

TERMINATION OF EMPLOYMENT: **RESPECTING EMPLOYEES AND PROTECTING EMPLOYERS**

By: Kaitlin A. Brown

I. WHEN AND HOW TO END THE EMPLOYMENT RELATIONSHIP

A. EVALUATE THE FACTUAL CIRCUMSTANCES LEADING UP TO AND SURROUNDING TERMINATION.

1. Has employee submitted any complaint about employment, or otherwise participated in an employment-related investigation, such that termination could be considered retaliation for such protected activity?
 - a. If so, then is there a non-retaliatory, legitimate business purpose for termination? To the extent possible, this legitimate business purpose should be documented. Consider explaining to the employee the legitimate business reason(s), to avoid any misconception of retaliatory reason.
 - b. Confirm that any termination would not be in retaliation for making such complaint, or otherwise based on the individual's membership in a protected classification under federal, state, or local laws.
2. Even if employee has not specifically articulated a complaint, but especially if employee has submitted complaint, consider whether there is potential liability for a claim under various employment laws, based on factual context.
 - a. Discrimination/harassment/retaliation (Title VII, Age Discrimination in Employment Act, Americans with Disabilities Act, Equal Pay Act)
 - b. Improper payment of wages (Fair Labor Standards Act)
 - c. Request for or provision of protected leave (Family Medical

- Leave Act, Americans with Disabilities Act)
- d. Restriction on protected concerted activity (National Labor Relations Act)
 - e. Failure to offer or provide benefits (Affordable Care Act)
 - f. Safety issues in the workplace (Occupational Safety and Health Act, Workers' Disability Compensation Act of Michigan)
 - g. Respective state law employment statutes
3. If termination is based on performance:
- a. Evaluate whether employee clearly understood expectations of the job, whether opportunities were given to improve performance, and whether such critiques were properly documented. Consider whether employees performing similarly are being treated the same.
 - b. Consider the manager's role in supporting the employee, having regular conversations about performance inadequacies, and expectations for moving forward. If the problem has been consistent or ongoing for an extended period, document a non-discriminatory and legitimate business reason why the adverse action is occurring now (e.g., job performance, lack of qualification, poor attendance, consistent or egregious disciplinary action, objective measurements of production).
 - c. Consider whether the employee requested additional resources to perform the job and whether such resources were timely provided, to enhance performance.
 - d. Evaluate whether the employee had explained personal circumstances impeding their ability to perform, and whether those personal circumstances would lead to a legal claim or are expected to no longer affect the employee in the near future.
 - e. Review the personnel file to determine whether the employee

has a history of failing to meet performance expectations, especially if transferred between multiple managers. Consider whether the personnel file supports the proposed reason for termination.

4. If termination based on reduction in force:
 - a. Consider whether costs may be cut in other areas of the business, such as marketing, overhead, sponsorships, etc.
 - b. Consider whether the termination will be temporary or permanent, such that other measures such as hiring freezes or temporary layoffs may be adequate alternatives.
 5. Consider staffing needs during transition and whether the company requires the employee's continued services
 - a. Review the ongoing projects being handled by employee and who would be available and qualified to assume those responsibilities following separation.
 - b. Evaluate whether replacement will be necessary to handle employee's responsibilities, or whether responsibilities will be absorbed by other employees.
 - i. If hiring a replacement employee, and employer has concerns about a potential age discrimination claim, ideally the replacement should be under the age of forty.
 - c. Consider effect on production and employee morale.
- B. CONSIDER OFFERING SEVERANCE IN EXCHANGE FOR RELEASE OF CLAIMS**
1. If, when evaluating the factual circumstances leading up to termination, you determine there is some risk for legal exposure, consider whether a severance package in exchange for a release is appropriate.
 2. If the company decides to offer severance in exchange for a release,

prepare an agreement. Details about what to consider including in the release are covered in section III.

3. Prepare a cover letter summarizing the terms of the severance and release agreement.
 - a. Identify the date on which employment will end.
 - b. Summarize the monetary compensation, health insurance benefits, and non-monetary offers in the agreement;
 - c. Provide the name and address of the individual to whom agreement must be sent;
 - d. Identify the date on which the agreement must be signed and returned to the company;
 - e. Identify whether there is a waiver form or revocation period applicable;
 - f. Identify any ongoing obligations that apply, regardless of whether employee accepts offer;
 - g. List any property that should be returned (and date by which employee should return it), regardless of whether employee accepts offer;
 - h. Insert date by which Company would like confirmation that all Company confidential information has been permanently deleted from employee's electronic or other storage devices; and
 - i. Insert final paycheck details, along with COBRA details, if applicable.

C. PREPARE FOR CONVERSATION AT TIME OF TERMINATION

1. Overall pointers:
 - a. Consider the right time, place, and people to be present.
 - i. Time: Company should weigh the risk of whether the employee has access to confidential information, along

with the likelihood of whether the integrity of such information may be compromised if the employee was told of employment being terminated prior to the last day of service.

- b. Place: Try to conduct the meeting at a time when and in a manner where other employees will be least adversely affected or intimidated by the process.
- c. Persons present: Having at least two people present on behalf of the company will provide additional protection, especially if the conversation becomes contentious and witnesses are necessary to explain what happened. If you anticipate a contentious or violent response, consider having security or police officers present nearby.
- d. Set the tone and get to the point quickly.
- e. Do not make it lengthy or get into too many details.
- f. You are not obligated to provide a reason for termination.

2. Introduction:

- a. Explain that this was a difficult discussion, but a necessary one for us all to move forward.
- b. Ask employee to please wait until finish before responding.
- c. Explain that when done, employee will have an opportunity to respond and ask questions.
- d. If you do provide a reason for termination, phrase it in a way that shows the decision was based on many factors that included but were not limited to the ones discussed.
- e. State that employer has decided to terminate employee's employment and employer is presenting you an offer to provide a smooth transition.

3. Review some history, if applicable, and only provided that it will not become too contentious. Otherwise, simply state that the company has decided to conclude the employment relationship based on the employee being at-will; accordingly, no notice or reason must be given.
 - a. Discuss history of written warnings, along with most recent one.
 - b. Give brief examples of insubordination; refusing to assist when asked; rude in conversations (don't just say "bad attitude"); dishonesty.
 - c. Give examples of how affecting the team; causing people to not come to you for help; bringing down the morale, discord, etc.
 - d. Explain that being able to trust employees is critical and that employee has lost its trust in employee, if applicable.
 - e. Explain that employer understands from multiple sources that employee is looking for alternate employment, if applicable. Explain that, regardless of whether this is true, employer has sensed that employee is no longer fully committed to the company. Provide short, concise examples.
4. Explain how company is prepared to provide employee with a smooth transition.
 - a. Explain rights to continued benefits, if any, along with COBRA notices if applicable.
 - b. Return company property (including laptop); may not retain any company data or information.
 - c. Provide copy of release, if offered, and describe details:
 - i. Payment of unused accrued PTO, if any.
 - ii. Additional monetary terms.
 - iii. Willingness to treat as resignation, if offered.

- iv. Continuing health insurance, if offered.
 - v. Willingness not to contest claim for unemployment insurance benefits, if offered.
 - vi. Describe consideration period. If 40 or older, describe revocation period..
 - vii. In exchange for compensation, employee would receive a release of claims arising from employment.
 - viii. Describe restraints (non-disparagement, non-competition, non-solicitation), if applicable.
5. On the day that you provide the employee with the release agreement, obtain employee's signature and date acknowledging receipt of such release agreement. Maintain the original for your records.
- a. If 40 or older, explain the waiver form. This form should be signed and returned if employee decides to accept the terms of the agreement prior to the end of the consideration period.
 - b. Identify person to contact (with phone number and e-mail) with any questions.
6. Conduct exit interview. Arrange for the return or collection of employee's personal belongings.
7. Questions you should be prepared to answer:
- a. How long do I have to sign this?
 - b. What happens if I decide not to sign?
 - c. Will employee be paid for unused accumulated sick leave/vacation?
 - d. Will company provide a reference?
8. Be prepared, upon acceptance of agreement, prepare to issue payment after expiration of revocation period (if 40 or older) or after expiration of consideration period (if under 40).

D. CONSIDER WHAT ACCESS TO COMPANY EQUIPMENT AND RESOURCES MUST BE TERMINATED UPON SEPARATION

1. Deactivate any security code and/or identification card for access to company property.
2. Remove access to computer programs and phones.
3. Request login and password information for any company accounts, and change the password or terminate such accounts.
4. Promptly inform customers and clients of the new contact replacing separated employee, and explain that separated employee no longer has authority to act on behalf of the company.

II. STATUTORY OBLIGATIONS AND RISKS FOR POTENTIAL LEGAL EXPOSURE UPON TERMINATION

A. EVALUATE THE POTENTIAL DAMAGES UNDER ANY POTENTIAL LEGAL CLAIM

1. Depending upon potential legal exposure, employer may wish to pay separated employee severance to avoid the inconvenience and costs associated with litigation in exchange for a release.

B. CONSIDER STATUTORY REQUIREMENTS TO OBTAIN RELEASE OF AGE DISCRIMINATION CLAIM

1. If there are less than 20 employees at the company, consider whether the employee(s) being released are age 40 or older.
2. Employees must be given a reasonable time to consider the agreement, which varies based on the circumstances and may require flexibility in providing extensions if requested.
3. If there are 20 or more employees at the company, then the Age Discrimination in Employment Act requires employers to provide certain protections to employees who are age forty or older, in order to waive an age discrimination claim.
 - a. If the employee being separated is over age 40, determine

whether the employee has 21 or 45 days to consider the agreement based on the following:

- i. Is the company terminating more than one employee over age 40 at same or similar time (reduction in force), not for performance reasons?
 - (a) If yes, then modify any reference to the timing in which the release must be signed and returned, so that the separated employee has 45 days to review and consider the agreement. Also provide the disclosures/adverse impact study attached as an exhibit. This adverse impact study must identify: the unit considered as part of the separation (do not rely on a protected classification, but rather focus on departments, job titles, location, etc.); each employee in the unit (by position title, not name); the age of each employee in the unit; and whether the employee was offered severance.
 - (b) If no, then modify any reference to the timing in which the release must be signed and returned, so that the separated employee has 21 days to review and consider the agreement. No adverse impact study is necessary.
- b. If the employee being separated is under age 40, provide the employee with a specific number of days or a specific deadline to review and consider the agreement. Employees under age 40 must be given a reasonable time to consider the agreement, which varies based on the circumstances and may require flexibility in providing extensions if requested.
- c. Include a revocation period of at least 7 days after employee accepts agreement, for employee to change employee's mind

and revoke such acceptance.

C. CONSIDER STATUTORY REQUIREMENTS IF COMPANY IS CLOSING A PLANT OR INSTITUTING A MASS LAYOFF (AND HAS AT LEAST 100 EMPLOYEES)?

1. Covered employers

- a. Employers are required to comply with the Worker Adjustment Retraining Notification Act ("WARN") if they have at least 100 employees (excluding those who worked less than 6 months in prior 12 months and those working less than 20 hours per week), unless a federal, state, or local government entity providing public services.

2. When notice is required

- a. Upon employment loss resulting in one of the scenarios described below. "Employment loss" means, with certain exceptions, an employment "termination, other than discharge for cause, voluntary departure, or retirement; a layoff exceeding 6 months; or a reduction in an employee's hours of work of more than 50% in each month of any 6-month period."
 - i. Plant closing: Shutdown will result in employment loss of 50 or more employees (as defined above) during any 30-day period.
 - ii. Mass layoff: Layoff resulting in loss at employment site of 500 or more employees (as defined above) over any 30-day period.
 - iii. Loss of 2 or more groups of workers: Layoff of employees that meets one of the two above thresholds over a 90-day period (but not 30-day period) for two or more groups of workers, unless losses are the result of separate and distinct actions and causes.
- b. Sale of business: Sale that results in a covered plant closing or

mass layoff (described above).

- c. Notice is not required if:
 - i. Resulting from closing of a temporary facility or completion of particular project or undertaking (i.e. "workers were hired with the understanding that their employment was limited to the duration of the facility, project, or undertaking").
 - ii. Employees are on strike or are part of bargaining unit involved in negotiations leading to a lockout, if the strike or lockout otherwise triggers a covered plant closing or mass layoff. Non-striking employees separated on account of otherwise covered event, however, are entitled to notice.
 - iii. Permanently replacing an economic striker (employee who strikes in order to obtain some economic concession from employer, such as higher wages, shorter hours, or improved working conditions).

3. How notice is required

- a. 60 days in advance of covered closing or layoff, except when one of the following conditions apply, in which case as much notice as practicable is required (with explanation of reason for abrogated notice period):
 - i. Faltering Company: when employer has sought new capital or business, where notice would ruin such opportunity (only applies to plant closings).
 - ii. Unforeseeable circumstances: when circumstances were not reasonably foreseeable within the time period for required notice (applies to plant closings and mass layoffs).

- iii. Natural disaster: when a direct result of a natural disaster (applies to plant closings and mass layoffs).
- b. In writing, with any reasonable method of delivery to ensure timely receipt, specifically conditioned upon a definite occurrence or nonoccurrence of an event that will result in a covered closing or layoff. See 20 CFR 639.7 for specific details about notice requirements, which include the following to affected employees and their representative(s) (note: separate criteria are required for non-represented employees):
 - i. Name and address of employment site where closing or layoff will occur;
 - ii. Name and telephone number of company official to contact for further information;
 - iii. Statement as to whether the planned action is expected to be permanent or temporary, including a statement that the entire plant will be closed (if applicable);
 - iv. The expected date of the first separation and anticipated schedule for subsequent separations;
 - v. Job titles of positions to be affected and names of workers currently holding affected jobs.
- c. Provide notice to affected workers (both exempt and non-exempt employees who are not business partners, regardless of the length of service and/or the schedule of service, and both represented and unrepresented) reasonably expected to experience employment loss, their representatives (union), State dislocated worker unit, and appropriate unit of local government.
- d. In a sale of business, the seller must provide notice for any covered plant closing or mass layoff up to and including the date

of the sale. The buyer is responsible for providing notice of any covered plant closing or mass layoff after the date of sale.

- e. Additional notices are required when the dates for the covered closing or layoff is extended beyond the date or 14-day period articulated in original notice.

4. Penalties

- a. If employer fails to comply with notice requirements, may be liable for the following damages:
 - i. To each affected and aggrieved employee: back wages for the period of the violation, up to 60 days, with certain potential credits applied toward such penalties.
 - ii. To unit of local government: civil penalty up to \$500 for each day of the violation, unless the employer pays the back wages owed to each aggrieved employee within 3 weeks after the closing or layoff.

- 5. If covered by WARN and closing a plant or instituting a mass layoff, be sure to include a release of claims under the Worker's Adjustment and Retraining Notification Act as amended.

III. HOW SEVERANCE PACKAGES PROTECT EMPLOYERS AND EASE THE TRANSITION FOR EMPLOYEES

A. IS THE EMPLOYEE ENTITLED TO ANY COMPENSATION, BONUS OR BENEFITS PURSUANT TO A CONTRACT OR POLICY?

- 1. Review relevant contracts to determine whether employee is entitled to any severance pay or other benefits upon separation and resignation.
- 2. Review employee handbook to determine whether employee is entitled to unused accrued paid time off upon termination or resignation.
- 3. In terms of wages, be sure to pay non-exempt employees for all hours

worked. Exempt employees must be paid for the proportionate number of hours or days worked, in relation to their weekly salary.

4. Be clear as to which benefits have vested (e.g., in terms of 401(k), profit sharing, or pensions).

B. WHAT IS THE COMPANY OFFERING AS ADDITIONAL CONSIDERATION (THAT EMPLOYEE DOES NOT OTHERWISE HAVE A RIGHT TO RECEIVE)? FOR EXAMPLE:

1. If offering monetary payment, will it be paid as lump sum or pay continuance?
2. Will the employee receive a pro-rata portion of any discretionary bonus?
 - a. If so, how much will the company pay the employee?
3. Does the employee have any benefits through the company?
 - a. If so, will the company offer to continue health insurance benefits through COBRA? If so, for how many months? Will such payments be made directly by the company or as reimbursements to employee?
4. Does the employee have any remaining unused accrued PTO, vacation, or sick time?
 - a. If so, what is the company's policy regarding payment upon termination/resignation?
 - b. Is there a negative balance? Did the company obtain employee's prior authorization to deduct such negative balance from final paycheck? Is the company is willing to forego recoupment of payments?
5. Has the employee engaged in any misconduct that prompted the termination?
 - a. If so, will the company offer not to challenge the employee's

application for unemployment compensation?

b. If not, then does the company want to allocate the additional compensation to a certain number of weeks to avoid paying unemployment insurance benefits in those weeks (see paragraph 4(a))?

6. Will company be offering outplacement services to assist employee with finding a new job?

7. Will company be offering a neutral letter of reference?

8. Is the employee being considered as having been terminated, resigned, or separated?

a. Providing employees with the option of having resigned as opposed to having been terminated is a benefit employers may offer at no cost, which may significantly ease the transition of employee to next job.

9. Will the employee be receiving any type of deferred compensation?

a. If so, address 409A implications to expressly state that employee shall be responsible for income tax obligations arising from all payments issued to employee by company.

C. RELEASE OF EMPLOYER

1. Release should be effective through the date that the agreement is signed.

2. Consider including an agreement not to sue company for any claim that has been released.

3. Are there any specific individuals who should be specifically included in release?

a. If so, insert their names into the release.

4. Are there any pending charges or cases that must be dismissed with prejudice as a result of the Release Agreement being signed?

- a. If so, be sure to specifically identify the charge or case that must be dismissed with prejudice upon signing the release, and the timeline for doing so.
- 5. Include carveout permitting employee to file charge with, or otherwise participate in investigation conducted by, EEOC or respective government agency.
 - a. Include waiver of monetary damages resulting from any such charge filed.
- 6. Include extensive list of employment laws under which claims are being released.
 - a. Is company a federal contractor?
 - i. If so, then make sure that the release includes a release of claims under the following statutes: Executive Order 11246, Executive Order 11141, Vietnam Era Veterans Readjustment Assistance Act of 1974, the Federal Railroad Safety Act, Vocational Rehabilitation Act of 1973.
 - b. Is the employee working out of state? Or is the company incorporated out of state?
 - i. If so, modify release to include out of state laws under which a claim may be asserted.

D. DID THE EMPLOYEE SIGN A CONFIDENTIALITY AGREEMENT?

- 1. If so, make sure that any obligation to maintain confidentiality in the release comports with the previously signed agreement, or at the very least does not abrogate the prior restraint to make it less protective. Consider whether the original confidentiality agreement appropriately covers all proprietary and confidential information of the company, and if not expand the restriction. Also consider adding language required by Defend Trade Secrets Act to preserve the option for increased damages, in the event that employee misappropriates trade secrets of

the company.

2. Consider whether employee had any access to confidential information of customers that could result in liability to the company if disclosed. If so, then create specific provisions in the release that require the employee to maintain confidentiality of such confidential and proprietary information of customers.

E. DOES COMPANY PREFER TO MAKE AGREEMENT CONFIDENTIAL?

1. If employee has articulated a claim of sexual harassment, then certain tax benefits will be lost if the agreement is required to be confidential.

F. CONFIRM WHETHER THE EMPLOYEE HAD ANY COMPANY PROPERTY.

1. If so, then insert a provision of the release that requires the employee to return to the company all company property, confidential information, and data, regardless of the format, that is in the possession or control of employee.

G. DID THE EMPLOYEE ENTER INTO A NON-COMPETITION AGREEMENT?

1. If so, consider whether the prior restraint is sufficient to protect the company's business interests. If not, modify the non-competition restraint to reflect the terms of the agreement and/or reasonable and appropriate preferred terms for time, geography, business purpose for restraint.
2. If not, consider whether there is a business interest that must be protected, given departure of employee from the company. Insert a non-competition restraint to reflect the reasonable and appropriate preferred time, geography, business purposes for restraint.

H. DID THE EMPLOYEE ENTER INTO A NON-SOLICITATION AGREEMENT

1. If so, consider whether the prior restraint is sufficient to protect the company from the employee soliciting its employees, customers, and clients. Insert a non-solicitation restraint to reflect the terms of the original agreement and/or reasonable and appropriate preferred time

and contacts whom employee should refrain from contracting to transact business or terminate association with company.

2. If not, consider whether there is a business interest that must be protected, such that employee should be restrained from soliciting company employees, customers, and clients. Insert a non-solicitation paragraph to reflect the reasonable and appropriate preferred time and contacts from whom employee should refrain from contacting to transact business or terminate association with company.

I. DID THE EMPLOYEE ENTER INTO A NON-DISPARAGEMENT AGREEMENT OR OTHERWISE WISH TO EXPAND/ADD SUCH RESTRAINT?

1. If so, consider whether the prior restraint is sufficient to protect the company from disparaging comments. Make sure any non-disparagement restraint in the release reflects the terms of the prior agreement and/or expand the restraint to enhance protections.
2. If not, consider inserting a non-disparagement restraint that prohibits the employee from defaming the company.

J. INCLUDE EXPRESS TERMS ABOUT RAMIFICATIONS UPON BREACH OF AGREEMENT.

1. To deter employees from breaching the agreement, consider myriad options for recovering damages or expediting recovery upon breach. For example, employers may consider including:
 - a. A "clawback" provision, stating that upon breach by employee, employer shall no longer be liable for any outstanding payments and employee is required to pay back any amounts previously paid under the agreement. This is one of the harsher options, which may result in pushback from employees and/or their counsel.
 - b. Liquidated damages clause, providing that upon breach (e.g., of confidentiality agreement or non-disparagement), employee

agrees to pay a sum certain.

2. Ex parte relief or injunction, providing employer with the option to seek an order from a judge, on an expedited basis, to demand that employee cease and desist from any further action in violation of the agreement.
 3. Other remedies, in equity or at law.
- K. INCLUDE CLAUSE STATING THAT, BY ENTERING INTO THE AGREEMENT, EMPLOYER IS NOT ADMITTING TO ANY LIABILITY, WHICH IS EXPRESSLY DENIED. RATHER, SETTLEMENT WAS INTENDED TO AVOID ADDITIONAL COSTS THAT MAY OTHERWISE BE ASSOCIATED WITH LITIGATION.
- L. DID EMPLOYEE SIGN ANY OTHER AGREEMENTS WITH THE COMPANY THAT INCLUDE TERMS THAT SURVIVE TERMINATION (E.G., ANY CONTRACT WITH OBLIGATION TO MAINTAIN CONFIDENTIALITY, NON-COMPETITION, NON-SOLICITATION, ETC.)?
1. If so, insert the date and full title of the agreements into the paragraph designating the entire agreement, to the extent that the surviving terms are intended to be incorporated into the agreement.
- M. INCLUDE PARAGRAPH WHEREBY EMPLOYEE ACKNOWLEDGES SIGNING THE AGREEMENT KNOWINGLY AND VOLUNTARILY WITHOUT DURESS, HAS HAD AN OPPORTUNITY TO HAVE AN ATTORNEY REVIEW THE AGREEMENT, AND THAT EMPLOYEE UNDERSTANDS THE TERMS CONTAINED IN THE AGREEMENT.