

Termination Decision Checklist

The decision to terminate an employee can raise many legal issues. The following checklist is designed to help an employer determine whether the termination is likely to lead to litigation. Although there is no way to guarantee an employee won't sue, using this checklist can alert the employer to potential legal problems. These problems can then be discussed with legal counsel before terminating the employee.

Step 1: Consider Company Policies and Documents

Review the company's Employee Handbook for policies that may limit the employer's right to terminate, such as:

- Employment at-will policies
- Progressive discipline policies
- Internal dispute resolution or arbitration policies
- Termination policies requiring "just cause"

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?

If the company has an established system/policy of progressive discipline (i.e., warnings, suspension, termination), was the system followed in this case?

- If so, was the process of progressive discipline well documented? Documentation of the progressive discipline is important evidence should a legal claim arise.
- 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.

If the company has an internal dispute resolution system, was the employee given a fair chance to resolve problems under that internal system?

Does the company have an established policy of giving a certain period of notice before terminating an employee? This policy may be in writing (i.e., Employee Handbook) or may simply be an unwritten policy the employer has established by having given employees notice in the past.

Step 2: Consider Oral or Implied Contracts of Employment

Will this termination breach an oral contract of employment?

- An oral contract may have been created if the employee was told her job was secure, or that she would always have a job if she did a good job, or some other similar guarantee of employment.
- 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.

Will this termination breach an implied contract of employment? An implied contract of employment may have been created by a combination of these factors:

- Long-term employment (although there is no specific number of years considered "long term," many attorneys use five years as a guideline)
- Promotions
- Commendations
- Lack of criticism of the employee's performance
- Other indicators of job security

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Step 3: Consider State/Federal Laws Protecting Employees

Americans with Disabilities Act

- Does the employee have a physical or mental disability?
- If so, were attempts made to reasonably accommodate the employee's disability?
- Were reasonable accommodation measures well documented?

Title VII / California's Fair Employment and Housing Act

- Is the employee being treated in the same manner as other employees in similar situations?
- Have other employees been given more chances before being terminated for the same or similar reasons as this employee?
- If so, are there legitimate, non-discriminatory reasons for treating this employee differently than other employees?

Is the employee pregnant? Employees are entitled to up to four months off for pregnancy-related disabilities.

Has the employee filed a workers' compensation claim? Terminating an employee who has filed a claim, intends to file a claim or has testified in a workers' compensation hearing could be considered workers' compensation discrimination.

Has the employee or the employee's family member reported any illegal activity of the company either internally or to a local, 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."

Has the employee participated in any official investigation of the employer (e.g., wage or safety violation) or testified against the employer in an unemployment insurance or other hearing?

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

Is the termination retaliation for discussing wages or working conditions?

Is the employee being terminated for absenteeism? If so, consider whether the absenteeism might be protected under the law, for example, protected family or medical leave, protected paid sick leave, leave for victims of certain crimes, or school or child care activity leave.

Step 4: Review Documentation

Review the employee's personnel file.

- Is there sufficient documentation in the file to substantiate your reasons for termination? Examples include written warnings, performance reviews and attendance records.
- 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.

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 5: 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.

The cost to the employer's unemployment insurance reserve account may be far greater than the cost of providing the employee with necessary training or performance counseling.

Step 6: Consider Legal Ramifications of Not Terminating the Employee

Failing to terminate an employee who has been violent or threatened violence could result in harm to other employees and lead to employer liability.

Termination of an employee who has sexually harassed other employees may be necessary to fulfill an employer's legal obligations under sexual harassment laws.