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A Guide to Employee Terminations

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Most employers know that Texas is an "employment at-will" state, meaning that—unless there is an employment agreement guaranteeing employment for a specific amount of time—employees can be terminated for any lawful reason. Being legally entitled to do something, however, doesn't necessarily make it "safe." Litigation is expensive, and ultimately winning your case can be cold comfort when compared to the cost to get there. This guide identifies some of the problems and offers possible solutions and practical tips to minimize the risks associated with the different types of employee terminations.

"For Cause" Termination

Can the terminated employee sue us for discrimination?

Federal and state laws protect employees from discrimination based on race, color, gender, national origin, religion, age, or disability. Federal law also protects employees who are on leave under the Family Medical Leave Act and who are on active military duty. If the employee fits into one of these categories, they could claim that their termination was discriminatory. You can always terminate any employee for a legitimate, non-discriminatory reason, but it pays to be careful. In addition, some of these categories—i.e., disability—can be hard to figure out. It might be a good idea to consult your lawyer if you have concerns about the termination.

How can we be sued for discrimination if we have "good cause" for termination?

Terminated employees in a protected class will often claim that what an employer calls a "good cause" for their termination was really a cover for discrimination. For example, excessive absenteeism might be related to a disability or a medical condition that is covered by the Family Medical Leave Act. Or what appears to be insubordination might be a miscommunication arising from cultural difference related to the employee's national origin. In most cases, you can still terminate the employee even if he or she might want to claim that it is "discrimination by proxy," but it is worthwhile to analyze the possibility and decide the best way to proceed.

How can we protect the company from discrimination claims?

One of the best ways to defend against a discrimination claim is to show documentation that objectively demonstrates the reasons for the termination. Courts and juries are very

suspicious, however, of documents created immediately before or after the termination. Unless the termination is based on a single, egregious event, it's best to have a written history of problems with the employee. If the only written documentation justifying the termination is something you just created (or will be creating later), you might want to wait a while and establish a better paper trail before letting the employee go.

What do we have to pay and when do when have to pay it?

In Texas, involuntarily terminated employees must be paid their final paycheck within 6 days. Unless you have a policy that specifically promises to "cash out" employees for unused vacation time and sick leave, you are not obligated to pay terminated employees for those items. Even if you have a great claim against the employee for damages or lost money or property, you may not deduct anything from the final paycheck without express written authorization—a blanket authorization signed at the time of hiring is probably not good enough.

Should we pay severance?

Even if you have done everything right, an unhappy former employee may still bring some type of claim against you. Litigation is expensive, even when you are right. A good safeguard against future litigation is to offer the employee some type of severance in exchange for the employee's full release of all claims. If the employee is over 40, you must comply with the Older Workers Benefit Protection Act, which requires that you give the employee at least 21 days to consider the release and to consult with an attorney and seven days to revoke the release after it is signed. Do not pay the employee until the final seven day revocation period has elapsed. The OWBPA does not require employees to return the severance pay if they revoke the release.

"Just Because" Termination

Do we have to have a good reason to fire employees? What if they are annoying?

Texas is an "at-will employment" state, which means that you can fire an employee for any legal, non-discriminatory reason—even for being annoying. Being legally allowed to do something, however, doesn't always make it a good idea. If the employee is in a protected class (race, color, gender, national origin, religion, age, disability, on FMLA leave, or on active military status), the employee could bring a claim for discrimination under state or federal law based on the termination. The primary method to defend against these claims is to demonstrate that there was a legitimate, non-discriminatory reason for the termination. Terminations based solely on the employee's "annoying personality" or "inability to fit in" can be very hard to justify in the face of a discrimination claim. You should think carefully about a "just because" termination before letting the employee go.

Can we fire an employee for being gay or having an "alternative lifestyle?"

Texas law and federal law do not specifically protect homosexuals, transsexuals, and cross-dressers from employment discrimination. There is a great deal of legal advocacy, however, trying to protect these groups through creative application of the existing laws. Firing an employee for being gay is not illegal discrimination, but firing an employee for not being "masculine enough" or "feminine enough" could create a viable discrimination claim. It's a good idea to get qualified legal advice if you want to terminate an employee based on their sexual orientation or other, non-traditional characteristics.

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Voluntary Termination

If the employee quits, we're in the clear, right?

Often, employees who voluntarily resign are moving on to greener pastures, and they don't bear their former employer any ill-will. Some employees, however, quit because they believe that they can no longer perform their job in a hostile or abusive work environment. The law calls this "constructive termination" and, if the hostile work environment is related to a protected classification (race, color, gender, national origin, religion, age, disability, on FMLA leave, or on active military status), the employee may still

be able to sue, even though he or she resigned. Employers need to have clear anti-harassment policies that require employees to report harassment and establish an easy process for making a report. Even if you have a reporting policy, it's not a bad idea to ask resigning employees why they are leaving (even if you are happy to see them go). If they don't complain about any harassment in response to your inquiry, make a note in their file. It will be hard for them to make a viable claim later if they didn't raise it when specifically asked.

Can we require employees to give two weeks notice?

In most cases, it is a practical impossibility to require employees to stay and work when they don't want to. What's more, employees who feel like they are being forced to stay for another two weeks are of questionable benefit to the company. A better approach is offering an incentive to employees who give two weeks notice. Because Texas does not require employers to pay departing employees for unused vacation and sick leave time, many employers offer to pay those amounts (or a percentage of them) to employees who give two weeks notice of termination.

What do we have to pay and when do we have to pay it?

In Texas, employees who resign must be paid their final paycheck on the next regular payday. Many times, resigning employees may have wages or salary that would not normally be paid until the payday after the next payday. The law, however, requires the employee to be paid in full on the next regular payday. Unless you have a policy that specifically promises to "cash out" employees for unused vacation time and sick leave, you are not obligated to pay resigning employees for those items. Even if you have a great claim against the employee for damages or lost money or property, you may not deduct anything from the final paycheck without express written authorization—a blanket authorization signed at the time of hiring is probably not good enough.

Reductions in Force

Does it matter whom we lay off?

If you have employees with contracts or employees who are part of a collective bargaining agreement with a union, you may be restricted in your ability to lay off those workers. Otherwise, you are technically free to lay off whomever you want. You may be exposing the company to discrimination claims, however, if the reduction in force adversely impacts a disproportionate number of employees in a protected class (race, color, gender, national origin, religion, age, disability, on FMLA leave, or on active military status). Therefore, it pays to exercise some caution when choosing whom to lay off.

How should we decide whom to lay off?

The key issue when selecting employees who will be affected is being able to explain later—if necessary—why there was no discriminatory intent. As a result, it is important to document the criteria that were used to select those who are to be laid off. One of the safest practices is to use a two step process: (1) have someone do a blind selection of employees without knowing the names, races, genders, ages, or other protected characteristic of the candidates; and (2) have someone else (or a panel) review the demographics of the selected employees to determine whether a protected group is disproportionately affected.

What if we just lay off all of the poor performers?

The best time to get rid of bad employees is when you recognize that they are not performing satisfactorily. Using a reduction in force to "weed out" substandard workers can be problematic, and it probably isn't the best practice. It's better to keep economic-based terminations separate from merit-based terminations, both for clarity and to avoid inadvertently enacting the discriminatory biases of individual supervisors. If you still insist on selecting affected employees based on performance, you should try to base the selection of objective criteria (i.e., annual sales numbers, productivity). You should also stay clear of criteria that could be proxies for something else. For example, laying off all the employees who are at the top of their wage scale could disproportionately affect older workers. Or downsizing employees based on sick days used or number of late arrivals at work could look like you are picking on employees who are disabled or who have recently been on Family Medical Leave.

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Should we pay severance?

Generally, a reduction in force is the result of financial difficulties facing the company, and paying severance to laid off employees can seem counterintuitive. It might be advisable, however, to safeguard against future litigation by offering affected employees some type of severance in exchange for a release of all claims. For employees who are over 40, you must to comply with the Older Workers Benefit Protection Act. For mass reductions in force, the

OWBPA requires that you give the employees at least 45 days to consider the release and to consult with an attorney and 7 days to revoke the release after it is signed. You also must provide a demographic breakdown of the positions and ages of the affected employees. Do not pay the employees until the final seven day revocation period has elapsed. The OWBPA does not require employees to return the severance pay if they revoke the release.

Do we have to provide advance notice of the lay offs?

If you have more than 100 employees, you may be required to comply with the Federal Worker Adjustment and Retraining Notification Act under some circumstances. Generally, WARN applies when: (1) a work location is being closed down and 50 or more employees will lose their jobs; (2) more than 500 employees will lose their jobs during a 30 day period; (3) more than 50 workers comprising at least 33% of the workforce will lose their jobs; or (4) two or more groups in the preceding categories who don't meet the minimum thresholds alone lose their jobs within 90 days and meet the minimum threshold when considered together. If WARN applies, the affected employees are entitled to receive at least 60 days notice of the lay off. The employer also must give notice to the state's dislocated worker unit and the chief elected official of the local government. WARN is a complicated law with many technical requirement and exceptions. If you think it may apply to your lay off, you should consult with qualified counsel.