

Be deliberate in making decisions to terminate employment

Memphis Business Journal - by Barbara Richman

Termination of employment is frequently referred to as “the capital punishment of the workplace,” since it is the strongest action that an employer can take in administering discipline. Although an employee’s conduct may warrant this final step in the disciplinary process, any decision to end the employment relationship should be made in a deliberate manner with an understanding of its potential impact on the terminated employee and the organization.

An employee who is terminated faces immediate uncertainties involving loss of income and prospects for subsequent employment. These are serious concerns at any time. However, the implications are far greater in the current, challenging economic environment where there is a scarcity of job openings.

Organizations face increased legal risks when employees are terminated. In the event of charges or litigation, employers will incur both tangible and intangible costs, including legal fees and time taken away from day-to-day job responsibilities.

Although these outcomes underscore the need for employers to be attentive to the potential impact of their decisions, these consequences should not deter management from taking appropriate actions to terminate employees who do not abide by organizational expectations for conduct or performance. Failure to terminate may create precedents that restrict management’s future disciplinary options.

The following are questions to assist employers in determining whether they are approaching decisions to terminate employees in a deliberate manner:

1. Does the employee’s conduct or performance warrant termination or should a lesser form of discipline be considered?
2. Has management taken mitigating circumstances into consideration and, if so, determined that the decision to terminate is still warranted?
3. Is the decision to terminate based on facts obtained in an objective investigation rather than on unsubstantiated perceptions and assumptions?

4. Did the employer's investigation meet reasonable standards for an effective workplace investigation, such as being conducted promptly, questioning witnesses that may have pertinent information, and allowing the employee being investigated to offer an explanation?
5. Is sufficient documentation in place to support a decision to terminate and, if so, is the documentation accurate, specific and objective?
6. Is the decision consistent with prior decisions involving similarly situated employees, and if not, is the employer's reason for the difference in treatment justifiable?
7. Has the employee's length of service and prior record, including performance appraisals, been reviewed as part of the decision-making process?
8. Was the employee given advance notice of the potential disciplinary consequences of the misconduct and, if not, was the offense so serious that any employee would be expected to know that this behavior (e.g. assaulting a supervisor or co-worker) could result in termination?
9. Prior to making a decision, did management consider federal, state and local employment laws that may be applicable in this specific situation?
10. Since discrimination is a factor to take into account in any termination involving a member of a protected class, did management determine whether the employee is in a covered status and, if so, examine the termination decision to rule out discrimination based on applicable legal protection(s), such as race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information?
11. Has management reviewed the decision to terminate the employee and concluded that there is no retaliation based on the employee's involvement in a protected activity, (e.g. filing an internal or external charge of harassment) and/or on participation in an investigation or lawsuit?
12. If the organization has adopted an employment-at-will policy based on applicable state laws, is the decision in keeping with that doctrine which allows the employer (and employees) to end the employment relationship at any time and for any or no reason, unless the termination violates other applicable federal, state, or local laws?
13. Has the organization taken reasonable steps to provide training for an employee with performance issues?
14. If the employer has a need to remove the employee from the workplace, has management considered a suspension pending final determination rather than terminating in haste?
15. Have relevant organizational documents (e.g. policies, employment contracts, prior disciplinary notices given to the employee) been reviewed to determine whether they support a decision to terminate?

16. Has the employer viewed the decision from the perspective of an opposing attorney to determine if it withstands that degree of scrutiny?

17. Has management followed organizational procedures for terminating employment, such as obtaining the agreement of all parties required for approval?

18. Has the employer considered seeking the input of an employment attorney prior to reaching a decision to terminate the employee?

BARBARA RICHMAN is a senior consultant with HR Mpact, a Memphis human resource consulting firm. She can be reached at (901) 685-9084, (901) 496-0462 or barbara@hr-mpact.com.