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Peaceful Endings

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Peaceful Endings: Managing the End of the Road



Audio Dial-In Information:
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April 21, 2011

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Increase Communication to Reduce Risk

- Evidence suggests that terminated employees who feel their employer has been fair and respectful in the process are less likely to file lawsuits.
- Open and candid communication is key to being fair and respectful.



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Discipline Options

- Key issues:
 - Timeliness
 - Fairness and consistency
- Criteria to consider:
 - Severity of the offense
 - Employee's past performance record
 - Employee's length of service with the organization
 - Employer's past practice when dealing with this sort of situation

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A Wide Range of Options are Available

- Options include:
 - Verbal and written warnings
 - Salary freezes
 - Demotion or transfer to a different position
 - Final written warnings
 - One-time one-day paid suspension ("decision-making leave" or "day of commitment")
 - Unpaid suspension
 - Probation
 - Discharge

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Paid Suspension—"Day of Contemplation"

- Intended to invoke a sense of obligation and resolution to improve performance
- Generally used as a once-in-a-career benefit
- Employer may require "homework"

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SAMPLE "Homework"

"In addition to giving you a final written warning about _____, we are giving you a day off with pay so that you may rethink your commitment to our organization. The purpose of this paid suspension is to impress upon you the seriousness of your (misconduct) (inappropriate conduct) (actions). If you choose not to return to work the day after tomorrow, we will respect your decision and your employment will terminate effective close of business tomorrow. If you decide to return to work you will be required to submit a written action plan, outlining the concrete steps you will take to correct this problem.

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SAMPLE "Homework", cont'd.

I specifically want you to address _____. You will need to present this written action plan to your supervisor first thing upon your return to work. This is a once-in-a-career benefit. If you decide to return to work, you will be expected to adhere to the action plan, if it's accepted by your supervisor. If your supervisor finds the action plan inadequate, or you fail to adhere to the action plan, your employment with us will be terminated."

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Progressive Discipline

- Common, but frequently misunderstood
- Not a series of prescriptive steps; guidance only
- Example:
 - Require first instance of performance failure to be treated as a warning
 - Successive occurrences result in more serious disciplinary measures
- Increasingly serious disciplinary steps
- NOTE: progressive discipline should never be rigidly applied; written policies should preserve your discretion to exercise flexibility

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"Fundamental Fairness" Formula

Key Elements:

- Consistency with internal policies and procedures
- Objective review by someone other than the decision-maker



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What is "employment at will"?

Either the employer, or the employee, may terminate the employment relationship, at any time, and for any reason, *except an illegal reason.*



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Limitations on "employment at will"

- Violation of **federal and state laws**, such as a claim of wrongful discharge based on discrimination or violation of family leave laws
- Violation of **common law rights**, such as a claim of wrongful discharge in violation of public policy
- **Breach of contract**, such as a claim that the employer acted in conflict with a provision in an employee handbook or did not uphold a verbal promise

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Termination: does the lingo matter?

- **Termination**, also referred to as being **separated** or **let go**, with no particular implication as to the reason for the termination.
- **Dismissal** or **"being fired"** can imply that the employee's performance or conduct was unsatisfactory.
- **Retirement** implies that the employee has voluntarily decided to cease being gainfully employed.
- **Lay-off** implies that employees are being put on unpaid leave status, but as soon as work is available they may be rehired; also **"furlough."**

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More Termination Terminology

- **Reduction in force** implies that more than one staff is being terminated, but no particular implication as to reason for terminations; generally, **not** appropriate to use when employee's performance was unsatisfactory.
- **Reorganizing** implies that positions are being eliminated and that reporting relationships are being restructured.
- **Elimination of a position** describes a situation where a particular position is being eliminated; no implication as to the reason, although generally not appropriate when the reason is poor performance; often used when grant funding that supports a position runs out or is terminated.
- **SEPARATION of employment** is a neutral expression.

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It's not only what you say,
it's how you say it that matters

Compassion, fairness and kindness: keep in mind that your values count.



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What "Not" to Do

"The work force reduction notification is currently in progress. Unfortunately your position is one that has been eliminated."

From Send: The Essential Guide to Email for Office and Home, by David Shipley and Will Schwalbe

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Economic Realities

- Many organizations face hardships from time to time and must reduce their workforces when demand for services goes down or the organization facing funding constraints.
- The need to retrench and regroup due to loss of long-time funding is not unusual.
- Letting people go may trigger employment claims.

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Why Do Separated Employees Sue?

- Affected employees may not understand why they were selected for separation
 - This is often true when action is termination for cause or separation due to economic circumstances

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Separation Checklist

- Follow **closely** any and all internal policies and procedures, including those found in your personnel manual or employee handbook, or promises in communications with the affected employee.
- Articulate the objective, business-related reason for deciding which employee will be terminated.
- Consult with legal counsel experienced in employment matters.
- Consider using a separation agreement and release.
- Review your D&O (and EPLI) insurance.

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Separation

- What planning is required?
- What steps should you take in advance of a separation?




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Why the claims "bubble" in tough times

One possible reason:
the time required to find
new positions is greater
than it would be in a
strong economy



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While it is hard, it is not impossible to prevent all EPL claims...

Employers that do sufficient "legwork" prior to separating employees from their jobs stand the best chance of surviving administrative complaints and litigation largely unscathed.

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Employment Cases

- Defense costs can be substantial. Even if the plaintiff wins a small sum, he or she may be able to collect attorney's fees.
- What's the value/cost of an employment case? One insurer says: a year's pay is a good rule of thumb
- There seems to be greater risk/cost with employees in higher pay categories; one possible reason—it takes these employees longer to find new jobs.

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Wrongful Termination Theories

- Constructive discharge
- Discrimination
- Retaliation
- Violation of public policy
- Breach of contract
- Breach of the Family and Medical Leave Act



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Administrative Complaints

- Many future plaintiffs begin at the administrative level by bringing a claim with the state human relations commission or federal EEOC
- Check your D&O (EPLI) coverage to determine if your carrier regards administrative filings as "claims" under the policy
- If "yes" or "no" – if a complaint is filed with an administrative agency seek your carrier's help without delay
- Involving carrier at the earliest stages is in your best interest. Failing to do so may jeopardize your coverage.

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If the EEOC or your state human relations agency offers mediation...

...Consider it:

- Mediation reveals information about what claimant is looking for.
- Keep in mind that when the matter moves to litigation, it will be highly disruptive to your organization.
- Failing to settle claim at early stages can invite future claims.



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Trend Spotter

- Age Discrimination
- ADA
- Leased Employees
- Retaliation
- Religious Discrimination
- Gender Identity/Sexual Identity




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Age Discrimination

“Whether trying to retain or obtain a job, older workers may find themselves susceptible to unlawful age-based stereotypes and discrimination.”



— Acting EEOC Chairman Stuart Ishimaru, at a July 15, 2009 hearing on age discrimination

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Age Discrimination, cont'd. 2

- “Employers’ conscious or unconscious stereotypes about older workers may cause them to **underestimate the contributions** of these workers to their organizations. As a result, **older workers may be disproportionately selected for layoffs during reductions-in-force.**”
- “To then make matters worse, evidence suggests that **older workers who lose their jobs may have more difficulty finding another job than their younger counterparts**, due to age discrimination.”

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Age Discrimination, cont'd. 3

- Stereotypes about older workers prevail, despite contrary evidence
 - Common negative stereotypes include that older workers are more costly, harder to train, less adaptable, less motivated, less flexible, more resistant to change, perhaps less competent and less energetic than younger employees.
 - Does job performance decline with age? No! The opposite is actually true. Research shows that performance often improves with age, and, when declines are found, they tend to be small. (Source: Michael Campion, Purdue University)


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Recent Cases

Recent Supreme Court rulings appear to make it harder for plaintiffs to prevail on age discrimination claims

- *Gross v. FBL Financial Services Inc.* (June 2009) - plaintiffs must meet a higher standard of proof under the ADEA than under Title VII and other anti-discrimination statutes



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Managing the Risk of Age Discrimination Claims

- Recognize that most people—including your staff!—hold age stereotypes that negatively influence employment decisions.
- Work to ensure that all employment decisions begin with an analysis of the work to be done, and the knowledge and skills required to perform that work.
- Use only job-related standards to evaluate employees.
- Train employees about the existence and consequences of age stereotypes.
- Monitor the impact of employment decisions on protected groups, including older workers.

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Americans with Disabilities Act of 1990 & ADA Amendments Act of 2008 (Applies to employers of 15 or more employees)

- The ADA prohibits discrimination against qualified individuals with a disability (those who with or without accommodation are capable of performing the essential functions of the position). Those who are protected include:
 - Currently disabled individuals, persons having a record of impairment, persons who are perceived as having impairment or those who are related to or associated with persons who are disabled/perceived as disabled.

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ADA Amendments Act of 2008

- Effective January 1, 2009
- Attempt to “strike a balance” between employer and employee interests
- What's new?
 - Law now prohibits the consideration of mitigating measures such as medication, prosthetic, and assistive technology, in determining whether an individual has a disability
 - The law now covers people who experience discrimination based on a perception of impairment regardless of whether the individual experiences disability

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ADA Amendments Act of 2008: What's New?

- The law now provides that reasonable accommodations are only required for individuals who can demonstrate **they have an impairment that substantially limits a major life activity**, or a record of such impairment -- accommodations need not be provided to an individual who is only “regarded as” having an impairment.
- The Act now lists **major life activities**, rather than leaving that phrase open to interpretation.
- The non-exhaustive list of major life activities in § 4(4)(a) includes: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.

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Leased Employees

- Employees of a third party (the leasing company or “PEO”) who work at an organization in a specific capacity, usually defined by the contract with the leasing company.
- Leasing firm carries staff on the leasing company's payroll, and handle all the withholding, paperwork, and human resources administration issues, freeing the traditional employer from many human resources burdens.
- Arrangement appears to relieve the traditional employer of liability for employment law claims, including wrongful discharge claims, but in fact does not.

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Leased Employees, cont'd. 2

- **CAUTION:** several courts have found that employees who work under the direction and control of the on-site employer are deemed the common law employees of that employer, not the leasing company.
- Both the employer and the leasing company will have various legal responsibilities under federal and state employment laws for the leased employees.

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Leased Employees, cont'd. 3

- Even if the contract with the leasing company is structured so that the leasing company handles many of the traditional roles of an employer, the employer always retains liability for claims of discrimination and for the safety of employees in the workplace. Leased employees also are included in any count for coverage and nondiscrimination purposes if they've worked for the nonprofit for more than one year.

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Hot Topic - Retaliation

- What is a retaliation claim?
 - "You fired me because I complained about illegal conduct at the workplace."
 - "You fired me because I participated in an investigation, offering my views about an allegation of wrongdoing."

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Retaliation

- The EEOC reports that retaliation charges are at a record high level – second highest category of claims behind race discrimination, more prevalent than gender discrimination
- Plaintiffs’ attorneys love filing these claims –they are difficult to dismiss because they are so fact sensitive

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Government Contractors Beware

Whistleblowers are often protected in government contracts.

Example: Stimulus funds under the ARRA* come with protections for whistleblowers who complain that grant recipients have wasted or misused funds, violated laws or abused authority related to the use of stimulus dollars.



*American Recovery and Reinvestment Act

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Tips for Avoiding Retaliation

- Make sure your policies prohibit retaliation
- Make sure that supervisors know that retaliation is against the law and contrary to your policies
- Educate supervisors about what may be perceived as retaliation
- Discipline employees who retaliate!

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Tips for Avoiding Retaliation

- Adopt an internal complaint resolution process and communicate information about the process to employees
 - Having a policy can encourage employees to come forward with allegations of unethical or illegal conduct
 - > 49% of all frauds in nonprofits detected through tips
 - > Source: 2008 Association of Certified Fraud Examiners "Report to the Nation"
- Take complaints seriously; investigate thoroughly
- Close the loop – communicate the results of the investigation to the complaining party so that she doesn't assume that her complaint was ignored.

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Religious Discrimination

- Growing area of litigation since terrorist attacks on 9-11; growing sensitivity to religious diversity
- Federal law: Title VII of the Civil Rights Act of 1964 – applies to employers who have 15+ employees
- New compliance guidance for employers published by EEOC @ www.eeoc.gov/policy/docs/religion.html
- Important tool: open door policy
- Harassment policy should address religious and race discrimination as well as sexual harassment

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Gender Identity/Sexual Identity

- Gender identity refers to a person's belief about whether they're male or female. It is not how someone appears physically or their sexual orientation.
- Growing number of states protect gender identity.
- Resource for considering whether and how to draft policies that are sensitive to gender identity issues:
 - > www.hrc.org/issues/9610.htm
- According to HRC, 35% of Fortune 500 companies prohibit discrimination based on gender identity as of February 2009, compared to just three companies in 2000.

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"Four-Step Mediation Process"

- Initial employee meeting. Talk to employee about what they and the employer should expect through the transition process.
- Initial management meeting. A separate meeting with employee's supervisor to give them information about what's going to happen and to review employer's policy and procedures.
- Joint meeting with employee and supervisor. To go over transition plan and address any questions or concerns.
- Inform co-workers. Employees who will have regular contact with transitioning employee will need at least basic information about the individual's plans, along with a reminder about the organization's policies, expected behavior and how to deal with any concerns they might have.

Source: Dr. Jillian T. Weiss, principal consultant of Jillian T. Weiss & Associates

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"Fundamental Fairness" Formula Self Test

- Business Needs – is there a job-related or business need for the action?
- Notice of Performance Expectations and Consequences – was employee informed of employer's expectations and consequences of falling short?
- Documentation – has notice been documented?
- Opportunity to Correct – was time allotted reasonable?
- Adherence to Policies and Procedures
- Legal Compliance
- Objective Review

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Termination Checklist & Key Questions

- Follow closely any internal policies and procedures in the organization's handbook.
- Articulate the objective, business-related reason for deciding which employee will be terminated.
- Consult w/legal counsel, experienced in employment matters.
- Consider using a separation agreement and release.
- Review your D&O (and EPLI) insurance.
- Is there any contractual language that limits the circumstances in which you may terminate the employee?

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Key Questions

- Are there procedural requirements that you need to follow prior to termination that haven't yet been followed with this employee?
- Is there written documentation in employee's file of reason for dismissal or lay off?
- Are business-related reasons for termination articulated in writing?
- How old is employee? Did age play a factor in decision to terminate?
- Who will replace employee? Someone younger? Different sex? Different religion? Different sexual orientation? Different culture or nationality? Is there a pattern that could be described as discriminatory?

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Termination Checklist

- Was the employee aware that termination was a possibility or was likely?
- Is there documentation of that awareness?
- If the discharge is based on failure to follow policy or violation of policy, can you document that the employee was aware of the policy?
- Do you have proof that the employee received the personnel manual or policies that are relevant to his or her termination?

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More Key Questions

- Does this employee have any expectations, either because of promises made, or because of past practices of the nonprofit, that employment is assured for any specific length of time, or that terminated employees would receive any special treatment, such as severance pay?
- Have you discharged or disciplined other employees for similar reasons? Was the treatment consistent with this employee's treatment?
- Has the employee recently filed a workers' compensation claim, or a sexual harassment complaint or any other complaint of illegal conduct?
- What did the employee's most recent performance evaluation conclude about the employee's performance? Does the evaluation support termination?

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Other Issues to Consider

- Final Pay – it's never permissible to withhold a final paycheck as ransom for keys or other property
 - If the employee owes you money, you may deduct the amount owed from final pay ONLY if you have received a written authorization to do so from the employee.
- Service Letter Laws – some states require that employers provide a written reason for the termination within a defined period. It is a good idea to do so, even when not required.

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Exit Interviews

- Who? – Someone other than the departing employee's direct supervisor
- How? – In-person or by telephone
- Why? – Identify issues that warrant follow-up; confirm that employee did or did not experience or witness illegal discrimination; peace of mind

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New HR Series! Fall 2011



- Sept 15**—Top 10 HR Risks Facing Nonprofits
- Oct 19**—Planning & Conducting Effective Interviews
- Nov 17**—Managing Workplace Safety Risks
- Dec 15**—Background Checking: What You Need to Know

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Thank you!

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