. Does the association have a
progressive discipline policy? Is the basis for the termination covered by the handbook as a
terminable offense? Does the handbook require the payment of any severance?

5. **Protected Factor**? In terms of employment actions, both positive and negative, all employees
must be treated equally without regard to any protected factor. Thus, no employment decision
should ever be made based upon a person’s race, disability, age, etc. That said, if the
employee who is being terminated belongs to a protected class, determine whether that
employee has raised any claims of unfair treatment or could argue that the termination is in
retaliation for engaging in protected activity.
6. **Separation Agreement.** If, after consideration of the above factors, the decision is made to terminate, determine whether a separation agreement is appropriate. Typically, such agreement requires payment of severance in exchange for a release of all claims. Separation agreements need to be carefully prepared in order to be enforceable. For example, if an employee is over the age of 40, provisions are required as part of the agreement that are not required for employees under 40.