

## CHECKLIST FOR TERMINATION OF EMPLOYEES

YES	NO	N/A	
_____	_____	_____	<ul style="list-style-type: none"> <li>• <u>Legal Counsel/Human Resources.</u> Consult with legal counsel and human resources before initiating any employee termination process.</li> </ul>
_____	_____	_____	<ul style="list-style-type: none"> <li>• <u>Terms of Employment.</u> Is the employment “at will” and/or probationary or is the termination of employment subject to “for cause” or “just cause” standards for any reason, such as a collective bargaining agreement, employment contract, personnel policies, etc.? Stated differently, are there any provisions in any such agreement, contract, or policies that might protect the employee from being terminated for the reasons contemplated? Also, could an implied-in-fact contract not to terminate except for “good cause” be inferred from a supervisor’s words or actions or the agency’s past practices?</li> </ul>
_____	_____	_____	<ul style="list-style-type: none"> <li>• <u>Personnel Policy.</u> Have the termination procedures that are contained in the personnel policy been complied with?</li> </ul>
_____	_____	_____	<ul style="list-style-type: none"> <li>• <u>Reason for Termination.</u> Is the reason for the termination clear? Are all managers and supervisors who participated in the termination decision in agreement with the reasons for termination? Is the termination consistent with the way other employees have been treated under similar circumstances in the past?</li> </ul>
_____	_____	_____	<ul style="list-style-type: none"> <li>• <u>Personnel File Documentation.</u> Review Personnel file and current job description to determine if other disciplinary actions have occurred and to familiarize yourself with employee’s job duties. Is there documentation of prior warnings, reprimands, other discipline, etc? Is the stated reason for the termination consistent with performance or conduct problems which have been discussed with the employee in the past and documented in the personnel file? Do the periodic written performance evaluations support the termination decision? Is the stated reason for the termination consistent with recent documented conduct of management, for example, a recent “merit” pay increase is likely inconsistent with termination for “poor performance”?</li> </ul>

- Protected Activity. Has the employee made an internal or external complaint or engaged in other activity which is protected under state or federal law? Such complaints can include complaining of sexual harassment or other discrimination, OSHA complaints, whistle blower complaints, etc. If such complaints have been made, the employer may have to demonstrate that the termination was not in retaliation for making such complaints.
  
- Protected Class. If the employee is within a protected class (over 40, female, minority, disabled, etc.) you will have to rule out any discriminatory motives that might be involved.
  
- Reasonable Accommodation. The ADA requires employers to reasonably accommodate the disabilities of their employees, by implementing an **“interactive process.”** The Federal courts require the following steps:
  - First, the employer must analyze the particular job to determine its purpose and essential functions.
  - Second, the employer and individual must work together to identify what barriers exist to allow the individual to perform the essential job functions.
  - Third, the employer and individual should work together to identify a range of possible accommodations that remove the barriers that interfere with the individuals ability to perform the essential functions of the job. Engaging in an interactive process requires the employer to document the communication and good faith exploration of possible accommodations, and is a continuing duty not exhausted by one effort.
  - Fourth, having identified various possible accommodations, the employer should assess each accommodation and the individual’s preference to determine whether the various accommodations would pose an undue hardship upon the employer.
  
- Progressive Discipline. If there is a progressive discipline policy, has it been reviewed to ensure that all required steps before termination have been complied with? Is there documentation to establish such compliance? If progressive discipline has not been imposed, is there a sufficient basis to justify an immediate termination? Have alternatives to termination, such as suspension, discipline, transfer to a different supervisor, etc., been considered and documented? Have employees in similar circumstances been treated in the same manner? (If not, document what makes this case different).

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- Collective Bargaining Agreement Compliance. If the employment is subject to a collective bargaining agreement, review the union contract to make sure that the Housing Authority is complying with agreed upon procedures and “past practice” with respect to the *manner* in which the employee is notified of the termination, of grievance rights, etc.

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- Investigation. Has there been a thorough investigation including interviewing witnesses and the affected employee? Have you documented the facts that were developed during the investigation? Do not rely on conjecture, conclusions or speculation.

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- Due Process Compliance. The due process clause of the 14<sup>th</sup> Amendment to the U.S. Constitution requires that certain notice and hearing rights be provided in two circumstances: (a) where “cause” is required for termination or the employee otherwise has a legitimate expectation in continued public employment; or (b) where the grounds for termination involve moral turpitude (i.e., theft, dishonesty, drugs, sex) and the employer will end up publicizing the termination. If either situation is present, then the employer must pursue one of the following approaches:

- (a) Inform the employee that he or she will be considered terminated as of a date certain unless the employee exercises the right to a dismissal hearing and, in the interim will be suspended with pay and benefits.
- (b) Inform the employee that a preliminary decision has been made to terminate the employment and that an informal meeting with a supervisor has been scheduled for a date certain to give the employee an opportunity to give his or her side of the story and correct any inaccuracies which may result in rescinding the decision to terminate. If the supervisor does not change the termination decision, then the employer should inform the employee of the right to a dismissal hearing and that the employee will be suspended in the interim without pay and benefits.

Under either approach, the employer should give the employee written notice of the proposed grounds for termination, a summary of the events or basic facts supporting termination on those grounds, and a statement of the procedural rights (i.e., a hearing).

The final termination decision should also be provided in writing to the employee with prior review by legal counsel.

- Final Paycheck/COBRA Notification. Make certain that the final paycheck for all hours worked is provided to the terminated employee in compliance with state and federal wage statutes. To be safe, the final paycheck should be provided to the terminated employee on the last day of work. Also make sure that the employee is informed of the statutory option to convert group health coverage to an individual policy at employee expense.
- Severance Agreement/Liability Releases. If the employee is provided with a severance package, make sure that a full release of liability claims is received and returned. If the liability release is to include claims released under the Federal Age Discrimination in Employment Act or the state analogue, special notice language may be required by the Federal Older Workers Benefits Protection Act, with a rescission period stated in the release.
- Maintain All Documentation. Maintain all original documentation of the events and facts underlying the termination and the termination process followed. This includes handwritten notes, e-mails, memoranda and other records that may have been generated by supervisors but are not part of the “official” personnel file. Such documents may be extremely valuable in the defense of any post-termination lawsuit, and destruction of any such documentation may expose employer to evidentiary sanctions in any such lawsuit.

### **ADDITIONAL PREVENTIVE MEASURES**

To minimize the risk of litigation, employers may consider taking and fully documenting extra steps before effecting a termination where any of the following factors apply:

- The employee is in a protected class or group under the discrimination laws;
- The employee has a history of initiating employment-related claims or lawsuits;

- The employee is presently receiving or recently has received workers' compensation or disability benefits;
- The employee has a long term employment history with the employer;
- The employee works under a supervisor who has a history of similar problems with other employees;
- The employee has recently complained about illegal, discriminatory, or unfair treatment;
- The employee is being terminated under circumstances that might be deemed evidence of an improper motive for the termination, such as a heated argument between the supervisor and employee or the termination coincides with the arrival of a new supervisor.

When one or more of the above factors are present, the employer may consider taking additional steps to minimize the risk of litigation, such as:

- Delay the termination to allow for additional warnings, counseling, or opportunity for improvement;
- Delay the termination decision to develop a better record of providing the employee a good faith opportunity to improve (such as through additional training, transfer to another position, etc.);
- Have a different supervisor evaluate the employee, particularly when there is a personality conflict between the employee and his or her immediate supervisor;
- Consider alternatives to a straight termination, including offering a severance package in exchange for a release of all claims or helping the terminated employee with a job search through placement assistance, provision of clerical assistance for a job search or, if appropriate, a positive letter of recommendation.

Finally, to minimize the risk of liability for defamation, employers should notify coworkers or others who had a working relationship with the terminated employee of the reasons for termination only where necessary, and then only in general terms. Detailed and gratuitous descriptions of the reasons for termination to persons who do not have any need to know will increase the employer's risk of liability for defamation. In addition, employment references given out for any employee (but especially a terminated employee) generally should include only the dates of employment and position last held.

Remember - When you follow all the right steps, you MUST document what you have done. If you don't document - the plaintiff will testify to the jury that you didn't follow the right steps!

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Certified By:

\_\_\_\_\_  
Date

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