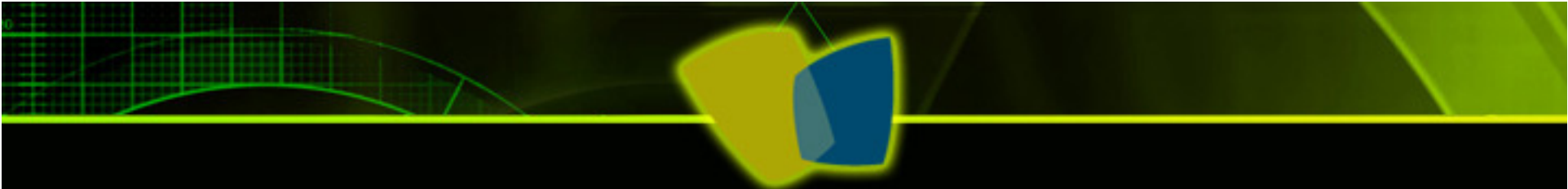




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# **Issues to Consider When Preparing for Layoffs & Other Terminations**



# Agenda

- Introductions
- Discussion Topics
  - Corrective Action Process
  - Termination Process
  - Designing Employment Releases
  - Older Workers Benefit Protection Act (OWBPA)
  - Worker Adjustment & Retraining Notification Act (WARN)
- Q&A



# **Corrective Action Process**

***Linda Dumas***



# Corrective Action Policy

- Fair treatment statement
- Prior notice
- Fair investigation
- Due Process
- Consequences
- Reservation of Employer Rights
- Employment at Will



# Purpose of Discipline

## Corrective versus Punitive Systems

- Punishment reinforces work rules or desired conduct by making the consequences unpleasant
- Behavior modification through correction works toward improved performance and looks at why behavior is off track



# Corrective Action Options

Employee Discipline action may include one or all of the following depending on the circumstances:

- Verbal Warning
- Written Warning
- Performance Improvement Plan
- Final Written Warning
- Suspension
- Termination



# Reasons for Employee Discipline

- Performance Issues
  - Poor productivity
  - Poor sales performance
  - Failure to meet minimum performance standards
- Behavior Problems
  - Misconduct
  - Insubordination
  - Poor attendance
  - Negligence



# Handling Behavior Problems

Behavior problems are usually within the employee's control. Formal actions regarding behavior problems should include:

- A statement describing the behavior deficiency, citing specific instances
- A restatement of minimum expectation of acceptable behavior
- Consequences of further incidences of unsatisfactory behavior
- A memo signed by the employee indicating his/her understanding of the contents of the discussion



# Handling Performance Problems

When the employee's performance does not meet the minimum expectations, the following formal corrective action should be taken:

- A clear statement describing the performance deficiencies.
- A restatement of the minimum expectations of the position.
- A list of the tasks, activities and deliverables that must be accomplished within a set time frame. Timeframes typically range from 30-90 days, depending on the circumstances.
- A scheduled date for formal follow-up. If expectations are met, employee should be formally removed from corrective actions.
- Statement of consequences should employee fail to meet expectations.
- A statement signed by the employee acknowledging his/her understanding of the contents of the document.



# Corrective Action Checklist

- Know all the facts accurately
- Review how other employees were disciplined – is this employee receiving the same treatment others have received for the same offense?
- Is the rule that has been violated reasonable?
- Did the employee know the rule – or should he or she have known the rule?
- Is the rule being applied reasonably?
- Have any preliminary procedures been followed?
- Except in cases such as observed theft, assault and other dangerous or harmful offenses, has the employee first been warned?



# Corrective Action Checklist

- Does the discipline fit the misconduct?
- What is the employee's disciplinary record?
- How long has the employee been with the organization?
- Does the employee have a reasonable excuse for the rule infraction or misconduct?
- Can the employee's responsibility for the rule infraction or misconduct be proven by direct, objective evidence or only by circumstantial evidence or conjecture?
- Did you have an opportunity to keep this employee from committing an offense and fail to do so?



# Reasons for Immediate Discharge

- Possessing or consuming non-prescribed narcotics on company property
- Reporting to work intoxicated or impaired
- Carrying a weapon without a business purpose on company property
- Theft
- Destruction of property
- Insubordination
- Misrepresentation of important facts on a job application
- Extended & unexcused absences
- Intentional harassment, including sexual harassment
- Workplace violence



# Elements of a Good System

- A code of conduct
- A philosophy of discipline
- Knowledge of the consequences of misconduct
- Consistent discipline procedures
- Quick response
- Review of the planned discipline by HR
- Employee due process
- Reservation of employer rights



# ABCs of Documentation

- Document communications with all employees
- Documentation should give details
- Documentation should be timely
- Involve the employee
- Conduct a final review
- Retain your records



# Investigation Guidelines

- Same investigative procedures
- Impartial investigator
- Prompt start
- Interview those involved and all witnesses
- Document investigation activities
- Assemble all relevant facts
- Gather relevant records
- Analyze all data
- Make a sound decision
- Write a final report



# Support & Substantiation

- Documentation can show:
  - Policies were followed
  - A valid business purpose for the discipline
  - Overall personnel record supports discipline
  - Treatment was evenhanded



# Basic Rules

- Don't fire an employee without just cause
- Don't make promises
- Golden rule



# Termination Process

*Linda Dumas*



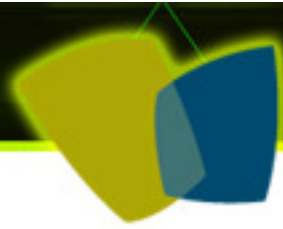
# Basic Rules

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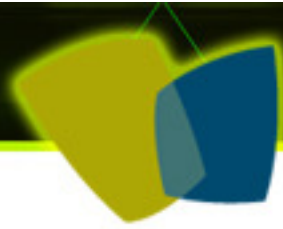
# When is Termination Illegal?

- Termination is illegal when it is based on a discriminatory employment practice
- Make sure there is a solid business reason for any adverse employment action that interferes with protected classes and protected behavior



## **Termination Checklist-General Concerns**

- Did the employee's protected status (race, color, religion or generally held religious beliefs, creed, gender, national origin, ancestry, non-job-related disability, age) arguably have anything to do with the decision and/or will it appear that recent employment decisions are adversely affecting a protected class?
- Has the employer made an offer of reasonable accommodation, taking into account the person's religion or disability?



## Termination Checklist-General Concerns

- Has a thorough investigation been conducted so that the decision is based upon facts and not perception, hearsay or speculation?
- Has the employee been given the opportunity to relate his or her side of the story?
- Are there extenuating circumstances or other mitigating factors that justify a lesser penalty?
- Is the decision timely?
- Should you suspend, pending further investigation?
- Is this action consistent with prior incidents of a similar nature?



# Termination Checklist-Misconduct

- Was the rule known to the employee? Was the rule published? Was the practice consistent with the rule?
- Have appropriate disciplinary steps been followed (e.g., oral, written, final written)?
- Did the employee have an opportunity to take constructive action?
- Are the witnesses credible?



# Termination Checklist-Misconduct

- Is the documentation in order?
- Does the employee's overall documented record support the decision (e.g., employee just received congratulatory letter and merit raise for outstanding performance)?
- Is this action consistent with prior incidents of a similar nature?



## **Termination Checklist-Performance**

- Do the evaluations support the decision?
- Was the employee not only told of deficiencies but also advised how to improve and when he or she needed to meet expectations?
- Did the employee ask for help and was denied (e.g., refusal to provide training)?
- Is the articulated reason for the discharge the real reason?



# Termination Checklist-Performance

- Is the deficiency capable of objective measurement, or are the criticisms at least specific (e.g., “bad attitude” vs. “employee refused to assist customer”)?
- Does the employee’s overall documented record support the decision (e.g., the employee just received a merit raise)?
- Was the employee ever told that failure to improve would result in termination?
- Is this action consistent with prior incidents of a similar nature?



# The Termination Meeting

- Remember: Termination is not discipline
  - Discipline is an attempt to remediate an inappropriate behavior
  - Termination is simply cutting ties
- Termination is not the time to teach life lessons
- Set the termination date and time early in the week and early in the day
- Notify other key personnel who have a need to know, such as senior management & security



# The Termination Meeting

- Be brief
  - No more than 15 minutes. . .any longer and you are lecturing not firing
  - Employee will start to escalate
  - Abandon normal protocol (exit interview)
- Keep your feelings to yourself
- Explain exit process & final pay information
- End the meeting & escort employee from building



# **Designing Employment Releases/ Severance Agreements**



# Employment Release

- Waives some or all of an employee's rights in return for something of value (usually cash or benefits) given to the employee by the employer, and
- Once signed by both employer and employee, becomes a contract between the two parties.



# **Anatomy of a Release**

## **(aka Severance Agreement)**

- Legally binding contract neutrally agreed to by employer & employee
- Why use one? Let's look at the parts which will help answer the question
  - Termination date
  - Severance benefit/consideration
  - Wages & benefits entitlement
  - Vacation days
  - No further payments or benefits
  - Consideration



# **Anatomy of a Release (aka Severance Agreement)**

- Release
- Non-Disparagement
- Reference
- Covenant not to seek re-employment
- Return of company property
- Confidential Information and intellectual property
- Confidentiality of agreement
- Severability
- Non-Admission
- Knowing & Voluntary
- Nullification



# Anatomy of a Release (aka Severance Agreement)

- When to use a release/severance agreement:
  - RIF & Survivor
  - Large vs. small
  - One-on-one
    - Poor documentation of performance problems
    - Protected class/legal issues
    - Procedures not followed
    - Perception of fair treatment



# Selection Criteria

- How to approach an RIF:
  - Perception of and reality of fairness
  - Look at openings, if any
    - Qualified standard if no competition for opening
    - Most qualified standard if competition for opening
      - ✓ Watch reasonableness of offer
      - ✓ 80% essential job duties & 90% of pay
    - If no openings:
      - ✓ Company seniority
      - ✓ Departmental seniority
      - ✓ Position seniority
      - ✓ Last performance evaluation
      - ✓ New performance evaluation



# Business Advantages

- Protects employers from claims arising out of forced terminations. Releases offer protection to the employer and also provide something of value to the employee.
- In situations where there has not been sufficient documentation concerning an employee's poor performance and the employer wants to act quickly to terminate the employee, releases offer some "insurance" for the employer against a future lawsuit arising out of the termination.
- When an employer offers a "termination package" that is opened up to a large group, it is common to include a release to provide the employer some protection.



# Assessing the Risk

- Fraud charges could be used to challenge releases that would otherwise be valid. For this reason, employers should be absolutely truthful when communicating the circumstances of a job elimination that results in employment separation involving a release. If circumstances change and the job is re-established, consider contacting the former employee prior to any recruiting activity.
- Former employees have claimed that not being represented by an attorney underscored their lack of understanding of what rights they waived. Court decisions are split on this issue. However, it is not uncommon for releases to include language that encourages an employee to discuss its contents with his or her attorney before signing.



# Assessing the Risk

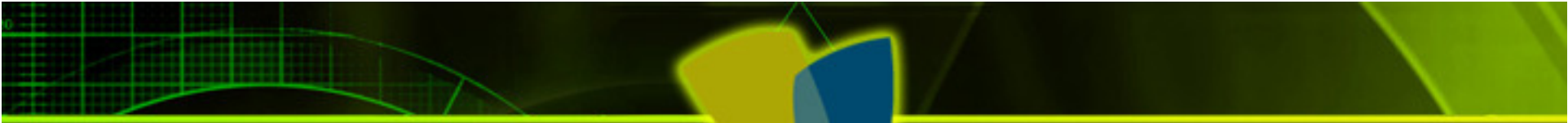
- No release can be assumed to be absolute – there are rights an employee cannot waive; however, some experts advise that it is better protection to secure the release than not to. There may be issues which may or may not be known to the employer at the time of the termination that cannot be litigated after the fact because a release was negotiated.
- The use of a release may signal that the employer “knows” some rights have been violated.
- Employers must guard against the use of releases that, over time, favor one group of employees over another.



# Manage the Aftermath

A considerable reduction in morale will likely occur where an employer cuts staff due to revenue loss and yet continues the usual number of expensive perks-such as long trips or high bonuses.

Advertising for new employees for the same or similar positions that were supposedly eliminated under a RIF, especially seeking younger or entry level workers, will all but guarantee discrimination lawsuits. If a hiring need arises, the employer should first recruit from the RIF employees.



# **Older Workers Benefit Protection Act “OWBPA”**



# Basic Provisions

The OWBPA which amended the Age Discrimination in Employment Act (ADEA) was signed in law on October 16, 1990. The law prohibits age discrimination in compensation; in terms, conditions or privileges of employment, and in all employee benefits and employee benefit plans.



# **OWBPA & Employment Releases**

The Older Workers Benefit Protection Act (“OWBPA”) requires that an employer inform employees that:

- They have the right to contact an attorney to discuss the release,
- They have 3 weeks to decide whether or not to sign the release, and
- They have 7 days after signing the release during which to revoke the contract if they so wish.



# **OWBPA & Employment Releases**

Releases to older workers should include the following lists:

- Who is staying (not specific names);
- Who is leaving (also not specific names);
- The job categories and grade levels of the two groups (remaining employees and those terminated);
- The ages of both groups.



# **Worker Adjustment and Retraining Notification Act “WARN”**



# What is WARN?

The WARN Act is a federal law requiring employers to provide at least 60 days advance notification of plant closings and mass layoffs. Notice must be given in writing to:

- The employees' representative or, if there is no representative, to each affected employee,
- The state dislocated worker unit, and
- The local government where the plant is located.



# Employer Coverage

Employers with 100 or more employees, not counting those who have worked less than 6 months in the last 12 months, nor those who work an average of less than 20 hours per week.



# What are the Exceptions?

The most common exceptions to providing notice at or prior to 60 days before closing include:

- An employer may give less than 60 days notice if at the 60-day time the employer is actively seeking capital that could avoid or postpone the shutdown and the giving of notice would preclude obtaining the capital.
- The employer may give less than 60 days notice if the closing or layoff is due to either business circumstances that were not reasonably foreseeable or a natural disaster.



# What are the Exceptions?

- The law does not apply when the closing or layoff constitutes a strike or lockout. An employer will not be required to give notice when permanently replacing a person who is deemed to be an economic striker.

**Caution:** Any employer wishing to pursue an exception to the law should contact counsel first.



# What are the Exceptions?

There are other exemptions to the notification requirement, such as:

- The law does not apply to the closing of a temporary facility.
- The law does not apply if the closing or layoff is the result of the completion of a particular project and the affected employees were hired with the understanding that their employment was limited to the duration of the project.



# Questions & Answers



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