

## Prepare Well, to Protect Company From Terminated Employees' Suits

By Karen L. Gabler

More often than not, a terminated employee's decision to file a lawsuit against an employer results from the way in which the employer handled the termination, rather than the fact of the termination itself. By fully investigating an employee's performance, working with the employee to improve as much as possible, and fully preparing for an inevitable termination, an employer can avoid employment-related disputes and ensure the smoothest transition possible for the employee and the company.

Employers considering whether to terminate any employee should first consider whether any alternative option is available and appropriate. Can the employee be demoted or transferred? Would further training be beneficial? Is there any hope or expectation of improvement with this employee?

If termination seems to be the best option, consider whether the employee's file contains sufficient documentation to support the termination. Is it consistent with prior reviews? Has the supervisor complied with all company policies and agreements, such as employment contracts, collective bargaining agreements and progressive discipline policies?

Employers also should review whether the termination creates a risk of an employment lawsuit. Have other similarly situated employees been treated differently, or has this employee made complaints of wrongdoing? Are there any ongoing investigations related to this employee?

Employers often find it easier to lay off a difficult employee instead of conveying a termination decision. Unfortunately, using inaccurate terminology can create more problems than it solves.

Employers laying off an employee must ensure that the position will not be advertised or filled in the near future. In a union or other contractually based situation, the employee may be entitled to reinstatement after a layoff, even where the employer intended to terminate the employee without the right to return.

In some instances, altering the structure of the termination can be productive. Allowing an employee to resign rather than being terminated gives the employee an opportunity to save face when speaking to friends, colleagues and prospective future employers. An employee who has resigned voluntarily also cannot collect unemployment insurance benefits from the employer.

Even if the employee has resigned, it is important to retain all performance and evaluation records. In the event of a subsequent lawsuit, the employer then will be able to defend against any claims on the basis that the employee's performance warranted termination if no resignation had occurred.

When proceeding with the termination or layoff, analyze whether it would be useful to offer a severance package. Severance offers can enhance the departing employee's morale and provide a financial bridge to the next position, making it less likely that the employee will file suit or take other adverse action out of panic or stress.

If a severance payment is to be offered in any substantial amount, the employer should require the employee to execute an enforceable release agreement. If no release is executed, the severance payment is a gift, rather than a severance. Release agreements must contain express terms to be enforceable in California. Employers should obtain legal advice from an experienced employment law attorney before using a release agreement.

Remember that release agreements should state that the employee had the opportunity to seek legal advice before signing the release agreement and that the employee's visit to an attorney may lead to a discussion of possible claims or employer wrongdoing. Where the severance to be paid is minimal, the employer may choose to forgo the protections of a release agreement in the hopes that the employee will move on without further dispute.

When offering a severance package to a departing employee, consider creative options beyond a mere financial proposal. Many

employees desire a lump-sum cash payment, but others would prefer staggered payments to provide them with payroll protection for some time. Other employees may be interested in continued medical benefits, outplacement services, the right to retain company property such as vehicles, cell phones and laptops, or letters of reference to use in locating alternative employment.

Employers proceeding with a termination should follow a number of steps to ensure legal compliance and ease of transition. First, comply with any termination procedures listed in your company handbook and all stand-alone procedures. Check the employment contract (if any) and union requirements for additional terms.

### Allow the employee to respond if desired, but do not engage in argument or try to defend the termination decision.

Confirm the amount of final wages, unpaid expenses, commissions, bonuses or other perks due to the employee on the termination date. Accrued but unused paid time off (such as vacation, personal days or floating holidays) also must be paid at the time of termination, at the employee's final rate of pay. Review any benefits due to the employee, such as stock option rights, pensions and retirement plans, or deferred compensation, and review insurance notification requirements.

If the employee owes money to the employer in the form of pay advances, overpayments, loans, advanced vacation or equipment that has not been returned, prepare to address repayment provisions with the employee. Remember not to withdraw any amounts due from the employee's final paycheck unless the employee has agreed voluntarily to the deduction in writing at the time of termination.

If the employee possesses any company property, such as keys, parking cards, cell phones, PDAs, laptops, files, software, tools or other equipment, arrange to have it returned

or reimbursed to the company. If the company has an enforceable confidentiality and nonsolicitation agreement in place, provide a copy of the agreement to the employee. If no prior agreement was executed, prepare one before the termination. Consider whether to send a written reminder of the agreement to the employee's next employer.

Prepare for security issues that may arise as the employee is departing. Employers should escort the employee to pack personal belongings, delete the employee's access to the computer and telephone system, and change administrative passwords used to access the system. Building and office doors should be rekeyed, even if the employee has returned his or her set of keys.

edge the confidentiality agreement and any other agreements continuing beyond the date of termination. Escort the employee to his or her office to pick up personal belongings (have boxes available), then off the premises.

After the employee's departure, document the termination with a memorandum stating the parties in attendance, the information conveyed and any response from the employee. Document property obtained from the employee, personal items removed by the employee, written notifications given to the employee and agreements acknowledged by the employee. In the event of a subsequent employment complaint, the documentation will provide evidence of the termination events.

If the employee is resigning, conduct an exit interview to find out the reasons for the employee's departure. Determine whether a new job position has been accepted and whether the new employer is a competitor. Determine whether the employee had any complaints. Follow up immediately to investigate any complaints of harassment or wrongdoing, even though the employee already has left. Remember that employers have an independent duty to investigate complaints of unlawful conduct in the workplace, even if the employee is no longer employed by the company.

Once the termination process is complete, follow up with remaining employees as well as with customers of the company to do any necessary damage control. Explain to continuing employees in very limited terms that the employee is no longer with the company, but do not reveal private information about the departed employee except to those management staff with a need to know.

Ensure that customers are reassigned to a remaining employee, and schedule in-person meetings to discuss the transition. Place a forwarding message on the e-mail and voice mail of a departed employee, directing callers to someone who can provide immediate alternative service.

Employees taking over the ac-

count of a former employee should introduce themselves to the customer and provide reassurance that continuing quality services will be provided. Refrain from any gossip about the former employee, even if the customer was unhappy with that person's services. With key customers of the company, consider assigning high-level personnel to handle the transition. Offer customers discounts for time spent in getting up to speed while moving the account.

Assign one employee to handle any post-termination issues or communications. Remind employees of the company's policy not to give employment references, and tell employees where to direct requests for information. Accept only written requests for references, and respond only in writing.

Keep a tickler system of employees eligible to return to the workplace after a layoff. Retain employment records after the employee's departure. Monitor the employee's compliance with the terms of any severance agreement, and follow up on post-termination benefit administration (COBRA, retirement plans, etc.).

Contact legal counsel if any complaint is received from the employee, no matter how small. The employer's response to Employee Development Department claims for unemployment compensation or complaints to the Department of Fair Employment and Housing can become evidence in a subsequent wrongful-termination lawsuit; obtain legal advice before submitting any description of the employee's performance or the basis for termination to any state or federal agency.

Handling a termination is never pleasant for an employer or an employee. By taking these steps, however, employers can treat the departing employee in a fair manner and ensure the greatest protection from potential disputes.

**Karen L. Gabler**, a partner in the employment law group at Nordman Cornany Hair & Compton in Ventura County, specializes in the representation of management clients in all aspects of employment law advice and litigation.

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##### LEGAL SECRETARY

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