

PRESENTATION



## Keeping Temperatures Down When Terminations Arise

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EXPAND YOUR EXPECTATIONS™

# Consider this...

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- Female server in a restaurant became pregnant and began missing work.
- Employer policy said “excessive” absences would result in discipline and that 3-days no-call, no-show would result in termination.
- Employer terminated employee for 3-day NC/NS.
- Termination notice listed first date employee failed to show/call and said she called 4 days later. Said she had NC/NS 3 other times.

# But a second look showed . . .

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- First day listed wasn't a day she was scheduled to work (wrong days). If she called 4 days later, she would only have had 2 days NC/NS.
- Employee did miss 3 shifts, but claimed she was in the hospital and called manager to tell her that she would be out.
- Employer logged activity such as employees calling in, but did not retain the logs.

# Then a third look showed . . .

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- Manager terminated employee without a witness despite his own claimed policy of never terminating employees without a witness.
- Manager designated her eligible for rehire in spite of handbook policy stating employees terminated for no-call, no-show could not be rehired.
- The 3 other NC/NS were over the course of one year and manager admitted that one NC/NS a month wasn't "excessive."

# And consider this...

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- Managers testified in unemployment hearing with no preparation. Former employee had attorney; managers did not.
- Managers relied on termination notice and testified as to wrong days for absences.
- Employee sued for pregnancy discrimination. Claimed manager told her in termination meeting that her pregnancy was too much of an issue and she could return to work after she had her baby.



Did the  
managers do  
anything that  
increased their  
employer's  
legal risks?

# Poor Judgment By The Front Line Managers

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- Didn't take the time to fill out the termination notice accurately.
- Didn't look at the schedule to ensure days missed were days scheduled.
- Didn't retain records that would have helped in the company's defense, like logs.
- Didn't follow their own policies regarding terminations and rehire.

Did upper level management, in-house counsel or HR do anything that increased the employer's legal risks?





# Penny-wise and Pound Foolish

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- Didn't prepare the employees for unemployment
- Didn't hire a lawyer to represent them when they became unemployed
- Didn't be represented by a lawyer



# Today's Agenda

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- Valid and Not-So-Valid Reasons for Discharge
- Pre-Termination Protocol and Meetings
- Severance Agreement(s)
- Termination Meeting(s)
- Post-Termination Communications
  - Internal
  - External
- Miscellaneous Considerations

# At-Will Employment and Its Limits

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Employment in Tennessee (and most other states) is at-will.

This technically means an employee can be discharged with or without cause, and with or without notice – for any reason or no reason – unless the employer and employee have an employment contract providing otherwise.





**REALLY?**

**WELL, NO,  
NOT REALLY .**

**..**

# Employees cannot legally be terminated for:

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-Race

-Age

-Veteran status

-Disability

-Organizing or joining a union

-Requesting or taking FMLA leave

-Smoking

-Sex/gender

-Ethnicity

-Need for military leave

-Complaining about terms and conditions of employment on social media?

-Suing employer for discrimination or harassment/protected activity

-Refusing to participate in, or refusing to remain silent about, illegal activities

-Religion

-Genetic information

-Filing work comp claim

-Having a gun in car at work in spite of employer policy?????

-Pregnancy

-Participating in an investigation of another employee's claim of discrimination or harassment

# Categories of Legal Reasons for Termination

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- Unsatisfactory performance
- Violating employment policies/breaking rules
- Unacceptable workplace behavior
- Reduction in force, reorganization, outsourcing work, closing facility

# What is the Key to Reducing Legal Risks for Managers, HR Professionals and In-house Counsel?

# **STOP AND THINK!**

# Before terminations occur-assess:

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- Your policies/practices affecting termination –
  - Attendance policies
  - Investigations
  - Discipline
  - Suspensions
  - Rehire
  - Layoff/RIF
  - Introductory periods





# Before terminations occur-assess:

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- Who in your Company is empowered to make a discharge decision?
- When must HR be notified? By whom?
- Who is responsible for generating documentation about the discharge?
- What planning occurs beforehand?
- Do you have a system – a checklist – you follow for terminations? If not, we'll help you customize one for your business.

# Employee identified for termination – consider:

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- Is there an employment contract? Are there limitations on termination under the contract?
- Has reason for discharge been investigated and employee's side of the story considered?
- Is the reason for the discharge legitimate?
- Is it non-discriminatory?

# Employee identified for termination – consider:

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- Is it non-retaliatory? Has the employee filed an EEOC charge; made an internal complaint about discrimination/harassment, pay issues, etc.; complained about illegal activities; taken FMLA leave; filed a workers' compensation claim; filed a charge with the NLRB; been involved in union organizing?
- Is it consistent with Company policy?
- Is it consistent with past practice?
- What do you find in the personnel file that gives you pause?

## What About Performance Appraisals?

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“We find the evaluation process by [Defendant/Employer] suspect and troubling. The evaluations of [Plaintiff/Employee] indicate that she was a quality performer, yet the hospital argues in this case that she was not and that many of her deficiencies were not stated in the evaluation report. We also find it troubling that the hospital contends that other areas of her performance were allegedly “discussed” by the evaluators with [Plaintiff/Employee] yet they are not revealed. Such a protocol is indicative of one being placed on super secret, double probation. **Such a practice greatly undermines the [Employer’s] argument that [Plaintiff/Employee] was not a quality performer.**”

- Tennessee Court of Appeals, March 8, 2010

# Pre-Termination Planning:

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- Assemble team
- Who is/are the decisionmaker(s)?
- What is the reason for the termination?
  - All decisionmakers should agree on the reason.
  - Draft Separation Agreement and other documentation to reflect this reason.
  - Advise team to avoid unnecessary written communications (may be discoverable)

# Pre-Termination Planning:

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- Does employee owe Company any money? (Check company credit card balances and cancel card).
- Does employee have access to information that can hurt your organization?
- Is employee a threat? How do you want to carry out termination?

# Pre-Termination Planning – for employee/threat:

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- Consider firing employee over the telephone or at another location.
- If termination must occur on Company property, is Company security robust enough to handle it? If not, consider hiring private security (plain-clothes/uniformed).
- Consider who will be in the room when termination occurs. Security inside the room or outside? Where will everyone sit?

# Pre-Termination Planning – for employee/threat:

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- Consider how employee's personal belongings will be returned to her.
- Consider how employee will get home. If ride is needed, coordinate cab in advance.
- Consider keeping security in place for some period after the event.



# Termination Meeting

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- Have at least 2 people from Company.
- Explain up front that the employee is being terminated and the reason. Always tell employee the real reason.
- Be compassionate but firm. If employee wants to argue, explain that you already took into consideration his explanation and that you've reached a final decision.
- Have employee submit final expense report (or give him a date by which to do so).

# Termination Meeting

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- Remind employee of any ongoing obligations (noncompete, nonsolicitation, nondisclosure).
- Have employee sign reimbursement agreement (for sign-on bonus, advance, etc.)
- Collect all Company property (laptop, phone, credit card, parking pass).
- Ensure you have correct home address.
- Allow employee to gather belongings. Consider whether supervision is necessary; if so, consider doing it after hours or without employee.

# **During or immediately after termination:**

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- Disable employee's access to e-mail, voicemail, security etc. Remote wipe Company devices if necessary.
- Assign another employee to monitor employee's e-mail and voicemail to address customer issues
- Each Company person should write down how termination went, any statements that were made by either party, and how employee reacted. Have HR person put those notes in file.

# During or immediately after termination:

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- Give or send Separation Notice and send COBRA letter
- Give employee final pay and vacation, if policy requires, by next regular payday
- Change locks/security code to building
- Communicate departure to staff
- Communicate departure to key customers, vendors, etc.
- Complete and submit benefit forms to stop coverage

# What about layoffs/RIFs?

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- Voluntary or involuntary?
- If voluntary, early retirement or resignation incentive?
- If voluntary doesn't work, plan for a RIF
  - Consider WARN Act or similar state law obligations
  - Define the business purpose (not “reduce costs” but “need to reduce sales force due to 20% reduction in demand for widgets”).
  - Consider selection criteria
    - Seniority
    - Positions v. people
    - Performance-based decisions
  - Conduct disparate impact analysis
  - Consider offering severance in exchange for a release

# Outplacement Services

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- Consider with or without severance
- Select the service carefully; services vary widely
- Look for one that provides emotional/practical counseling as well as career counseling



# Severance Agreement(s)-Benefits

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- Nondisparagement (but be prepared for employee to want mutuality)
- Cooperation with future litigation
- Noncompete or nonsolicitation (of employees or customers)
- Return of property
- Recommend paying out over time rather than lump sum so employee has an incentive to continue to abide by obligations
- Employee agrees he is ineligible for rehire
- Release of most claims
- Statement that employee has received all pay to which he is entitled

# Severance Agreement(s) – What to know before you use:

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- Must provide for “consideration,” which is something you don’t already owe the employee.
- To be effective release of age claims under the ADEA/OWBPA, must also:
  - Be written in a manner that can be clearly understood
  - Specifically refer to the ADEA by name
  - Advise employee to consult with an attorney
  - Provide 21/45 days to consider the agreement (waivable)
  - Provide 7 days to revoke (non-waivable)
  - Exclude rights and claims that arise after execution date
  - Cannot be a result of fraud or duress
  - For group terminations, provide required information about ages of individuals retained v. those terminated



# Post-Termination Communication Issues & Considerations

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- References?
- Unemployment benefits?
- Rehire status?
- Resignation in lieu of termination?

# Post-Termination Issues- References

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- If a former employer gives a negative reference that the former employee perceives to be false, the former employer can be sued for defamation.
- If the former employer provides a falsely positive reference about a dangerous former employee who goes on to commit a violent crime at the place of new employment, could the former employer be held liable for negligent or intentional misrepresentation?
- What's an employer to do? Consider moral, legal, and PR impact.

# Post-Termination Communication Issues & Considerations

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- Unemployment benefits?
  - Can you win?
  - Is it worth fighting?
  - Is there a reason not to?



# Post-Termination Communication Issues & Considerations

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- Rehire status
  - Have a policy
  - Follow it



# Resignation in lieu of termination – pros and cons

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- Doesn't really protect you from EEOC charge, lawsuit, unemployment compensation benefits
- But relieves the employee of having to tell prospective employers they were fired
- May encourage the employee to sign a severance agreement and release of claims
- May force you to designate the employee as eligible for rehire if your policy states all resignations are eligible for rehire
- May make current workers feel as if the employee “got away with” something
- May set a bad precedent

# Miscellaneous Considerations

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- Review and update your policies and procedures that can impact termination
- Assemble a termination team, with HR as the lead, so everyone understands termination procedure.
- If supervisors are empowered to terminate, consider special training similar to this for them.
- Prepare a checklist for terminations in conjunction with legal counsel (so it's privileged).

# Bottom line

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- STOP AND THINK!
- Be respectful and mindful of your employee's dignity
- Follow your policies
- Be prepared
- Seek legal counsel if warranted



# Questions, Comments, Discussion...

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