





At Will Status

At Will Caveat

• But employees cannot be terminated for illegal reasons.



Discrimination

- The employee's protected class or protected conduct....
- ...was a motivating factor...
- ...in making an adverse personnel decision...
- ...or in harassing the employee.

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Discrimination Claims

Beware Of P	rotected Classes
Race	Religion
Color	National Origin
Sex	Ancestry
Age	Marital Status
Disability / Pregnancy	Sexual Orientation
Genetic Characteristics	Military Status

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Retaliation/Whistleblowing Beware Of Protected Activity Leave Absence Reporting Illegal Conduct Workers' comp Disability Accommodation Exercising Legal Discrimination Complaints Ogletree Dokins

How Can It Happen To Me?

- Lack of diversity
- Untrained supervisors
- Rogue supervisors
- Inadequate personnel policies
- Inconsistent/haphazard discipline
- Lack of communication
- Sloppy recordkeeping
- Bad timing
- Salting the wound



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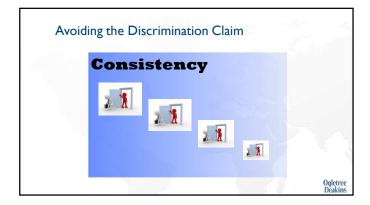
Before the Need to Terminate Arises



Clear Rules and Procedure

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Dealing With Red Flags Legitimate business justifications Bide time Double check Legal counsel Severance agreement

Common Discipline Pitfalls

- Too lenient
- Too harsh (precedents)
- Uneven (inconsistent)
- Late
- No specific examples
- Narrow focus
- Failure to obtain employee acknowledgment

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Verbal Warnings • Witnesses • File Notes • Incorporate Into Written Warnings



Types of Supporting Documentation:

- I. Performance Reviews
- 2. Counseling Memo
- 3. Disciplinary Reports



Documenting Discipline

- Document the Investigation
- Document Statements
- Misconduct:The 5 W's
- Record of Counseling
 - Employee comments
- Employee acknowledgment



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Performance Improvement Plans

☐ Preserve "At-Will"

- 60 day PIP does not guarantee 60 days

☐ Avoid Discrimination Claims

- Use PIPs uniformly, according to handbook
- Use objective standards (job descriptions)
- Fairly identify deficiencies
- Propose reasonable method to improve

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Performance Improvement Plans

☐ Be Careful What You Wish For ...

- \dots Be prepared to follow through
- Fire the employee (or other discipline consistent with policies)
- Retain the employee who meets PIP objectives

☐ Should be used only for performance problems, not misconduct

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Performance Reviews

General considerations for performance reviews:

- ➤ Training supervisors/managers
- > Consistency (over time & among employees)
- ➤ Candidness and Accuracy
- > Job-related criteria
- \succ Effective rating or scoring systems (objective and subjective)
- Comments, including at least one area which needs improvement
- > Opportunity for employee response
- ➤ Bonuses
- ➤ Wage increases

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Performance Reviews

How Reviews Minimize Liability

Create a record that can:

- Justify terminations/ layoffs
 Track record of poor
 - Track record of poor performance
 - Notice to employee and opportunity to improve
- Demonstrate Equal Treatment (vs.
- Discrimination)
 Promotions
- Pay
- Disparate treatment

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Termination Due Diligence

- Supervisors, managers, HR agreement
- · Policies followed
- · Protected classes considered
- Fair and Reasonable
- · Employee's response



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Final Meeting Checklist

- Compliance with written policies/procedures/agreements
- Payment of wages/accrued unused benefits
- Advances/loans
- Unpaid expenses
- Stock options
- Severance package
- Return of company property
- Outplacement
- Release agreement?



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Severance Agreements



- Discretionary benefit per employer policy
- Usually offered to employees terminated involuntarily
- Should contain release of all claims
 - Exception cannot release wage claims per LC 206.5

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Discharge Letters

- Purpose:
 - Notice to employee
 - Contemporaneous evidence
 - Reduce risk of litigation
- Careful draft and review
- Giving a reason
 - Legal consequences of being too specific?
- Legal consequences of being too general?



Final Meeting Considerations

- Select time and place to conduct
- Make checklist of points to cover
- Have third party witness attend
- Be direct- do not "sugarcoat"
- Do not argue or become defensive
- Allow employee opportunity to respond
- Memorialize for personnel file



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Exit Interviews- should you have?

Valuable resource for employers to obtain information from the employee one last time, if done correctly.

- Exit interviews are a reality check
- Exit interviews offer opportunities to deliver important information



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