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Beyond "You're Fired": Key Points for Executing Terminations

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"You're fired!" has been a catchy phrase during the Trump era. If that phrase amounts to your plan for an upcoming termination meeting, however, you are in trouble.

Much of the risk analysis and decision-making process for terminating an employee focuses on the termination decision itself and whether it is lawful and warranted. Those certainly are critical considerations, but employers all too often forget a perhaps equally important consideration: how to actually perform the termination.

How an employer performs a termination can often determine whether the termination leads to litigation or further disputes. Even when an employer terminates an employee for a lawful and perfectly valid reason, an employee may feel compelled to challenge the termination where, for example, the employer has unduly embarrassed the employee or crushed the employee's dignity. As I often preach to employers, much of successfully maneuvering through employment law involves simply preserving the dignity of employees while making and implementing business-related decisions.

To be sure, not all terminations are the same. Some terminations involve potentially violent employees or employees who are at a high risk of damaging the employer through access to important information and systems. In those situations, an employer may need to take less typical steps, such as providing more security at the workplace both during and after the termination or terminating the employee without letting him or her return to the workplace.

For the most part, however, an employer can minimize the chances of a termination resulting in future problems, including litigation, by taking the following steps:

- **Choose the appropriate persons to attend the termination meeting.** As a general rule, at least two persons should attend the termination meeting in addition to the employee being terminated. It is helpful to have more than one witness for the employer if a dispute later occurs about what was said during the termination meeting. Due to risk of appearing threatening, the employer should generally avoid having more than two or three persons attend the meeting. At least one of the attendees should be very familiar with the basis for the termination decision and the related circumstances. The attendees for the employer should also be persons whom the employee would naturally expect to be there. For example, an employer should avoid using as a witness a nonsupervisory co-worker of the terminated employee. The terminated employee may view the presence of such an attendee as a breach of privacy.
- **Choose the appropriate termination meeting location.** If possible, hold the termination meeting in a private, neutral area at the workplace, such as a conference room. It is generally best not to hold the termination meeting in the office of the manager who is conducting the meeting. If the meeting becomes hostile, the manager will certainly not want to leave his or her office with the terminated employee in it. Similarly, an employer should generally avoid terminating an employee in the terminated employee's office. Such a space is less secure, and the employee may be more emboldened to challenge the termination decision while in his or her own place. In some situations, it may make sense to hold the termination meeting off-site, such as when it may be more difficult to

keep from embarrassing the terminated employee in front of others. Such an off-site location may, for example, be a conference room at the office of a board member. If the meeting is held offsite, it may be necessary to make arrangements with the terminated employee to retrieve his or her personal belongings at a later time, preferably after hours.

- **Choose the appropriate time for the termination meeting.** As a general rule, it is best to hold the termination meeting at the end of the day. An advantage to that time includes that the terminated employee will be less likely to see other employees as he or she exits because other employees likely will have already gone home for the day. In that situation as well, the terminated employee can more likely collect his or her personal belongings in a more private setting. Also, it is often best to conduct the termination on a Friday. The employer will then have the weekend to implement changes and prepare for the transition. Furthermore, if media attention is a concern, less media attention typically occurs over a weekend. Finally, if possible, avoid terminations on dates of personal significance to the employee such as his or her birthday or immediately before a major holiday such as Christmas.
- **Carefully plan what will be said during the meeting.** If litigation ensues regarding the termination, few things will be more relevant to the termination decision than what was discussed during the termination meeting. For that reason, it is particularly important to carefully plan what will be said during the meeting. Develop talking points in advance that explain the termination and why it is taking place. Try to keep the explanation brief. If the employee attempts to challenge the decision, the best response is often that the termination decision has been made and it is final. Avoid a dispute, but if the employee alleges that the termination decision amounts to unlawful discrimination, the employer should deny that and point to the legitimate business reason for the termination. In any event, it is critical that those attending the meeting avoid getting angry or raising their voices. The meeting should be professional and respectful. Keep in mind as well that notes on talking points for the meeting could be later produced in litigation. Consider working with counsel on the talking points so that they can be treated as privileged.
- **Avoid embarrassing the employee with a high-profile exit of the premises.** Escorting a terminated employee from the premises is typically necessary, but such exits should be done discretely and not in any way to unduly embarrass the terminated employee. Rarely should the exit include a security or police officer, which would lead to a heightened degree of embarrassment and loss of dignity. Similarly, although it is advisable for an employer to have a witness present when an employee cleans out his or her office, the witness should generally not include a security or police officer.
- **Ensure that necessary termination documents are prepared and ready for delivery during the meeting.** Many states require that employees be provided a separation notice at the time of termination. Furthermore, some states require that employees receive their final paychecks at the time of termination. An employer must be ready to meet any such obligations. Additionally, if the employer chooses to provide a separation agreement at the termination meeting, the employer should be prepared to provide a brief explanation of the agreement and how it is intended to provide closure for both the employee and employer.
- **Ensure that the employee's access to networks are removed and property is returned.** Either immediately before or during the termination meeting, an employer should cut off the terminated employee's access to the employer's computer networks. For instance, the employer should make sure that the employee is no longer able to access confidential information electronically, send and receive company emails, and access and post information on the employer's websites or social media sites. The employer should also immediately retrieve any company cell phone from the terminated employee and request that the employee immediately return any company property to the employer, including any property stored at the employee's home or on personal computers or other electronic devices.
- **Inform managers with a need to know about the termination.** An employer should avoid broadly broadcasting the termination, even within the company. It will be necessary, however, to inform key

managers and board members or owners who have a need to know about the termination. In that situation, a brief explanation as to the legitimate business reason for the termination is typically appropriate.

- **Plan communications to other employees about the termination.** As a general rule, an employer should avoid providing explanations to other employees about why an employee was terminated. A terminated employee often views such an explanation as a breach of privacy. Instead, it is generally best to keep the explanation of the termination to other employees as brief and simple as possible. For instance, a brief explanation that the employee is no longer with the company and that the company wishes him or her the best in the future will often suffice. If employees ask questions about the termination, the best response is typically that the company does not discuss personnel matters with other employees.
- **Be prepared for any media attention.** Most terminations do not result in media attention, but some high-profile terminations do. If an employer believes that the termination may create media attention, it should consider preparing a brief written press release about the termination. It should do so with the assistance of counsel. Furthermore, it is often helpful in such situations to engage a public relations firm to help manage the media attention.

Next time you need to terminate an employee, do not stop the preparations with ensuring that a lawful reason exists for the termination. Carefully plan the performance of the termination so that it minimizes the impact on both the employee and employer, and in turn minimizes the risk of a post-termination dispute occurring.