LAW OFFICES
OF
JOEL L. SCHWARTZ

333 Tilton Road
Northfield, NJ 08225
ESQinAC@aol.com

Phone: 609.677.9454
Facsimile: 609.677.9455
Cellular: 609.892.3237

Joel L. Schwartz, Esq.
LL.M. Taxation
Member PA and NJ Bar

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LEGAL NOTICE

This Wrongful Termination Checklist is designed to help employers and employees evaluate whether a termination or layoff complies with legal standards. Please note that the law of wrongful termination varies state by state, and ultimately is decided on a case by case basis. As a result, it is impossible to write a checklist that will tell you definitively whether a particular termination is legal.

What we have attempted to do here is set out the best practices that an employer should follow to avoid legal liability. For employees, if your employer has followed these practices, then you know it is likely that the termination was not wrongful. If these practices were not followed, then the termination falls into a gray area and it may be worthwhile for you to contact a local attorney about your rights.

There are numerous applicable state, federal and local laws, as well as contractual or other legal obligations to consider that may require modification of this Checklist. This Checklist may be affected by changes in statutes, regulations or cases. Therefore, it cannot be and is not warranted.

Wrongful Termination Checklist

"At-Will" Employment

Most employees are presumed by law to be "at-will." Exceptions: government, Union, or employees with written contracts for a specified period of time.

If employees are "at-will," legally they can be fired for any reason, or no reason. However, courts have created exceptions to at-will employment in 3 situations:

If the employee is "long-term" (generally, more than 5 years) there may be an implied contract that the employer must have good cause to terminate.

If the employer has written or unwritten policies that it always follows before terminating, then it can be required to follow those policies in all terminations.

The employee cannot be fired for reporting illegal conduct, or for reasons related to the employee's gender, age, race, religion, citizenship, disability, family or medical leave, veteran status, or (in some states) marital status or sexual orientation.

If you are an at-will employee, and you do not fall into one of the 3 exceptions listed above, you may not have a claim for wrongful termination. However, the only way to be sure is to contact a local employment attorney.

If you are an at-will company, you should follow all the steps below in this Checklist to avoid the possibility of a lawsuit claiming the termination falls into one of these exceptions. This Checklist also insures that you are being fair.

Part I — Terminations

What is the reason for termination?

If this is a layoff or reduction in force, go to Part II, below.

There should be a legitimate business reason for the termination, supported by documentation.

333 Tilton Road
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Legitimate business reasons fall in to three categories: poor performance, poor attendance, and misconduct.

Article I. Poor performance is where the employee is not meeting job requirements.

Article II. Poor attendance is where the employee misses work by arriving late, leaving early, taking long breaks, or calling in sick.

Article III. Misconduct is where the employee violates an employer rule, for example, dishonesty.

Poor Performance

1 The job requirements should be documented and should be specific. A written job description is best.

2 The job requirements should be the same for all other people holding the same job. If not, the legitimate business reason for requiring only this employee to meet these requirements should be documented.

3 The employee should have been notified, in writing, of what job requirements are not being met. The notification should be specific about what the employee must do to meet the requirements, e.g., produce 100 widgets per hour, sell $100,000 in product next month, complete a writing assignment in one week to department standard specifications, etc.

4 The employer should be able to prove with documentation that the employee is not meeting the job requirements. This may include examples of the employee's work, re-work orders, complaints received, etc.

5 The employer should be able to prove that all other people holding the same job are meeting the job requirements. (If other employees are not meeting the job requirements, they should also be terminated, or else this employee should not be terminated.)

6 The employer should be able to prove that, in similar circumstances, other employees with similar performance problems were terminated in the past. If not, this employee should not be terminated now.

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7 The employer should give the employee reasonable help in order to meet job requirements, This may include sending the employee to a training class, meeting with him / her frequently to review progress, giving the employee examples of acceptable work, etc.

8 The employer should ask the employee for other ideas on what help he / she needs to meet the job requirements. The employer should ask the employee if there is anything within the employer's control (e.g., other employees) that is preventing the employee from meeting the job requirements.

9 The employer should also be open to any personal issues the employee brings up concerning the employee's own or a family member's serious health condition or disability. If these issues are raised, the employer should immediately seek competent legal advice about giving the employee leave or other reasonable accommodation.

10 The employer should give the employee reasonable time to meet the job requirements after the employee has been notified, in writing, that they are not being met and been given help to meet them. The employer should give at least as much time as other employees with similar performance issues have been given in the past. Generally, give a minimum of 30 days. For long-term employees, give as much time to improve as a new employee in the same job would be given to get up to speed. For employees with many years of seniority, you may want to allow as much as one month to improve for every year of employment.

11 The employer must follow all its own policies and procedures for poor performance problems, whether or not those policies are written in an employee handbook or other document. The company must also comply with any Union contract in effect. If the employer has a policy, for example, of putting the employee on a formal performance improvement plan, then the employee must be placed on such a plan.

12 The employer should give the employee a final written warning that failure to meet the job requirements by a certain date will result in termination.

13 The employer should continue to coach, counsel, train and otherwise help the employee to meet the job requirements.

14 If the employee does not meet the job requirements in the stated time, then it is fair to fire, giving the employee the truthful reasons for the termination.

15 Security and logistics are considered.

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16 Employers should take reasonable security measures to protect people and property. Employers must notify certain federal and state agencies of the termination, and some states require employers to provide employees with letters stating the reason for termination. The reason given should be accurate, and can be general, such as "Employee did not meet standard."

Poor Attendance

1 The standards for attendance and punctuality must be documented and must be specific. For example, employees accrue one day of sick leave per month, and cannot take more days off than accrued; employees must be at their work stations ready to work at starting time; breaks are 15 minutes; etc. (All employees, exempt and non-exempt, can be held to attendance standards.)

2 The employer's standard for attendance must conform to all state and federal laws concerning time off for disability and family and medical leave. Generally, for employers with more than 50 employees, if an employee or the employee's family member has a serious health condition, the employee is entitled to take off up to 12 weeks unpaid leave per year (by the hour, day or week). For employers with 15 or more employees, if the employee has a disability, the employee is entitled to take a "reasonable" amount of time off, which could be more than 12 weeks.

3 The employer's standard for attendance must also conform to all state and federal laws concerning time off for jury duty, military service, children's school activities or other reasons.

4 The employer should have documentation to prove the employee is not meeting attendance standards. This can be in the form of the employee's time card, the manager's notes, key card records, etc.

5 The employer should have the same documentation to prove that all other people holding the same job are meeting the attendance requirements. If other employees are not meeting the requirements, they should also be terminated, or else this employee should not be terminated.

6 The employer should be able to prove that, in similar circumstances, other employees with similar attendance problems were terminated in the past. If not, this employee should not be terminated now. However, the employer can tell this employee and announce to all employees, that in the future this kind of attendance abuse will result in termination.

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7 The employer should ask the employee if there is any reason that attendance standards are not being met. If the employee brings up the employee's own or a family member's serious health condition or disability, the employer should immediately seek competent legal advice about giving the employee leave or other reasonable accommodation.

8 The employer must follow all of its own policies and procedures for attendance problems. If the employer has a policy, for example, of giving an employee 30 days to improve attendance, 30 days must be given.

9 The employee must be told, in writing, of the standard, that it is not being met, and that if attendance does not improve immediately, the employee will be terminated. It is not necessary to give the employee a reasonable time to improve attendance.

10 If the employee continues to miss work, the employee can fairly be terminated.

11 Security and logistics are considered. Employers should take reasonable security measures to protect people and property. Employers must notify certain federal and state agencies of the termination, and some states require employers to provide employees with letters stating the reason for termination. The reason given should be accurate, and can be general, such as "Employee did not meet standard."

Misconduct

1 Most standards of conduct should be documented. This can be in a policy and procedure manual or memo. Some standards are so obvious, they do not require documentation. For example, it is legal to fire an employee for stabbing another employee, even if the "no stabbing" policy is not documented. Typically prohibited in written standards of conduct are: fighting, horseplay, dishonesty, theft, gross negligence, violation of employer confidentiality, harassment, discrimination, conflict of interest, insubordination, misuse of alcohol or drugs, falsifying company records, causing a safety or health violation, possession of firearms or explosives, destroying or damaging property, or any other conduct that is not in the best interest of the employer.

2 If an employee is accused of misconduct, an investigation must be conducted. The employee can be suspended from work pending the outcome of the investigation. The investigation should include talking to any witnesses, and documenting the specific facts they give, and obtaining any documentation that tends to prove the misconduct such as cash register receipts, surveillance videotapes, printouts of e-mail, telephone records, etc.

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3 The investigation must include asking the employee for the employee's side of the story. Union employees must be allowed to have a union representative present at this meeting. Under some circumstances, other non-supervisory employees may be entitled to have a co-worker present at this meeting. If an employee asks to bring a co-worker, the employer should immediately seek competent legal advice. During the meeting the employer must listen in good faith, and should not yell, threaten, pressure, minimize, ridicule or otherwise intimidate the employee. The employer should ask for any documentation the employee may have. If it is one employee's word against another's, the employer should investigate whether either employee, especially the employee making the allegation, has a motive to lie.

4 The employer should ask the employee if there is any reason that the standard of conduct is not being met. If the employee brings up the employee's disability, the employer should immediately seek competent legal advice about giving the employee reasonable accommodation. Although all employees can and should be held to standards of conduct, employees with disabilities in some situations must be reasonably accommodated.

5 The employer must treat this situation consistently with similar situations with other employees in the past. If the employer has not terminated in the past for such misconduct, the employer should not now terminate; however, the employer can tell this employee and announce to all employees, that in the future this misconduct will result in immediate termination.

6 The employer may consider other misconduct by this employee in deciding whether to terminate. An excellent employee with a perfect work record who makes one mistake should be treated more leniently then a below average employee with a record of poor attendance and a history of other misconduct.

7 The employer must make a decision, in good faith, based on all the above information, whether immediate termination is appropriate.

8 In cases of gross misconduct, immediate termination is appropriate. In lesser cases, the employee should be told, in writing, of the standard, that it is not being met, and that further misconduct will result in termination. (It is not necessary to give the employee a reasonable time, or multiple chances to improve.)

9 Security and logistics are considered Employers should take reasonable security measures to protect people and property. Employers must notify certain federal and state agencies of the termination, and some states require employers to provide employees with letters stating the reason for termination. The reason given should be accurate, and can be general, such as "Employee did not meet standard."

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For frequently asked questions about terminations, go to Part III.

Part II - Layoffs and Reductions in Force

Layoffs or reductions in force (RIFs) are undertaken by employers to reduce costs. They usually result in a significant proportion of the workforce being terminated. If only one person is laid off in a company with more than 25 workers, it may in fact be a termination. In that case, use the checklist in Part I instead.

1 Existing policies are reviewed. If there are any company policies and procedures for layoffs, or Union contracts, they must be followed precisely. If there is no company policy, or the policy is not complete, the following steps should be followed.

2 A layoff plan is created. The employer should create a layoff plan with clear business justifications.

Job functions that can be eliminated are identified, based on legitimate business reasons.

Examples: If a contract is lost, all jobs created to fulfill the contract are eliminated. When two companies merge, duplicate positions are eliminated. When a product is discontinued, associated jobs are eliminated.

To the extent possible, employers should freeze hiring during the layoff period. It is permissible to "lay off" new hires before their start dates, to keep existing employees from being laid off. Employers also should minimize or eliminate the use of independent contractors and temporary agency employees.

The employer decides criteria for picking individual employees for layoff in the positions targeted for elimination.

Examples of legitimate business reasons that may be used are:

Seniority: the employees who have been with the company the longest can be kept; or the employees of the acquiring company can be kept.

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Performance: good performers can be kept and poor performers can be laid off. (Performance should be documented in regular performance appraisals independent of a layoff. However, creating performance documentation at the time of the layoff is acceptable, as long as it is true.)

Skill set: employees who can cover more job responsibilities can be kept. However, employees should be asked about their skill and experience at prior employers, and skill sets should be documented.

Flexibility: employees who have proven to be adaptable to change, who engage in continuous learning and who are enthusiastic about new ventures can be kept; these qualities should be documented with specific, objective, verifiable facts.

Other: other reasons for picking employees for layoff are acceptable as long as they are justified by legitimate business (economic) reasons.

The same criteria should be used for employees in the same job functions. However, the employer may use different criteria for the same job functions in different departments. For example, criteria for picking engineers in Research & Development may be different than for engineers in Design.

3 Demographics are analyzed.

After making its initial layoff decisions, management should analyze the demographics of the group being laid off compared to the group remaining, to ensure there will not be a disparate impact based on age, race, sex, or the other characteristics protected under discrimination laws.

For example, if the group to be laid off has an average age of 52, while the retained workers have an average age of 35, the employer should re-review the layoff selections to make sure it has a solid, documented rationale for each selection and retention. If not, the layoff decisions should be revised.

4 Notice may be required.

If the company's employee handbook, Union contract or other policies require a certain amount of notice, they must be followed exactly.

The federal WARN Act requires 60 days notice be given (or pay in lieu of notice) if the following occur:

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A "plant closing," defined as a permanent or temporary shutdown of a site, such as a branch office, or a unit, such as an engineering group associated with a product line, no matter how many employees are affected.

A "mass layoff," where either (1) at least 33% of all employees (but at least 50 employees) are laid off or (2) 500 or more employees are laid off. All layoffs within any 90 day period are aggregated together to determine if a mass layoff has occurred.

5 Security and logistics are considered.

Employers should take reasonable security measures to protect people and property. Employers must notify certain federal and state agencies of the termination, and some states require employers to provide employees with letters stating the reason for termination. The reason given should be accurate, and can be general, such as "Reduction in force."

Part III -- Frequently Asked Questions

1 The employer didn't follow these steps. What are the employee's rights? If the firing or layoff did not follow these steps, it probably is unfair. Whether it is illegal is another question. Sometimes the law sets a lower standard than this Checklist. If these steps were not followed, the termination falls into a gray area. An attorney who specializes in employment law should be consulted immediately.

2 Can the employer give a bad reference for a terminated employee? An employer can give references to other employers, as long as they are truthful. If an employee is fired for misconduct, an employer can say that. However, employers who wish to avoid potential lawsuits usually limit the reference information they give out to job title, dates of employment, and confirming final salary.

3 When is a firing or layoff illegal because it is discriminatory? Discrimination is proved by showing that an employee is being treated differently from other, similarly-situated employees, without a legitimate business reason, on the basis of gender, race, national origin, citizenship, age, religion, veteran status, disability, sexual orientation or other protected characteristic. If this employee is treated consistently with other, similar employees, if the employer's policies and procedures are followed, if the employee is allowed to give the employee's side of the story, and the other steps above are followed, then the firing is not discriminatory. If these steps were not followed, it may be because of illegal discrimination, or it may be due to mere incompetence, which generally is not illegal. Consult with an attorney about your particular situation.

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4 What if the employee was harassed before the termination? If the "harassment" was micro-managing the employee to get work done or to be on time, it is not illegal. But the employee may have a claim for discrimination if derogatory comments were made about the employee's gender, race, national origin, citizenship, age, religion, veteran status, disability, sexual orientation or other protected characteristic.

5 What if the employee blew the whistle on the employer? It is illegal in almost every state to fire or layoff employees for reporting violations of health and safety and other laws. However, if all the above steps are followed, it will be difficult-- if not impossible --for the employee to prove retaliation.

6 What if the employer listens to the employee's side, but can't decide? In minor situations, the employer may decide not to decide, and just remind the employee what standards must be met and save the notes from the investigation. When an allegation of gross misconduct is made, the employer must make a decision. As long as the employer listens fairly to both sides, weighs the evidence in good faith, and makes an honest decision, that decision will be upheld by the courts, even if later it turns out the employer believed the wrong person. Investigations can be tricky and we recommend in situations where serious allegations are made that an attorney be consulted by the employer.

7 The employee feels that the employer is setting impossibly high job standards to meet. Is that illegal? As long as the employer sets these high standards for everyone in the same or similar jobs, and enforces them consistently, it is not illegal.

8 When can employees get unemployment compensation? Generally, employees are entitled to unemployment if they are laid off for lack of work or job elimination or terminated for inability to perform up to standard. Those fired for proven gross misconduct are not entitled to unemployment. Workers who are terminated for attendance abuse or minor misconduct may receive full, partial, or no unemployment benefits, depending on the facts and the law of your state.

9 What about severance pay? Unless company policy, the employee handbook or a Union contract require it, terminated workers are not entitled to severance pay. However, all employees are entitled to be paid promptly for all time actually worked, up to termination. In some states, that includes accrued vacation pay. Some states require employers to pay the final paycheck on the day of termination; check with a local attorney or your state's Department of Labor. Also, if employees are laid off and the layoff is subject to the WARN Act referred to in the Checklist, the employees are entitled to 60 days notice, or 60 days pay in lieu of layoff.

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10 Is it legal to require employees to sign releases of all claims against the company in order to get severance pay? It is not legal to make an employee sign a release to get paid for time worked, or to receive severance called for in a Union contract, employee handbook or company policy. If the employee receives more than that (extra severance pay, extended medical benefits, payment of COBRA premiums, outplacement assistance, greater retirement benefits, etc.), then a release and waiver of claims may be appropriate. There are special legal requirements for a release; check with an employment lawyer.

11 The employee signed a release. Can the employee come back and sue anyway? Generally, employees cannot sue once they have signed releases. However, the release may be invalid if it was signed under duress. Examples of duress are when an employee is forced to sign a release without being given the opportunity to consider it. Duress also may be found if the employer refuses to give the employee the last paycheck unless the employee signs the release. For employees over the age of 40 who are releasing claims of age discrimination, there are additional legal requirements which must be followed in order for the release to be valid. These include that the employee must be given 21 days to sign the release, and be informed in the release itself of the right to contact an attorney to review the release.

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