

TAKING YOUR SKILLS TO THE NEXT LEVEL: The *Respectful* Discharge

By Karen Schechter, SPHR

Discharging an employee is one of the most difficult and important steps a supervisor can take. Because the repercussions go beyond the supervisor and employee, it is not a step that should be taken lightly or without good preparation. Co-workers are affected deeply by the firing of another employee, even if they felt the person was a poor worker or took advantage, or didn't want to work, or whatever. A firing is unnerving to everyone around the affected worker and may bring out feelings of uncertainty and vulnerability in other employees. The firing of an employee may have an impact on relationships with customers and vendors, the reputation of the organization to the public and potential job candidates, and can result in a wrongful discharge claim.

Unfortunately, many supervisors and managers believe the legal concept of "employment-at-will" allows an employer to behave in a somewhat cavalier manner when ending an employment relationship. "Employment-at-will" means the employer has the right to end the employment relationship at any time and for any reason. This legal concept emerged in the 1930's. By the 1980's, however, 43 out of 50 states in the U.S. recognized exceptions to this concept. Exceptions to "employment-at-will" vary from state to state, but focus on three areas:

- An implied contract for an employee's continued employment can be established;
- The discharge violates a State's public policy; and/or
- The employer has breached its responsibility for "good faith and fair dealing."

If your organization employs workers outside of the U.S., you will find varying restrictions on "at-will" employment from Argentina to Venezuela, and a host of countries alphabetically in between.

Discharge is the time when unresolved issues between the employer and worker either go away entirely or grow into full-blown disputes. Issues may range from minor differences over compensation and benefits to a major disagreement over the circumstances of the discharge. The terminated employee may feel she/he has little to lose in a confrontation with the employer, so inhibitions tend to disappear. The antidote for these dynamics is establishing a climate of *mutual* respect for the organization and the discharged individual. The goal should be to minimize the negative impact of the discharge for *both* parties. The attached checklist is intended to help you establish that climate for the *respectful* discharge – taking your good professional skills to the next level.

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CHECKLIST FOR DISCHARGE CASES

Before a decision is made

- Do I have all the facts recorded accurately?
- Have I assembled the records?
- Do I have specific examples of unsatisfactory work product or specific policy violations, etc.?
- What is the attendance record?
- Are there prior discipline and warning records?
- What sections of the employee handbook, personnel policies, or Company procedures apply?
- Is my decision based on facts (not inference, suspicion, or emotions)?
- Do I feel certain the Employee understood the job requirements or behavior standards?
- Does the Employee know where she/he has fallen short of those requirements or standards?
- Has the Employee had sufficient time, opportunity, or training to correct the situation?
- Has the Employee had a chance to give his or her version of the situation?
- Have I considered the Employee's point of view?
- Have any special mitigating circumstances been taken into consideration?
- Is this discharge consistent with prior similar cases?
- Would I be able to justify the treatment of this Employee if he/she claimed wrongful discharge or discrimination?
- Do others in my Company need to review/approve my decision?

Preparing for the discharge meeting

- Should I be working with my Company's attorney on a settlement agreement?
- Have I scheduled the discharge meeting at a time that will minimize the Employee's personal contact with other employees as he/she leaves the premises?
- Have I made arrangements to meet with the Employee in private?
- Have I made arrangements for the final paycheck, and am I prepared to explain the amount?
- Am I able to tell the Employee what will happen to his/her benefits after the discharge?
- Have I decided what restricted statements will be made to other employees concerning the Employee's discharge?
- If the Employee requests the reasons for the discharge in writing, what will be the Company's response?
- Are there resource providers I can identify for the Employee (e.g. employee assistance plan, outplacement counselor, retraining assistance, etc.)?
- Have I planned for any safety concerns (e.g. security personnel alert and standing by)?
- How will I end the meeting with the Employee?
- Do I know what Company property the Employee has in his/her possession?
- How and when will the Employee remove his/her personal property from the Company?
- Have I made arrangements to terminate the Employee's access to phone and computer systems, cell phone and pager, company credit cards, company parking, and the physical premises?

The structure of the discharge meeting

The decision-maker(s) should personally conduct the discharge meeting. This shows respect to the Employee and avoids misunderstandings or inconsistencies (that arise from one person attempting to explain the actions of another).

Make sure you are composed and organized and exhibit self-assurance. (This is the most effective deterrent to contentiousness from the discharged person.) Be self-confident and in control, without being arrogant. Be open, but not defensive.

It is advisable to have another member of management present at the meeting.

Briefly state the reason(s) for the discharge.

Give the Employee an opportunity to respond.

Very briefly express your personal regret for the situation.

Thank the Employee for his/her contributions to the Company, if appropriate.

Give the Employee COBRA and benefit information.

Discuss the return of property – both the Company's and the Employee's.

Discuss the procedure for leaving the premises.

Discuss any applicable severance offer or explain the calculation of the final paycheck.

Review any contractual restrictions (e.g. non-compete or confidentiality agreements).

Allow the Employee to leave if he/she wants to leave.

Post-discharge concerns

Be prepared for how you will handle these typical post-termination issues:

Unemployment claim;

References for prospective employers;

Violations of non-compete or confidentiality agreements;

Communication between current employees and the discharged Employee;

Inquiries from current employees about the discharged Employee;

Notification/announcement (where applicable) of the discharged Employee's departure (e.g. customers, vendors, bank, etc.)

Review of the personnel records by the discharged Employee;

Request from the discharged Employee for the reason(s) for discharge (in writing);

Statements about the discharged Employee that could fuel defamation claim;

Statements about the private life of the discharged Employee that could fuel an invasion of privacy claim.