



DELAWARE

EMPLOYMENT LAW LETTER

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HR ISSUES

Employee terminations: Don't let the door hit you on the way out!

by Lauren E.M. Russell

Employee terminations can be a tricky issue. Most of them are straightforward and by the book: Employees frequently know when it's time to move on, and they leave without any hard feelings. But employers are occasionally faced with having to terminate problem employees. Those are the cases where we get ourselves into trouble!

The decision

The first area where you can trip up is the termination decision. Often, problem employees with a long list of relatively minor transgressions aren't terminated until they hit the straw that breaks the camel's back. In such cases — as in all terminations — documentation is key. You are well-advised to come up with a comprehensive list of the employee's offenses and then make a rational determination about what actually resulted in the decision to terminate.

For example, if an employee has a history of misconduct, including tardiness, insubordination, and sloppy work product, capped by an incident of serious misconduct, focus on the real issues: his insubordination and serious misconduct. The termination letter shouldn't include the employee's habit of being five minutes late for the start of his shift unless it seriously affects business operations. The notice of termination should address between one and three serious issues, not all of the minutiae that made the employee generally miserable to work with.

In the same vein, be aware when the decision to terminate is untimely or the triggering event is relatively minor. Imagine, for example, that an employee blew up in front of a customer three months ago and lost a major account for your business. This week, he has been more than one hour late for work three days in a row. Your termination letter shouldn't focus on the major incident three months ago — any attorney worth his salt is going to ask you why it took three months to fire an employee if his conduct was so awful. He will also argue that if the blowup wasn't sufficient to warrant termination, how could three tardies do the trick?

Instead, consider waiting for the next significant incident and firing the employee promptly after it occurs. Problem employees always slip up again, so wait for a better situation that will make the termination decision easier to justify.

The meeting

When possible, conduct an exit interview. Even awful employees may have something constructive to say on their way out the door. In addition, if they are planning to sue you, you may get useful insight into their complaints.

For example, if a departing employee suddenly, for the first time ever, complains that she was being sexually harassed, you'll have a leg up. Take careful notes, and start an investigation. You'll be ahead of the game when you receive the charge of discrimination.

The benefits

You should also be aware of any benefits an employee is entitled to before you hand him a termination letter. Generally, your benefits coordinator will be responsible for sending out the COBRA notice and handling continuation of health insurance and related benefits. But there are other considerations, including accrued but unused sick leave and vacation time.

Under Delaware law, employees aren't automatically entitled to the value of unused leave upon termination. However, if your company has a policy or practice of paying the value of unused leave, you have an obligation to do it for all employees — regardless of the reason they are terminated. The best way to manage such benefits is to have a simple policy in your personnel manual addressing when leave will be paid and when it won't.

For example, your policy might state: "Employees who are terminated involuntarily will not be paid the value of accrued but unused leave. Employees who voluntarily resign or retire, and provide two weeks' notice, will be paid the full value of all accrued but unused leave in accordance with standard payroll practices." You can also elect not to pay out anyone's leave for any reason. Just be sure to have a policy and stick to it!

Bottom line

Employee terminations generally aren't an issue — until they are. When dealing with a problem employee, managers need to remember to keep their cool. The termination process isn't the time to send a message to the employee about everything he's done wrong for the last five years while refusing to provide him with benefits that other employees have received. Instead, be calm and evenhanded, and smile quietly as a difficult employee walks out of your life.

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