



# Breaking Up Is Hard to Do: Managing Challenges That Arise When the Employment Relationship Ends

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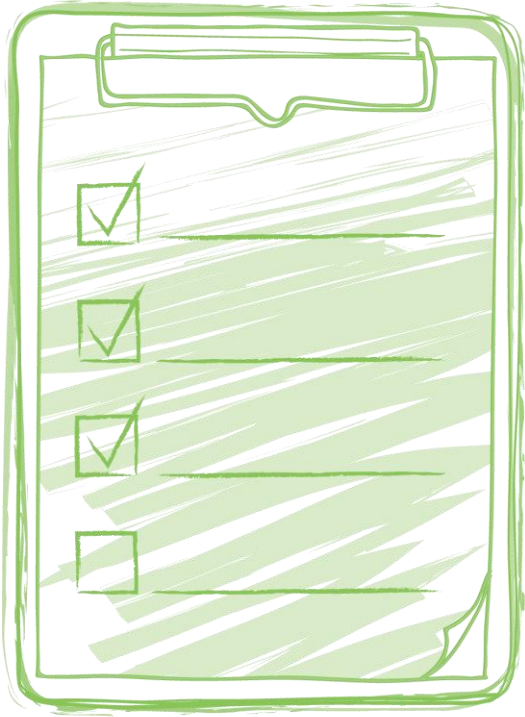
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# Agenda



- Getting It Right – When Does It Start?
- The Termination Checklist
- Defining the Separation
- Devising and Executing the Plan
- The Termination Meeting
- Post-Employment Considerations
- Difficult Termination Issues
- Questions and (Hopefully) Answers



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Getting It Right  
From the Start  
(When Does It  
Start?)

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# Managing Expectations

- Employees should rarely be surprised
- Effective performance management should include advising employees of their duties, the company's expectations and potential consequences
- Consistent application of policies provides employees with context and allows for performance improvement
- The goals of performance management should be:
  - Retain high performers
  - Provide marginal performers opportunities to improve
  - Eliminate poor performers



# Employment Documents Crucial to Supporting Termination

- Job descriptions – outline critical duties and requirements
- Employee handbooks



# Employee Handbook

- Acknowledgement of Receipt of Handbook
  - Receipt of handbook
  - Employee's obligation to read, understand, and adhere to policies and procedures
  - Employee's at-will status
  - Employer's right to modify, supplement, rescind or revise policies and procedures
- Necessary Language/Policies
  - → → →
  - The following are essential provisions/disclaimers that every employee handbook should include

# Employee Handbook

## At-Will Employment

Every handbook should include a provision expressly stating that it does not create a contract for employment.





# You're Killing Me, *Small[s]*!

- *Small v. Springs Industries*, 357 S.E.2d 452 (S.C. S.Ct. 1987).
- Mandatory language in handbook or policy can alter at-will relationship and create a contract of employment.
- Touched off more than a decade of litigation and furious wordsmithing of handbooks.
- S.C. Code Ann. § 41-1-110 (2004). CONSPICUOUS disclaimer saves the day.
- But, let's be careful out there.

# Employment At-Will

- Employer or employee can terminate the employment relationship:
  - At any time
  - With or without notice
  - With or without cause
  - For “any” reason (with some exceptions)
- But:
  - Courts have eroded “at-will” doctrine – think: collective bargaining agreements, discrimination and whistleblower statutes
    - Need “legitimate, non-discriminatory reason”
    - Still good defense against contract claims
  - Fact-finder has expectations of “fairness”
    - Even though not required by law

# Employee Handbook

## EEO Policy

- Title VII, ADA, ADEA, GINA and THRA
  - Prohibits discrimination based on race, color, creed, religion, sex, national origin, disability, age, and genetic information.
- Statement that you are an Equal Employment Opportunity employer
- Include statement committing to providing reasonable accommodation to disabled employees and employees with religious observance needs (also consider accommodations that may be required under the PDA)

# Employee Handbook

## Anti-Harassment Policy

- Define prohibited conduct and provide examples
- Create formal channels and procedures for reporting harassment
- Helps employer avoid liability where employee fails to utilize these channels
- Annual training

## Complaint Procedure

- Identify how employee can make complaints
  - Direct supervisor
  - Next level manager
  - Any other manager
  - Human resources
  - Employee hotline

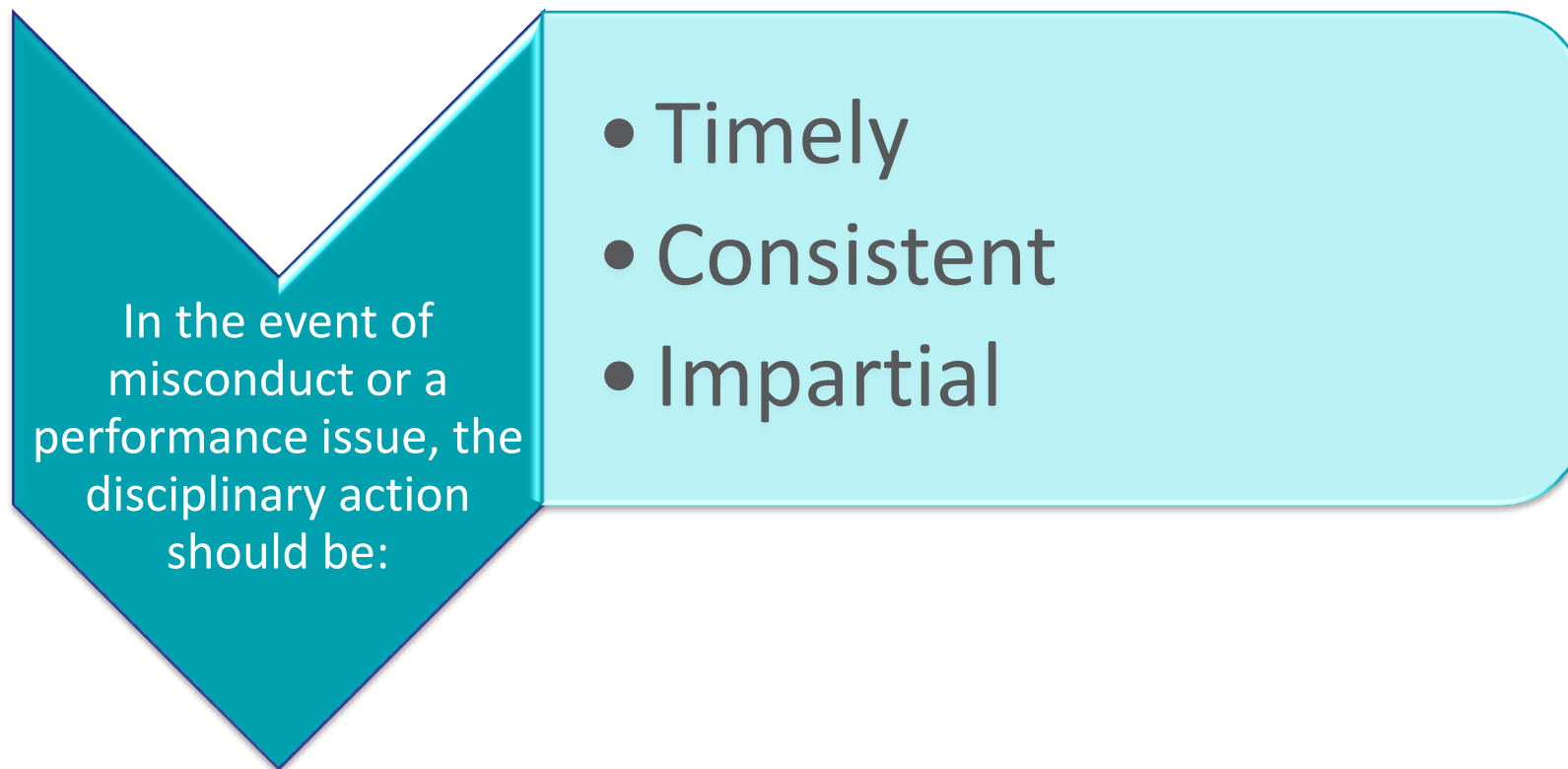


# Employee Handbook

- Revise handbook as appropriate
  - Laws change frequently:
    - New laws are passed and old laws are changed (e.g., marijuana use allowed in certain states)
    - Courts write opinions that reinterpret laws (e.g., the Supreme Court's 2015 *Young v. UPS* decision).
- Companies that are slow to incorporate these changes may risk liability.
- Publicize!
  - Upon hire
  - Communicate every change or revision
- Follow the policies
  - Consistency is Key
  - Inconsistent enforcement will be Exhibit A to show pretext

# Disciplines

- Discipline is meant to correct employee's unsatisfactory work performance and/or violation of company policies.





# Types of Employee Discipline

## Progressive Discipline

- Verbal warning
- Written warning
- Final written warning / Performance Improvement Plan / Probation
- Suspension
- Termination

PROS of Progressive Discipline – Fair warning, projects sense of stability and fairness on the part of the employer, creates clear rules

## OR Open-ended Policy

- Most important factor is to be consistent

# The Disciplinary Session

**Make consequences for future violations clear**



**Have the employee acknowledge the session by signing the report**



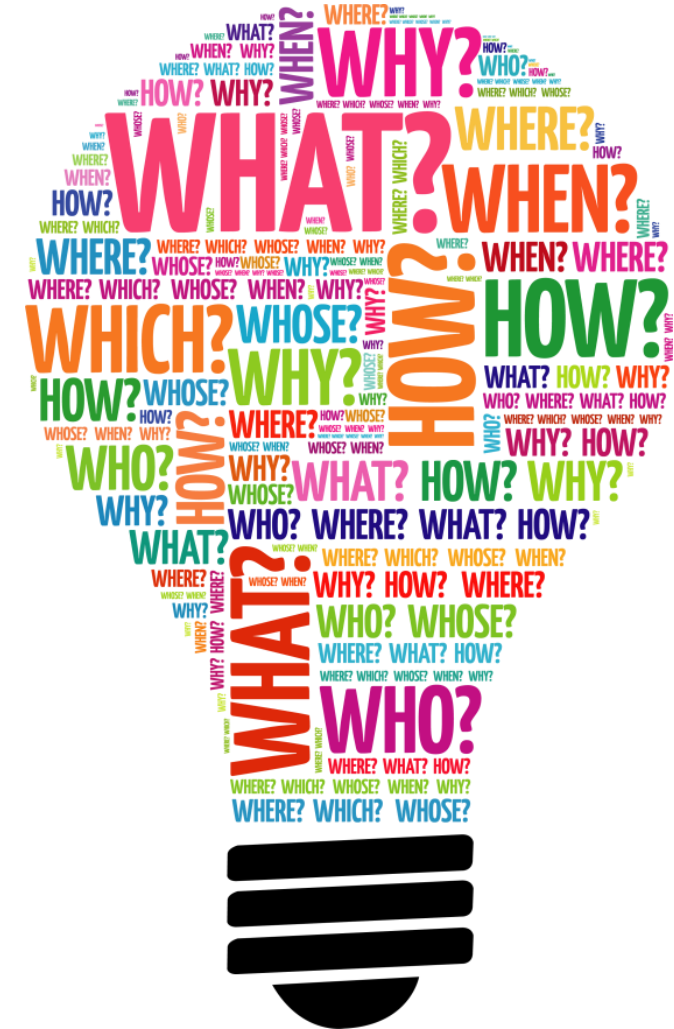
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# The Termination Checklist

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# Make Sure You Know

- How long has the employee been employed?
- What specific policies are implicated?
- Can you show the employee knew, or should have known, the conduct was wrong, or performance inadequate AND the consequences?
- Was employee given time to improve or correct actions?
- Have other employees been terminated for the same conduct?



# Make Sure You Know

- Did the employee recently claim a work-related injury or illness?
- Has the employee been, or claimed to be, a spokesperson for other employees regarding working conditions?
- Is the employee a member of a protected group?
- Has the employee made claims of illegal conduct?
- Could there be FMLA or ADA implications, especially in an attendance-based discharges?



# Make Sure You Know

- Does the employee appear to be getting legal advice, keeping records, or trying to commit you to particular positions?
- Does the employee have access to sensitive or proprietary information?
- Back up and save electronic activity.







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# Defining the Separation

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# Defining the Separation

- Call it like you see it - appropriately define the separation
  - Resignation
  - Job abandonment
  - Reduction in force
  - Layoff
  - Termination

# Resignation

- Get it in writing
- Why is the employee leaving?
- Is employee going to a competitor or a client?
- Transition period or immediate exit?
- Generally do not allow employees to “go back” on their resignations



# Job Abandonment

- Know and follow your policies
- Ensure consistency
- Send a self-serving follow-up letter where appropriate
- Pay accrued vacation and PTO in accordance with your policies and state law
- Beware of protected leaves and medical issues



# Reductions in Force (RIF)

- Reductions in force, or layoffs, are forms of termination that relate to business needs or economic conditions
- Typically, positions eliminated through layoff should not be replaced
- Consider:
  - WARN Notices
  - Severance policies
  - Separation agreements, including OWBPA considerations
- Layoffs are not substitutes for performance or misconduct-related discharges—be careful with your terminology!!!





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# Devising and Executing the Plan

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# Termination Logistics

- Immediate or notice period
- Witness present
- Schedule the time (late in the day?)
- Private location
- Addressing computer access
- Return of keys, access badges, and other company property
- Security/risk assessment
- Written notice of termination/other documentation to be delivered in meeting
- Severance?
- Rehire eligibility?

# Final Funds

Assess WHAT payments must be included in final paycheck and WHEN payment must be issued under state laws

- Wages through last date of employment
- Unreimbursed business expenses
- Vacation
  - What does your policy state?
  - How is vacation accrued?



# Non-Competes/Confidentiality Agreements



- Is there already one in place?
  - If so, remind employee of his/her obligations
- If not, do you want to put one in place?
  - How much access did the employee have?
  - Will it be enforceable?
  - Extra consideration required?

A man with a beard, wearing a white shirt and a dark tie, is holding a white document. The document has the words "TERMINATION OF CONTRACT" printed in large, bold, black capital letters. Below this title, there is some smaller, illegible text. The man's face is partially visible in the background, slightly out of focus.

# **TERMINATION OF CONTRACT**

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## The Termination Meeting

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# Telling the Bad News

- Be calm and professional
- Get to the point
- Briefly explain reasons (but not too specific)
- Take notes
- Listen
- NOT the time to argue or debate
- Follow the “golden rule”



# The Termination Discussion

- Avoid jokes, sarcasm, explanations, put-downs, excuses – ***be direct***
- Not a Q&A session
  - Decision is final
  - Make it clear that meeting is not to discuss whether decision is justified
- Discuss severance if applicable
- Tell employee who to contact if any questions
- Advise of appeal opportunity (if appropriate)





# Final Documents

- Separation Notice (required?)
- Final wages (*if* required by state law)
- Severance Agreement (if applicable)
- COBRA/other benefit continuation





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# Post-Separation Considerations

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# Managing Post-Separation Relationships

- Unemployment - Should you challenge it?
- Reason for termination should be communicated to others on a need-to-know basis only
- No disparagement
- Keep references neutral
- Instruct managers to direct reference requests to a designated company representative
- Consider running all future communications with employee through one employee
- Preserve electronic activity and monitor work email post-termination

# To-Do List After the Termination Meeting

- Terminate access to the Company's computer including email and remote
- Terminate the employee's access to telephone/voicemail system
- Terminate credit cards, telephone charge cards, etc.
- Return all Company property, equipment, access cards, credit cards, calling cards, laptops, cellular telephones, etc.
  - Don't forget documents!!!
- Do not let the employee have time alone in her office after the termination
- If necessary, tell the employee that a Company representative will pack and send all of her personal belongings to her
- Change passwords and locks, if necessary

# Exit Interviews

- Best opportunity for an honest assessment of workplace issues
  - *Sometimes*
  - Consider letting some time pass / use of 3<sup>rd</sup> parties





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Should've Seen  
*That* Coming

Addressing  
Problem  
Terminations

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# 1. Employee Resigns with Two Weeks' Notice

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# More Notice Than Necessary?

- Payment in lieu of working the notice period?
- Accept resignation immediately?
  - Adverse Action?
- No right, *per se*, to work notice period
- Consistency is key
- Requests to rescind resignation?





2.

“I didn’t meet  
my goals  
because of my  
medical  
condition.”

# I Didn't Meet My Goals Because of My "Medical Condition"

- The Company has decided to terminate a female salesperson because she failed to hit her sales numbers for the fourth quarter in a row
- During the termination meeting, the employee indicates that she has a "medical condition" that has impacted her ability to meet the performance standards
- What should you do?
  - A. Stop the termination and attempt to accommodate?
  - B. Continue the termination and bring the employee back if an accommodation is required?
  - C. Suspend the employee pending an investigation?
  - D. Do not accommodate if this the first report of the medical condition?





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3.

Employee  
Complains of  
Illegal Conduct  
at Time of  
Departure

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# My Supervisor Sexually Harassed Me!

- During the termination meeting, an employee claims that her male manager has been sexually harassing her (making comments and inappropriately touching her) for the past six weeks, and it has severely impacted her ability to do her job
- She threatens to “go straight to the EEOC” if you terminate her and says that she has two other female loan officer colleagues who will substantiate her story
- What do you do?



# I've Been Mistreated!

- What should you do if an employee complains of illegal conduct at time of departure?
  - Resignation vs. Termination?
  - First time?
  - Investigation?
  - Hold termination in abeyance?





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4.

The Heat of the  
Moment Break  
Up

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# Reducing “Rogue” Behavior

- Require all terminations be run by HR or upper management
  - 3<sup>rd</sup> party involvement reduces subjectivity and emotions
- If managers have termination authority, train them on EEO and end-of-employment issues
- Develop “termination alternatives” to sustain manager’s authority and reduce potential liability
  - ALOA





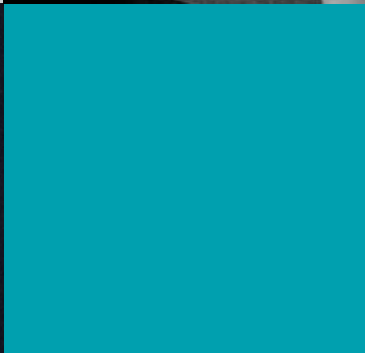
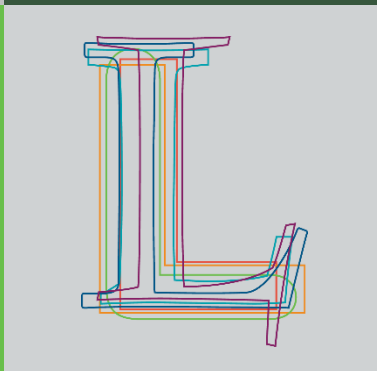
# Wrap Up

- Consistency in addressing employee complaints and deficiencies avoids many pitfalls
- Use checklists and consult policies to make employment decisions in a methodic manner
- Plan and prepare paperwork in advance of termination whenever possible
- Be prepared to be flexible, when necessary, based on new information





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# Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.

