

The sample forms provided as part of Ogletree Deakins' sponsorship of the Association of Corporate Counsel's Sports and Entertainment Law Network are intended merely for informational purposes. No representation is made as to the enforceability of these forms in any jurisdiction, and the materials should not be relied upon or construed as legal advice, or as a substitute for obtaining legal advice from an attorney licensed in the applicable jurisdiction(s).

TERMINATION CHECKLIST

1. Economic or non-economic discharge?
 - a. If economic, were selection criteria objective?
 - b. If economic, did legitimate, non-discriminatory criteria have a disparate impact on protected category? If so, are the criteria job-related and consistent with business necessity?
 - c. If economic, did company comply with its internal policies and contractual obligations regarding selection of candidates for discharge?
2. If non-economic, is discharge based on performance or conduct?
3. Did the employee have advance notice of that the performance/conduct would be considered unacceptable by the employer? In other words, will employee be surprised by termination decision?
4. Have any representations, written or oral, been made about continued employment?
5. Does source of standard by which performance/conduct is judged give rise to contractual right to continued employment?
 - a. Does handbook or other policy disclaim existence of contract, express or implied?
 - b. If existence of contract not adequately disclaimed, what rights does policy or rule provide?
6. Did employee have an opportunity to bring performance or conduct in line with expectations?
 - a. Does policy require progressive discipline?
 - i. If so, has progressive discipline been provided?
7. Did the employer give the employee the opportunity to give his/her "side of the story" before the employer made a final decision on the employee's status? Has the employee's response been documented?
8. Is employee a member of a protected category?
 - a. Was membership in protected categories considered in employment decision?

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9. Independent investigation that reason for discharge is not a pretext for discrimination or retaliation?
 - a. Documents support discharge decision?
 - i. Are grounds for termination clear?
 - ii. Are grounds for termination timely?
 - iii. History of performance or conduct deficiencies?
 - iv. If based on conduct, have you reviewed prior disciplinary record?
 - v. If based on conduct, is conduct arguably “concerted” activity under NLRA?
 - vi. If based on performance, have you reviewed prior performance evaluations and evaluated whether any merit raises or bonuses have been issued?
10. Have employees subject to same policy been similarly disciplined for failing to meet performance/conduct standards? Examples in same job category? At same location? Under the same manager?
11. Any extenuating circumstances or mitigating factors that would justify a lesser penalty?
12. Has company followed written policies regarding termination, including notification to employee and representatives and internal grievance procedures?
 - a. Public or private sector?
 - i. If public, what are due process considerations?
 - (1) Timely notice?
 - b. Union or non-union?
 - i. If union, what is the “just cause” standard?
 - ii. If union, does conduct rise to just cause standard?
 - iii. Complied with contractual notice requirements?
 - (1) Timely notice?

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- c. Does at-will employment apply in jurisdiction?
 - i. If not, what is legal standard for discharge?
- 13. Has company followed external requirements for discharge, including state laws governing notice of terminations?
- 14. Is employee capable of performing essential functions of job, with or without accommodation?
- 15. Is attendance a factor in discharge decision?
 - a. If so, are absences potentially covered under FMLA, the ADA, or any state laws mandating leave?
 - b. Is employee substantially limited in a major life activity?
 - i. If so, would additional time off enable employee to return to work and to perform the essential functions of the position, with or without accommodation?
 - c. Is discharge related in any way to claim for workers' compensation benefits?
- 16. Has employee recently taken any medical or military leave?
- 17. Has employee incurred absences because of a medical condition that could potentially warrant coverage under FMLA or ADA?
- 18. Has employee asked for change to terms or conditions of employment because of medical condition?
 - a. If so, has company engaged in interactive process envisioned by the ADA?
 - i. Is the requested accommodation reasonable?
 - ii. Would accommodation cause undue hardship to organization?
 - iii. Would accommodation require violation of CBA?
 - b. Has company fully complied with FMLA?
- 19. Employee engaged in any activity that might be covered by federal or state whistleblower statute?

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20. What is the likely impact of decision on business?
21. Arranged for discharge meeting?
 - a. Secured semi-private location?
 - b. Witness necessary/desired [union/Weingarten v. non-union]?
 - c. Prepared talking points?
 - i. Return of company property?
 - ii. COBRA?
 - d. Arranged for security if necessary? Locking employee out of computer system?
22. Prepared final paycheck?
 - a. Confirmed timing of last paycheck under state law?
23. Complied with state notification requirements?
 - a. Unemployment?
 - b. Employee notification/discharge letter?
 - c. Notified
24. Intend to offer severance?
 - a. Comply with company policy?
 - b. Comply with ADEA?
 - i. Part of a group layoff?
 - (1) OWBPA Exhibit to severance agreement?
 - (2) 45 days within which to consider?
 - (3) 7 days to revoke under federal ADEA (Minnesota has a different revocation period)?
 - ii. Individual discharge?

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- (1) 21 days within which to consider?
 - (2) 7 days to revoke under federal ADEA (Minnesota has a different revocation period)?
25. Trigger WARN notice obligations (Chapter 19 consideration)?

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