The Correct Way to Terminate an Employee

By Noah Green,[1] Kelly Ryan,[2] and Martin Levy[3]

A. Introduction

Terminating employees is one of the most unpleasant aspects of a business owner or manager's job duties, but sometimes it is absolutely necessary in order to continue the business of the employer. But if terminating an employee is necessary, then it should be performed in the most ethical, and professional manner possible. Following the proper protocol in conducting the termination softens the blow to the terminated employee (who is very often surprised that they are being terminated); protects the business from potential litigation arising from the termination; and reassures the owner or manager that they did the right thing. Whether the terminated employee was a good worker or a bad worker is irrelevant. The decision to terminate an employee, once made, sets in motion a number of duties of the employer to handle the termination in a professional manner preserving the dignity of the terminated employee and protecting the employer's interests as the employer does not want to see an angry former employee down the road in court.

Below is a short primer on the usual issues, both legal and professional, that arise under California law surrounding the termination of an employee. This article collects some of the information and observations we have gathered over the years and which we use to assist our clients as they navigate their way through this difficult area.

B. Should You Terminate?

There are a wide variety of reasons why employers would terminate an employee. As long as those reasons are not impermissible in accordance with California and Federal law, then the question of whether or not to terminate an employee is dependent on the facts and circumstances of each case and the business judgment of the employer.

Once it has been decided that it is in the company's best interest to terminate an employee, certain practical business issues must be confronted along with the legal issues discussed later in this article. In the short term, the employer must decide how to distribute the terminated employee(s) existing projects and re-assign their job duties to other workers.

In the long term, the company will need to continue producing goods or services once the employee is gone, but, at least in the short term, will have fewer human resources available to produce those goods and/or services. A heavier burden will fall on the remaining workforce and

[1] Noah Green is an attorney at the Ryan Law Firm, a full-service law firm located at 80 S. Lake Avenue, Suite 500, Pasadena, California 91101. He can be reached by e-mail at ngreen@ryanattorneys.com and by telephone at (626) 568-8808.

[2] Kelly Ryan is also an attorney at the Ryan Law Firm, a full-service law firm located at 80 S. Lake Avenue, Suite 500, Pasadena, California 91101. He can be reached by e-mail at kryan@ryanattorneys.com and by telephone at (626) 568-8808.

[3] Martin Levy is the president of Human Resources 4U, a full-service Human Resources consulting company located at 1085 Bonita Ave., La Verne, CA 91750. He can be reached by email at hrexec@humanresources4u.com and by telephone at (909) 912-9995

they will be expected to increase their productivity. The company must anticipate how these additional stresses on the workforce, the company's finances, and public image will be addressed prior to implementing the termination. Like all business decisions, terminations must be thought through and properly planned out before being set in motion.

A "Termination Risk Analysis" can help you make the "go/no go" decision to terminate an employee.

Termination Risk Analysis

The decision to terminate an employee can raise many legal issues. The following checklist is designed to help you determine whether the termination is likely to lead to litigation. While there is no way to guarantee that an employee will not sue, using this risk analysis checklist can alert you to potential legal issues resulting in potential litigation. The identified issues could then be discussed with legal counsel before terminating the employee if you feel uncertain.

Step 1: Consider Your Company Policies and Documents

If applicable, review your Employee Handbook for policies which may limit your right to terminate, such as:

- Employment at-will policies
- Progressive discipline policies
- Internal dispute resolution or arbitration policies
- Termination policies requiring "just cause"

Is there a written employment contract? If so, what limits does it place on your right to terminate the employee?

If you have an established system/policy of progressive discipline (i.e., written warnings prior to termination), was the system followed in this case?

- If so, was the process of progressive discipline well documented? Documentation of the progressive discipline is important evidence should a legal claim arise.
- If not, can you show a valid reason for your failure to follow your own policy? For example, an employer might terminate a violent employee without warnings in order to protect other employees from harm.

If you have an internal dispute resolution system, was the employee given a fair chance to resolve problems under that internal system?

Do you have an established policy of giving a certain period of notice before terminating an employee? This policy may be in writing (i.e., Employee Handbook) or may simply be an unwritten policy that you have established by having given employees notice in the past.

Step 2: Consider Oral or Implied Contracts of Employment

Will this termination breach an oral contract of employment?

- An oral contract may have been created if the employee was told her job was secure, or that she would always have a job if she did a good job, or some other similar guarantee of employment.
- An oral contract can be created by anyone in the company with authority over the employee. This means that the company may be held to a supervisor's promise to an employee of secure employment, even if the supervisor did not have the company's authorization to make such a promise.
- Will this termination breach an implied contract of employment? An implied contract of employment may have been created by a combination of these factors:
- Long-term employment (although there is no specific number of years considered "long term," many attorneys use five years as a guideline).
- Evidence or indicators of job security for the employee such as promotions, commendations, lack of criticism of the employee's performance or other indicators of job security.

Step 3: Consider State/Federal Laws Protecting Certain Classes of Employees

<u>Americans with Disabilities Act</u>

- Is the employee physically or mentally disabled?
- If so, were attempts made to reasonably accommodate the employee's disability?
- Were reasonable accommodation measures well documented?

<u>Title VII / California's Fair Employment and Housing Act</u>

- Is the employee being treated in the same manner as other employees in similar situations?
- Have other employees been given more chances before being terminated for the same or similar reasons as this employee?
- If so, are there legitimate, non-discriminatory reasons for treating this employee differently than other employees?

<u>Pregnancy</u>

- Is the employee pregnant? Employees are entitled to four months off for pregnancy-related disabilities.

<u>Workers' Compensation</u>

- Has the employee filed a workers' compensation claim? Terminating an employee who has filed a claim, intends to file a claim, or has testified in a worker's compensation hearing could be considered workers' compensation discrimination.

Retaliation

- Has the employee reported any illegal activity of the company to a state or federal agency? Even if the company is not in fact acting illegally, the termination could be seen as retaliation for "whistle-blowing."

- Has the employee participated in any official investigation of the employer (i.e., wage or safety violation) or testified against the employer in an unemployment insurance or other hearing?

- Is the termination in retaliation for the employee's exercise of protected personal rights, such as freedom of speech or political activity?

Step 4: Review the employee's personnel file

- Is there sufficient documentation in the file to substantiate your reasons for termination? Examples include written warnings, performance reviews and attendance records.

- Is there anything in the file that might be evidence of an illegal termination? For example, a supervisor may have written a warning notice to the employee that her pregnancy was causing her to be absent too often. Legal counsel should be consulted if there are concerns.

Review personnel files for other employees who have similar problems. This comparison can point out potential discrimination issues. For example, could a female employee being terminated for attendance problems show that a male employee had the same number of absences but was not terminated?

Step 5: Consider the Employee's Eligibility for Unemployment Insurance

A terminated employee may be eligible for unemployment insurance unless the termination is for refusal to perform suitable work or for misconduct. Mere inability to perform the duties of the job is not considered misconduct.

The cost to your unemployment insurance reserve account may be far greater than the cost of providing the employee with necessary training or performance counseling.

Step 6: Consider Legal Ramifications of Not Terminating the Employee

Failing to terminate an employee who has been violent or threatened violence could result in harm to other employees and lead to employer liability.

Termination of an employee who has sexually harassed other employees may be necessary to fulfill an employer's legal obligations under sexual harassment laws.

C. Lay-Offs v. Terminations

It is important to distinguish between the two major types of terminations:

1) Lay-offs; and

2) Terminations.

Downsizing and the need to eliminate part of a company's work force to reduce overhead costs is an unfortunate but common reality in todays stressed economy. In these cases, the terminations are not classified as firings, but rather as lay-offs. One hallmark distinction between a lay-off and a firing is that the terminated employee's position is refilled, whereas a laid-off employee's position is eliminated not re-filled.

On the other hand, "firings" are, at their heart, triggered by an employee's poor job performance, rather than the company's economic health. As distinguished from a lay-off, in these types of terminations, another employee is hired to replace the vacancy created by the termination of the employee.

The distinctions between the two types of terminations create different considerations for the employer prior to carrying out the termination of the targeted employee(s):

1. Lay-Offs

If the business is suffering financially and needs to cut back on costs, the employer may have no choice but to lay off one or more employees. When this situation arises, the question becomes which employee or group of employees should be terminated.

When making these types of decisions, the employer must be careful to base its decisions on criteria that are neutral or blind to a person's age, race, national origin, religion, gender, physical disability, or sexual orientation (also known as "protected classes").[3]

For example, the decision becomes tricky if the employer chooses to terminate those employees with the highest salaries, as they may also be the oldest employees at the company, thereby creating issues of age discrimination.[4] In other words, an employer may be unwittingly discriminating against its employees on the basis of their age without intending to do so. Rather, the unintended consequence of laying-off the highest paid employees may have a *disparate impact* on the oldest employees and therefore amount to unlawful age discrimination.[5]

You can also have a disparate impact on any other protected category, therefore, for layoffs that involve larger numbers of employees, a formal, statistical, disparate impact analysis is recommended. This will highlight potential discriminatory layoffs for all protected categories.

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[3] California Government Code §12920.
[4] California Government Code §12941.1; Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317, 354, fn. 20
[5] California Government Code §12941.1; 2 California Code of Regulations ("C.C.R.") §7286.7(b).

To reduce the risk of discrimination claims, it is always best to base your decisions on sound business related criteria, policies and practices

2. Firings

If the decision to terminate lies not with the economic impact of continuing to employee a worker on the business' bottom line, but rather with the employee's job performance, the employer is well within its rights to terminate the employee. California, like most states, is an "at-will" employment state.[6] This means that that law presumes that an employer may hire or fire an employee whenever they like for almost any reason or no reason at all, including poor job performance. Stated differently, the common notion that an employer must have "good cause" for termination is false. However, there are many ways an employee can challenge the "at-will" relationship so it is generally better practice if there is a demonstrable legitimate business reasons for making your termination decision.

In these types of cases, information such as written performance evaluations and/or disciplinary notices should be gathered from employee's personnel file. If there is no formal documentation it might be better to postpone the termination decision that documentation is available. Such documentation may become valuable evidence later on to refute claims of wrongful termination.

The employer should also consider whether or not the employee has a legitimate excuse for their poor performance, whether or not employees who were guilty of similar performance issues in the past were also fired, and/or whether or not a lesser action such as a reprimand or write-up should be used in conjunction with a warning or probationary period.

A very important consideration for the employer to consider prior to termination is whether the employee's poor performance is due to a disability of the employee that with reasonable accommodation the employee could properly perform the essential job functions of their employment. If this is a consideration, the employer should immediately discuss the termination with competent legal counsel prior to the termination. These terminations are fraught with peril and often, when improperly performed, lead to lengthy and expensive litigation.

D. Can You Terminate?

Whether or not a certain employee can be terminated is an inherently legal question that is generally best answered with the assistance of counsel. As mentioned above, the general rule is that employers may generally terminate employment at will. However, there are important exceptions to this rule:

1. Restrictions Based on Contract

Some employees, such as executives and professionals, have written employment contracts which stipulate that the employer may only terminate the employee by way of a vote by the board of directors, for good cause, or for some other specific reason and cannot terminate

[6] California Labor Code §2922.

their employment at will.[7] If the employee in question has such a contract, it must be consulted before the decision to terminate is made. These types of employment contracts are rare however, and most employees do not fall into the class of workers who have the bargaining power to negotiate for contracts that give them rights beyond those given to all workers under the law.

Another form of contract which may limit the employer's right to terminate arises when the employee in question is a member of a union. If that is the case, the collective bargaining agreement or "CBA" usually controls the question of whether or not the employee may be terminated, delineates the circumstances under which they can be fired and the procedures that must be followed in order to do so.[8] In union cases, the CBA must be consulted along with an attorney familiar with its provisions and processes.

Though they are not actually legal contracts, employee handbooks and manuals may also spell out the specific grounds upon which an employee may be terminated and the procedures for doing so. Again, these documents must be studied before the decision to terminate an employee is made or carried out.

2. Restrictions Based on Law

Both state and federal law prohibit termination of employment on the basis of age, race, national origin, religion, gender, physical disability, or sexual orientation, as well as several other protected categories.[9] These characteristics may not be taken into consideration when making the decision to fire an employee. This seems like a simple enough rule to follow, but certain situations arise that can turn a clear bright line into a murky one.

For example, the physical disability issue, mentioned above, often arises when an employee goes out on medical leave. The federal Family Medical Leave Act and its concurrent California sister law, the California Family Rights Act, guarantee most employees up to 12 weeks (three months) of medical leave, to care for themselves, a sick family member, or maternity leave.[10] During that period of time, the employee may not be terminated because of their absence.

Similarly, if an employee is injured or ill but is still attempting to work under a doctor's restrictions, the employer must offer them reasonable accommodations for their disability or medical condition so long as they are still able to perform the essential functions of the job.[11] It is also impermissible for an employer to terminate an employee for filing a workers compensation claim due to a work related injury.[12]

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[7] Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654, 677.
[8] See The National Labor Relations Act, 29 U.S.C. §§151-169.
[9] California Government Code §12940.
[10] Provided that they have worked at a company for more than one year. See California Government Code §12945.2; 29 United States Code §2601.
[11] California Government Code §12940(m).
[12] California Labor Code §132(a).

What if the employee becomes pregnant? Under the California Pregnancy Disability Leave Law, a pregnant employee is entitled to four months of unpaid leave.[13] In such cases, pregnant employees are treated as being "disabled."

It is also unlawful to terminate an employee for complaining of discrimination or harassment either internally to or to outside governmental authorities. Similarly, it is unlawful to terminate an employee for reporting improper or illegal activities going on inside the company to outside governmental authorities.[14] The law views this as improper retaliation and protects such employees as "whistleblowers."

The foregoing list is not exhaustive and additional issues must be spotted and addressed by the employer before the decision to terminate is put into effect. Again, competent legal counsel is vital if the employer wishes to avoid incurring liability for wrongful termination.

E. How Do You Terminate?

1. How to Say It

There is no way to inform an employee that he or she is being terminated without the risk of inflicting some emotional pain. Thus, it behooves the employer to state the reason for termination with the utmost care. An employee whose feelings are badly bruised or who feels slighted will be more likely to seek out a lawyer and explore a wrongful termination suit. It is not necessary to give the reasons for termination at the time of termination. A short statement indicating that it is no longer in the best interest of the company to continue the employment relationship suffices. Nothing more should be said to the employee. In our experience, any explanation of why an employee is being terminated leads to further questions and the employee is not likely to believe what the employer is stating in any event. Rather, the employee is already starting to determine whether sufficient information exists to file for unemployment benefits as well as to determine whether the employer is firing them for "cause" or as a pretext for some other impermissible reason such as race or sexual orientation.

It is also considered good practice to have the employee's direct supervisor be the one to inform the employee of the termination, and have a member of the company's management team or human resources department and/or an attorney present as well. This will demonstrate that the decision was made collectively, rather than by an individual, but nevertheless with input and approval of someone who has firsthand knowledge of the employee's job performance. It may also reduce the risk of physical violence.

2. When to Do it

One school of thought holds that employers should carry out terminations on Fridays. Assuming that the employer's office is closed over the weekend, it will give all parties involved a few days apart to allow emotions to cool. It will also reduce the risk of an angry employee showing up the following day and disrupting work.

[13] California Government Code §12945(b)(2).
[14] California Labor Code §1102.5.

Another school of thought believes that terminations should be done early in the week in order to give the terminated employee an opportunity to start looking for a job, applying for unemployment benefits, and making other necessary arrangements as soon as possible, rather than stewing with frustration and anger and no outlet for positive action over the weekend.

A third school of thought believes that it should be done at the end of a pay period. Our experience is that it does not make a difference or change the outcome of the termination. Rather, once the decision to terminate an employee is made by the employer, the timing of the termination should be immediate and carried out prior to the end of the work day if possible. If not, then the termination should be conducted at the start of the following work day (for which the employer will still have to pay the terminated employee).

Letting someone go at the end of the work day is generally not a good idea. When a terminated employee is leaving the premises the same time as all other employees there is a potential for employee interactions that might encourage inappropriate behaviors and other avenues for litigation.

3. The Last Paycheck

All outstanding wages, salaries, expenses, and unused vacation pay owed to the employee must usually be paid immediately upon termination.[15] As such it is good practice to have the final paycheck available at the termination meeting to avoid claims of withholding pay.

Note that it is improper to condition receipt of the final paycheck upon an agreement by the employee to waive their right to bring suit, and tendering of the final paycheck should not be confused with severance pay. The employee is already legally entitled to all wages earned as of the date of termination and attempting to deprive them of such pay for any reason may be construed as in violation of the law.

An employee may only be asked to waive their right to bring a lawsuit if they are offered additional consideration in good faith, i.e., a good faith severance package.

4. Severance Pay Agreement

An employer may offer the employee additional payment in exchange for the employee's agreement to waive their right to bring a lawsuit for wrongful termination and related claims. This is commonly known as "severance pay."

Whenever possible, it is best to reach a severance agreement with the employee who is to be terminated. This will help ease the transition for both the employee and the company. In particular, it will help the employee by providing them with extra income to bridge the gap until

[15] California Labor Code §201 and §227.3. The only time an employee is not owed their final paycheck immediately is if they voluntarily quit without giving at least 72 hours (three days) notice, in which case the employer has 72 hours to pay them all outstanding wages, salaries and/or commissions. California Labor Code §202(a).

their next job. It also helps the employer by eliminating the possibility of wrongful termination lawsuit. All that said; the employer is not required to provide severance pay to a terminated employee unless there is a prior written employment agreement requiring such payment.

The best way to offer a severance package is to "fire" the person first then offer them the severance package. This makes it clear that the severance package is "consideration" for the employees' waiving there right to sue. Otherwise, the person has not been fired and you are just entering a negotiation about what it would take to get them to leave!

5. Return of Property, Keys and Passwords

At the termination meeting, the employer should ask for the employee to immediately turn over all company property that they have in their possession. This includes key cards, keys, and other devices used for employee access to the company's premises as well as any other company property that the employee has at their home or work station. The employer should gather all of the employee's personal belongings before the meeting and turn them over to the employee during the meeting. The terminated employee should not be permitted to return to their work area to "gather" their things or to speak to other employees.

The employee must also be notified that they have a duty to maintain the confidentiality of all company trade secrets and passwords.

Care should also be taken to delete and remove the terminated employee's name from company letterhead, stationary, e-mails, and/or websites following the termination.

You should also have the employee review all signed agreements from their time of hire to remind them you intend to enforce these agreements.

6. Future References

If the employee is leaving on good terms and has a history of good job performance, the employer should provide that information to future potential employers upon request.

If the employee is leaving on bad terms or has a history of poor performance, they will not be likely to use the employer as a reference on future job applications. If a fired employee still lists them as a reference, the employer should limit their comments to the bare minimum information, stating no more than the employee's dates of employment, job title, and salary. This will reduce the risk of liability on the part of the employer for defamation.[16] Indeed, it is a misdemeanor to make negative false statements about a former employee to a potential hirer.[17] However, you are protected from defamation if you give fair, honest balanced feedback regarding past employees.

The employer should also designate a contact person for the terminated person to communicate with at the company for payroll, benefits, tax records, unemployment benefits, and

[16] California Civil Code §§44-46.
[17] California Labor Code §1050.

references for future job applications. Typically, this should be the employer's head of human resources.

7. Whether To Contest Claims for Unemployment Benefits

A terminated employee may apply to the State of California's Employment Development Department (EDD) for unemployment benefits. If contacted by the EDD to confirm the lay-off, the employer should do so as soon as practical in order to facilitate the employee's receipt of benefits.

If the employee was terminated for cause or quit their job however, that must also be reported to the EDD, even if it may jeopardize the former employee's ability to collect such benefits.[18]

In addition, there are two forms you must give all terminated employees. On is the EDD booklet (ED2320) and the other is the "NOTICE TO EMPLOYEE AS TO CHANGE IN RELATIONSHIP" (ISSUED TO PURSUANT TO PROVISIONS OF SECTION 1089, CALIFORNIA UNEMPLOYMENT INSURANCE CODE)

8. COBRA

Under the Consolidated Omnibus Budget Reconciliation Act of 1985, commonly-referred to as "COBRA," companies with 20 or more employees that provide health insurance to their employees must give terminated employees the opportunity to remain on the policy for 18 months after their termination, provided that the employee pays for the premiums themselves. If you have between 2 and 20 employees, you may have to provide this same benefit under Cal-COBRA.

F. Do You Need an Attorney?

The decision to utilize an attorney really depends on the facts and circumstances surrounding the termination, the type of termination, whether any of the issues described above are present, the sophistication of the employee, and the amount of animus expected at the time of termination. An attorney can provide advice, draft severance agreements, and in some circumstances can attend the termination meeting and/or perform the termination of the employee. Of course, if an employee has filed a complaint against you or your company with a state agency or in court, you will need legal representation.

[18] California Unemployment Insurance Code §1256.