



Pre-Termination Checklist and Considerations

Before the decision is made to terminate an employee, there are a number of issues—set forth below—that an Employer will want to consider. This is not legal advice, is by no means an exhaustive list and legal counsel should always be consulted in making and executing a termination decision. In the event that a claim by an employee is made against an employer, the following may help the employer in preparation for a meeting with legal counsel.

General Considerations:

Why are you considering this particular employee for termination?

Did the subject employee ever lodge any complaints, including about the person making the termination decision (or the person communicating the termination decision even if that was not the same person who made it)?

Does the employer have performance documents supporting or evidencing the reasons behind the decision and was the employee given notice of any performance issues and the opportunity to cure them?

Was there an investigation conducted regarding the facts supporting the termination decision?

Has the employer considered retaining the employee in an alternate capacity?

Does continued retention of the employee in any capacity constitute a life/health/safety risk to the other employees?

Is the employer going to replace the employee with another employee and, if so, how soon?

Has the employer considered another form of separation, such as layoff or voluntary resignation?

Is the employer also terminating other employees?

Has this employee ever made a complaint with the employer, and if so, how recent was the complaint and what was its nature?

Did the employee ever take any collective action with other workers for mutual aid and/or protection, such as a mass protest or walking off the job?

Is any part of the reason for termination related to the employee's engaging in or use of some form of social media?

Does the employer have an Employee Handbook which contains any termination procedures or protocols (such as a progressive discipline policy)?
Is the employee going on leave, on leave or returning from leave?
Is the employee's personnel file in order (such as, does it contain a resume, employment application, performance reviews and warning notices)?
Is the employer going to offer severance in exchange for release(s) of all claims?
Does the employer have adequate liability insurance in case a claim is made?
Are there any non-employment (*e.g.* confidentiality or assignment invention) agreements which may come into play?
Was the employee properly classified as (exempt/independent contractor)?
Are you sure that you have paid this employee correctly, recorded all meal breaks and have adequate evidence of rest breaks taken?
Are there any wages (including vacation) which the employee is owed or any commissions or bonuses for which the employee may be eligible?
Will the employer conduct an exit interview?

Protected Classes: Each attribute below may give rise to a claim of discrimination, harassment or retaliation if believed to be the basis for the employer's action. Does the employee belong to, is believed to belong to or is associated with anyone in any of these protected classes?

- Age (over 40)
- Race
- Color National Origin
- Religion/Religious Dress
- Sex (including gender, pregnancy, childbirth, breastfeeding or related medical conditions)
- Physical or Mental Disability (including an intellectual disability)
- HIV/AIDS
- Sexual Orientation
- Gender Expression/Identity
- Medical Condition (cancer or genetic characteristics)
- Pregnancy Disability
- Marital Status
- Genetic Characteristic
- Military Status
- Immigration Status
- Whistleblower/Complaints about wages, hours, workplace conditions
- Filed claim with administrative agency (Workers' Comp, EDD, DLSE)

Americans with Disabilities Act: Persons considered disabled under the Americans with Disabilities Act of 1990 and/or California law relating to disability (mental or physical) discrimination requires that the employer engage in an interactive process with the employee to determine if a reasonable accommodation exists.

- Was the employer provided notice of a disabling condition or should the employer have known of same?
- Did the interactive process occur?
- What accommodations were requested?
- Were reasonable accommodations made?
- If reasonable accommodations were not made, is there a business reason why not?
- Is there documentation of either (1) accommodation or (2) inability to accommodate?

Title VII /California's Fair Employment and Housing Act:

- Was the employee treated differently than others in similar situations?
- Were other employees in similar situations given more chances?
- Even if the employee was not treated differently, was there a policy or practice of the employer which, when implemented, resulted in a discriminatory or differential impact on a group of workers?
- Has the employee previously filed a harassment complaint?
- Did the employee notify governmental agencies or law enforcement of regulatory violations
- Did the employee notify governmental agencies of workplace safety violations?
- Did the employee take time off for medical reasons?
- Did the employee take time off for military service?
- Did the employee take time off due to pregnancy or illness?
- Did the employee violate a policy in the Employee Handbook?

Breach of Employment Contract: An express or implied understanding may have arguably arisen between the employer and employee which would limit the employer's discretion to terminate the employee except for good cause.

Possible Express Employment Contract

- Oral agreement with the employee regarding the terms or conditions of employment
- Written agreement with the employee regarding the terms or conditions of employment

Possible Implied Employment Contract

- History of promotion
 - Length of tenure (usually more than 5 years)
 - Commendations
 - Lack of criticism
 - Other indicators of job security
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There is no way to eliminate all risk.

The keys to minimizing risk are clear communication, reasonable expectation, and consistent application of policy, fair treatment and thorough documentation.