

**EMPLOYMENT LAW**  
**PRACTICAL CONSIDERATIONS FOR TERMINATION**

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**I. INTRODUCTION**

An Employer must take into consideration many factors before discharging an employee. By attending to these considerations, the Employer can ensure that Federal and State statutes are complied with, and that records are preserved in case of a lawsuit, administrative proceeding, or regulatory action. Clear cut employment procedures also enhance and help to preserve the employer/employee relationship. Below is a non-exhaustive list of factors to consider before terminating or disciplining an employee, and what to be prepared for afterward.

**II. BEFORE TERMINATION**

**A. Is the employee an At-Will or Contract Employee?**

1. Ohio is an at-will state. At-will means an employee is employed “at the convenience or sole decision of the employer.” *Kuhn v. St. John & Westshore Hosp.*, 50 Ohio App. 3d 23 (1989).
  - a. An at-will employee can be fired at any time with or without reason/cause so long as the basis for termination is not illegal or a violation of public policy.
  - b. Most employees are at-will.
2. An employee has an employment contract when:
  - a. An express written or oral employment contract exists;
  - b. A contract can be inferred from the circumstances, *Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100 (1985); or

- c. Promissory estoppel, e.g., the employer made a promise upon which the employee relied to his/her detriment. *Id.*

**B. File Documentation/ Review of Personnel File**

- 1. Is the employee's performance deficiency documented?
  - a. Is there any evidence of performance or behavioral problems?
    - i. Was the employee previously warned?
    - ii. Was the employee given adequate training and/or the same training as other employees?
    - iii. Has the employee's prior disciplinary history been carefully reviewed?
    - iv. Was the employee properly warned and given adequate time to improve her performance or behavior? Was the employee given a probationary period?
  - b. Is the reason for termination documented?
    - i. Was there an investigation and, if not, should there have been?
    - ii. Did the employee tell her side of story, was she given an opportunity to tell her side of the story? Are there written statements by witnesses or the employee?
    - iii. Is there enough evidence to establish that the employee violated a rule or policy?
  - c. Is the termination consistent with the employee's prior discipline record and the employer's response to similar discipline issues?
- 2. Employee evaluations
  - a. Does the file contain employee evaluations?
  - b. Are the evaluations accurate?

- c. Were the evaluations reviewed and acknowledged by the employee?
3. Did the employee acknowledge the handbook or company policies?
    - a. Did the employee sign an acknowledgment form indicating that she read and understood the handbook?
    - b. Did the employee sign an acknowledgment form indicating that she read and understood the harassment/discrimination/retaliation policy?
    - c. Is the offense for which the employee is terminated set forth in the handbook as a terminable offense?
    - d. Is a progressive discipline policy in place?
  4. Does the file appear to be “papered?”
    - a. Are documents created to protect against a discrimination claim?
    - b. Based on the number of lawsuits (and expense of defending a lawsuit), it is better to document adverse employment actions or discipline.
  5. Did the organization periodically perform human resource audits? Is the organization in compliance with regulatory procedures?

**C. Is the Employee a Member of a Protected Class?**

A number of federal and state laws restrict the right to terminate employees in many cases and afford certain protections to those identified as members of a protected class. The following is a non-exhaustive list of common protected classes and relevant cases.

1. Race/Color
  - a. Title VII of The Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.* (Title VII);
  - b. Section 1981 of The Civil Rights Act of 1866, 42 U.S.C. § 1981;
  - c. The Ohio Civil Right Statute, Ohio Rev. Code § 4112.01 *et. seq.*

2. Religion
  - a. Title VII
  - b. The Ohio Civil Rights Statute
3. National Origin/Ancestry
  - a. Title VII
  - b. The Ohio Civil Rights Statute
4. Age
  - a. The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et. seq.*
  - b. The Ohio Civil Rights Statute
  - c. Is the employee over 40?
    - i. Is the employee being replaced by someone 10 or more years younger?
    - ii. ADEA does not protect employees from reverse age discrimination. The ADEA is a remedy for unfair preferences based on relative youth, leaving complaints of the relatively young outside the statutory concern. *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004).
5. Sex
  - a. Title VII
  - b. The Equal Pay Act (EPA), 29 U.S.C. § 206 *et. seq.*
  - c. The Ohio Civil Rights Statute
  - d. Title VII and the Ohio Civil Rights statute protect both men and women from all forms of sexual harassment in the workplace, including same-sex harassment. *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998); *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St. 3d 169, 2000-Ohio-128.

6. Pregnancy

- a. The Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. §2000e (k)
- b. The Ohio Civil Rights Statute
- c. “The Supreme Court has held that the PDA prohibits an employer from discriminating against a woman because of her capacity to become pregnant.” *Kocak v. Community Health Partners of Ohio, Inc.*, 400 F.3d 466 (6th Cir. 2005).

7. Sexual Orientation

- a. The traditional view is that it is not protected or covered under Title VII, but some states afford protections.
- b. The Second Circuit Court of Appeals held that Title VII does not prohibit harassment or discrimination because of sexual orientation. *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000).
- c. The United States Supreme Court held that sex discrimination consisting of same sex harassment is actionable under Title VII. *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998)
- d. The Sixth Circuit Court of Appeals held that a government employer can sanction its employees for discriminating on the basis of sexual orientation. *Akridge v. Wilkinson* No. 05-3015, Slip.Op. (6<sup>th</sup> Cir. Apr. 26, 2006), 2006 U.S. App. LEXIS 10671

8. Transgender/Transsexual

- a. Title VII
- b. A gender/sex discrimination claim is sufficiently alleged when a plaintiff asserts that he or she was discriminated against based on the failure to conform to sexual stereotypes concerning how a man or woman looks or behaves. *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

9. Stereotypes
  - a. Title VII
  - b. The Second Circuit Court of Appeals recognized that a gender stereotyping claim should not be used to “bootstrap protection for sexual orientation into Title VII.” *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005)(citations omitted).
  - c. The Second Circuit Court of Appeals held that stereotyping about the qualities of mothers was a form of gender discrimination. *Back v. Hastings on Hudson Union Free School Dist.*, 365 F.3d 107 (2d Cir. 2004).
10. The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et. seq.*
11. Disability
  - a. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 1201 *et. seq.*
  - b. The Ohio Civil Rights Statute
  - c. ADA does not offer protection for reasons unrelated to the disability like bad performance, poor work ethic, insubordination and bad attitude. *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852 (7th Cir. 2005)
13. Union Member
  - a. The National Labor Relations Act
  - b. The Railway Labor Act

**D. Is There a Basis for a Retaliation Claim?**

1. Did the employee complain about discriminatory conduct?
  - a. Is there a written anti-harassment /anti-discrimination/anti-retaliation policy?
  - b. Was the complaint/report taken seriously?

- i. Were the simple questions asked - who, what, where, when, how often, witnesses?
  - c. Was the complaint investigated promptly?
  - d. Was the investigation documented?
    - i. Were notes from the interview preserved?
    - ii. Were conclusions and resolutions or remedies documented?
  - e. Was the complaint kept confidential to the greatest extent possible?
  - f. Were witnesses interviewed?
  - g. Were both the accused and the accuser interviewed?
  - h. Was the accuser notified of the results of the investigation?
2. Did the employee file an EEOC/OCRC Complaint or was the employee a witness in an EEOC/OCRC proceeding?
  3. Did the employee file for Workers' Compensation?
  4. Did the employee request FMLA leave?
  5. Is the Employee a Whistleblower?
    - i. Ohio's Whistleblower Statute – Ohio Rev. Code § 4113.52
    - ii. Federal False Claims Act
    - iii. Aviation Investment and Reform Act for the 21<sup>st</sup> Century (AIR 21), 49 U.S.C. §42121
    - iv. Other industries have their own applicable whistleblower acts.

**E. Are Similarly Situated Employees Treated Consistently?**

**F. Are There any Alternatives to Discharge?**

1. Reassignment/retraining
2. Early retirement
3. Voluntary resignation

**G. Is the Employee Entitled to Paid or Unpaid Leave? Did Vacation Time Accrue Before Termination?**

**H. Was the Employee Given a Right to a Review Process and if so, Did the Employee Use It? (For Public Employees Only)**

1. Was there a pre-termination and/or post-termination hearing?
2. The Sixth Circuit Court of Appeals notes that although a pre-termination proceeding is required for public employees who can only be fired for cause, all required before termination is pre-termination notice and an opportunity to be heard, “even if the person against whom he made the allegations was the same person who presided over the hearing.” *Farhat v. Jopke*, 370 F.3d 580 (6th Cir. 2004)

**I. Does the Organization Carry Adequate Employment Practices Liability Insurance?**

**J. Did the Employee Previously Sign Non-Disclosure and Non-Competition Agreements? Does the Employee Have Access to Trade Secrets, Confidential Customer Lists, or Other Confidential Information?**

**K. Impact on Defense of Lawsuit**

1. How will this look to a jury?
2. Does the employee make a sympathetic witness?
3. Are the employer’s witnesses, particularly the Human Resources Director, likely to be viewed favorably by a jury?

## **II. POST-TERMINATION**

In addition, you must take into consideration your post-termination actions which can result in a lawsuit.

### **A. Was an Exit Interview Conducted?**

1. Did the employee complain of being treated unfairly, and if so, was an investigation conducted and were the results documented?
2. Were any complaints of unfair treatment made earlier?
3. Did the employee raise the possibility of a lawsuit or hiring a lawyer in the meeting?
4. Was the procedure for handling references discussed?
  - a. Verification of employment dates.
  - b. A glowing reference can raise a red flag.
5. Did the employee sign a severance agreement or refuse to sign a severance agreement?
6. Were unemployment compensation benefits discussed?

### **B. Confidentiality**

1. Was the employee escorted out of the building by a security guard in the view of other employees or customers?
2. Was the reason for termination kept confidential?

### **C. Potential Defamation Claim**

### **D. Severance Agreements**

1. Does the severance agreement contain a confidentiality provision?
2. Does the severance agreement comply with all federal and state laws, such as the Older Workers Benefit Protection Act (“OWBPA”)?
3. Does the severance agreement contain a release of potential claims?

