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TERMINATION CHECKLIST

Questions to Consider Prior to Termination:

A. Is the employee in a protected class?

1. over/under 40
2. race/ethnicity
3. national origin
4. disability
5. sexual orientation
6. sex/gender
7. taking a protected leave

B. Are there any potential whistleblower/retaliation claims?

1. Has the employee complained within the past year of discrimination or harassment, or participated in any investigation regarding discrimination or harassment?
2. Has he or she raised any other complaints that could be basis for a retaliation claim? Has the employee filed a workers' compensation claim?
3. For any of the above categories, when and what documentation does the Company have to support its proper handling of the claim/complaint?

C. Leave Issues? Has the employee taken protected leave that could be the basis for a claim? If so, when and what documentation exists?

D. At-Will Issues? Was the employment at-will and does the Company have documentation s/he signed acknowledging that status? Employment was not for fixed term, right? How long was the employee employed? [Note: the longer the term of employment, the higher the chances of the employee bringing an implied contract (or other) claim].

E. Reasons For Termination

1. What is the reason for the termination and how is it documented, if at all?
2. Was there a performance review that reflected poor performance, or was it good/stellar?

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3. Are there any non-privileged internal emails, notes, or other documents that support or undercut the reasons for termination?
4. Is termination based on facts verses inference/suspicion/emotion?
5. Did the employee understand that s/he could be terminated for this offense? How?
6. Did employee have an opportunity to correct the problem? Will that be an issue?
7. What will jury/plaintiff/co-workers think about this reason for the termination? Is it fair?
8. Have others been terminated for this same reason? If not, what was done to them and why was it less than termination?
9. Has the termination decision been discussed with the appropriate level of management?
10. Have all document(s) and evidence been preserved, in case they are needed later for litigation or otherwise?

F. Additional documentation required? Should the Company create an e-mail exchange between HR and the person making the termination decision that confirms in writing the basis for the termination?

G. Alternatives considered? Are there any alternatives to termination, such as PIP, suspension, transfer, unpaid leave, sabbatical, etc.?

H. Additional documentation?

1. Did employee sign Company's arbitration agreement (if any)?
2. Confidentiality Agreement?
3. Non-Solicitation Agreement?
4. Does the Company have copies of all of the above? If not, is it possible to get the employee to provide copies of any of these documents before termination?

I. Separation agreement considerations

1. How much severance, if any? Is it provided for in offer letter? Employment agreement? Company policy?
2. Stock option vesting/acceleration?
3. Reimbursement of COBRA premiums?
4. Move termination date back to allow for time to look for another job?

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5. Do you want liquidated damages for confidentiality breach? If so, how much?
6. If employee is 40 or over, note that a specific type of separation agreement is needed (needs ADEA waiver and other ADEA language).

J. Logistics of termination

1. Two Company witnesses present for termination discussion to avoid he said/she said situations.
2. Final check is ready [NOT direct deposit] and employee signs document acknowledging receipt of it (if they refuse to sign, have them write that they refuse to sign); COBRA documents are ready (or if applicable, the Company should just reference that COBRA and other relevant forms will be provided under separate cover).
3. Final check includes wages through termination date, accurate amount for accrued vacation/PTO. [Note: The final paycheck is due immediately upon termination in California, within 72 hours if employee resigns].
4. Prepare termination letter for employee including termination date, information regarding enclosed final paycheck, including accrued but unused vacation/PTO, reminder of confidentiality and non-solicitation obligations and consider providing signed copies of confidentiality and non-solicitation agreements.
5. [California] Provide employee with EDD notice re unemployment: http://www.edd.ca.gov/pdf_pub_ctr/de2320.pdf
6. Turn off employee's access to network immediately upon termination.
7. Have a plan in place for cutting off employee's access to office, telephone, cell phone, e-mail, credit card, other business accounts.
8. Cancel any direct deposit/electronic funds transfer connected to employee's bank account.
9. Document results of meeting, so that a contemporaneous account of discussion exists.
10. Schedule meeting at a time and place that will minimize contact with other employees.
11. Any workplace violence issues to worry about?
12. Will all equipment and other company items (keys, credit cards, PDAs, cell phones, computers, etc.) be returned by time of termination meeting?

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13. Reminder that if reference call is made to company, company representative should only say
 - a. dates of employment and
 - b. last position held (no comments about whether employee would be rehired, what reason for termination was, how good/bad the employee was, etc., because of potential liability for defamation)
14. What will you say to other employees/co-workers?
15. Consider exit interview (you can sometimes get admissions from employee and/or get sense of whether employee is likely to sue).
16. Consider severance/separation agreement & have that ready.
17. Employee should sign "Termination Certification" that is attached to his/her Confidentiality/Invention Assignment Agreement.

K. Technology Hold. Consider freezing/copying computer hard drives and email files and servers in case termination leads to litigation, so minimizing likelihood that relevant documents are destroyed, deleted, or otherwise lost.