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If you've decided it's time to part ways with an employee, how do you execute that decision? For many [small employers](#), this is an issue you've rarely faced. Follow these five critical tips to make the termination (and its potential aftermath) go more smoothly.

### **1. Have All Documents In Order**

Before terminating an employee, it is crucial to make sure you have documentation to support the reasons for the termination, including performance reviews, write-ups and/or supporting emails. Review these documents to ensure that the reason for the termination is valid and defensible. This means that the termination cannot be based on [discriminatory, retaliatory or other unlawful reasons](#). When reviewing the

documents supporting the termination, keep in mind that often times, emails or documents from employees who are inexperienced with the law contain emotional, personal or inflammatory statements. If the employee ends up litigating, this evidence can reflect poorly if the employer wants to rely on it to defend the basis for the termination. To avoid this situation, make sure that the supporting evidence is factual, unbiased and objective. If there's ever a question about whether to put something in writing, discuss the information first and objectively analyze it before committing it to writing. Once your documentation is in order, ensure that you preserve it because it will be critical to your defense if litigation arises. Preserving documentation often requires turning off any electronic auto-delete functions and suspending destruction policies that might otherwise inadvertently capture this key information.

## **2. Plan How You'll Break the News**

Planning the logistics of the termination meeting in advance is critical to ensure that it goes smoothly. Where to hold the termination meeting, and who will attend are things you should consider.

First, you must ensure that the setting is private and confidential. This can be challenging for small employers because even if you have conference room, other employees typically walk by and wonder what's happening. To minimize the gossip mill, or if you do not have a private setting in the office, conduct the meeting at a private off-site location, and plan how you will notify the employee about the location without arousing suspicion.

Second, an unbiased representative experienced in termination (typically a human resource representative or office manager) should conduct the termination meeting. In addition to the person leading the termination meeting, have an unbiased witness present to document what occurs during the meeting. In advance of the meeting, prepare a script or an outline of what will be said and how to answer the employee's questions. Practice how the

message will be delivered, remembering to treat the employee with respect, and to use clear, objective and factually-supported statements. Do not try to bait the employee into an argument or otherwise inflame what is already an emotional discussion. If there is any concern for safety, arrange for a security guard or other security measures to be in place when the meeting occurs and to escort the employee off the premises when the meeting concludes.

Last, but not least, document the termination by preparing an objective memorandum that details the reasons for the termination, and attach the supporting documentation. Do not include personal comments, emotions, speculation or other non-factual information because this memorandum will likely be used as evidence to defend the termination if the employee decides to sue. If in doubt whether to include something or not, pretend that everything in the memorandum will be scrutinized by the employee's attorney if litigation results down the road.

### **3. Have All Paperwork On Deck**

The employer must provide the employee with his or her final paycheck during the termination meeting. The final paycheck must include all earned wages, accrued vacation, personal time off, commissions or bonuses. If you outsource your payroll, be sure to alert your payroll company about the need to include all compensation due. It is easy to forget things like commissions or bonuses because often, they are paid on a different schedule (i.e., monthly or quarterly) and may not align with the time of the employee's termination. If the money is earned, however, the employer must pay it on the employee's last day. What seems like a simple mistake can be extremely costly, as failing to comply carries extensive penalties, interest and resulting attorneys' fees.

In addition, make sure to provide the employee with all documentation regarding applicable benefits (including retirement benefits and insurance/COBRA information, if applicable) and unemployment benefits.

#### **4. Make Sure that Company Property Stays Company Property**

Effective immediately, collect all company property (keys, access cards, laptop, company cell phone, parking card, etc.) during the termination meeting, and ensure that the employee no longer has any access to electronic data, including his or her email account (via cell phone and computer), remote login access, and voicemail. It's important to cut off employee access at the right time. If access is cut off too early, the employee will get suspicious, which could derail your plan. If the opposite occurs and access is not cut off until hours or days after the termination, the employee can gather information and/or create evidence to support any legal claims he or she may try to raise against you. To avoid either of these problematic outcomes, be sure to coordinate with your IT representative in advance of the meeting to ensure that all electronic access is cut off while the employee is in the termination meeting.

During the termination meeting, have the employee sign and acknowledge that he or she has returned all company property and information, and that he or she has no copies. If the employee signed a confidentiality agreement upon hire, remind the employee of his or her continuing confidentiality obligations post-employment, and have the employee acknowledge that he or she is still bound by those obligations.

#### **5. Seek Legal Advice**

Every termination comes with different considerations, so it is wise to consult with experienced legal counsel about the risks and benefits of your particular situation. Legal counsel can guide you through the process for your particular situation, and can provide helpful ideas to consider, such as whether to offer a severance agreement. Deciding whether to offer a severance agreement involves weighing the associated pros and cons. On one hand, a severance agreement provides certainty and limits potential costly litigation that

otherwise may result if the employee believes that he or she was wrongfully terminated. On the other hand, a severance agreement can cause the employee to start thinking about claims he or she may have against the employer and entice the employee to seek legal advice. Indeed, most severance agreements explicitly advise the employee that he or she has the right to consult with counsel. If you engage an attorney, he or she can also recommend the amount of severance to offer, because offering too little can insult the employee and inflame him or her to reject it and consider potential legal claims against you. Your attorney can also draft the severance agreement to ensure that it covers the issues specific to your jurisdiction and the employee at issue (including if he or she is over 40 years old), and most importantly, is enforceable.

Terminating an employee can be stressful and uncomfortable, especially for employers who are not familiar with the process. Following the steps above will help make the process orderly, efficient, and if necessary, more defensible down the road.

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