BREAKING UP IS HARD TO DO: A MANAGER’S GUIDE TO GET IT RIGHT

Keeping the bank out of trouble while preserving employee dignity

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One of the hardest tasks a manager must perform is terminating an employee. While we should never forget it’s even harder to be the terminated employee on the other side of the desk, empathy--combined with fear of litigation--may undermine our resolve to make a clean break, even with an individual whose conduct fully justifies firing. When the individual is a long-term employee, and the decision is based on factors beyond the employee’s control, the termination interview is even harder.

Because of the high stakes involved in terminating employment, the decision should be a last resort, based on sound, objective, and documented grounds, and carried out with respect for the dignity and welfare of the terminated employee.

Notice and opportunity

Two words should guide all termination decisions: notice and opportunity.

Notice: Was the employee given adequate notice of the policy, standard, or rule that is being used to justify the termination? Was it reviewed thoroughly in employee orientation; included in the employee handbook; covered during training; regular staff meetings; or individual performance reviews and counseling sessions?

Opportunity: Was the employee given an adequate opportunity to conform to the policy, meet the standard, or comply with the rule? If an employee is denied the proper tools (for example, computer software) or training to perform up to the required standard, it is unfair to penalize the employee for poor performance. Similarly, if a new policy is introduced, give employees time to learn it and adopt it.

A progressive disciplinary process offers employees an opportunity to correct behavior. For example, verbal counseling may be appropriate for the first offense, written warning for the second, etc.

Progressive discipline processes should not be too rigid nor universal: some offenses, like those involving violence or theft, may warrant immediate termination, but don’t define those “immediately terminable” offenses up front.

Beware the “final warning”: It is not unusual to find two or three of these in a terminated employee’s personnel file--usually after the employee has sued! Management loses credibility when progressive discipline is applied erratically.

Often, the event that ultimately triggers termination is minor. Know this: Juries are not sympathetic to “the straw that broke the camel’s back” justification.

Progressive disciplinary steps must be thoughtfully applied with the object of rehabilitating the employee, not building a file to justify firing. However, it is important that each step be documented. Even a verbal counseling merits a note on the manager’s calendar.

Performance vs. conduct

Once the decision is made, however reluctantly, that an employee should be fired, it is worthwhile thinking through carefully what the basis for the termination is.

This may sound obvious. But consider that someday you may have to defend the decision in court, to a government agency like the Equal Employment Opportunity Commission, or in responding to an unemployment benefits claim. At that point it will be important that the accurate reason is given to the employee, reflected in internal disciplinary process documentation, and consistent with any position taken in external filings.

The critical question: Is the termination for poor performance or for misconduct?

From the point of view of the unemployment claims examiner, poor performance is not usually a reason to deny benefits because it is deemed to be outside the former employee’s control. I have seen many “performance” terminations that were the direct result of poor hiring decisions; the individual was wrong for the job from day one.

When performance declines after the employee has been in the job a while, management is still not off the hook. A performance improvement plan is a joint effort, with both the employee and his manager sharing responsibility for setting goals and monitoring achievement. Performance improvement plans are not punitive, and, like progressive discipline, the aim is continued employment, not termination.

Where an employee is terminated for misconduct, unemployment benefits will not be payable, and any claim of wrongful termination should fail, if notice and opportunity (see above) can be adequately demonstrated.

The problem is that many managers, through a desire to sugar-coat the termination, use ambiguous language to characterize the basis for it. Terms such as “poor attitude,” “not a good fit” and “inadequate work ethic” are imprecise at best. At worst, they are a pretext for discrimination that a plaintiff’s lawyer will take joy in piercing.

“Attitude,” “work ethic,” and “fit” are reflected in behaviors. It is essential to address and document those behaviors.

For example, a poor work ethic is reflected in unexcused absences; coming back late from lunch; disappearing a few minutes before day’s end. Time records will reflect these behaviors for non-exempt employees. Exempt employees’ timekeeping and productivity should be monitored by their managers. If other employees have complained about an individual’s lack of cooperation; bad language in the workplace or other conduct that undermines their ability to do their work, these behaviors should be addressed with the offending employee as they arise, rather than being subsumed in a “not a good fit” basis for termination.

Should you give severance?

Other than senior executives with individually negotiated employment contracts that provide for it, or those employees laid off in a planned reduction in force, there is usually no reason to make a severance payment (whether lump sum or salary continuation) to terminated employees, especially if they are being fired for conduct reasons.

However, many times managers will want to make some kind of extra payment, if only to mask the unease they feel with the basis for the termination. Ideally, the basis for the termination will be clear, objective, consistent with the treatment of other similar situations, and appropriately documented. Where those ideal conditions do not exist, it may be advisable to offer severance, but only if the bank obtains the quid pro quo of a release of all claims from the terminating employee.

The release can be a fairly simple, one- or two-page document (subscribers to ELC’s Bankers’ HR Toolkit can find a model online.) It should list those claims being released, for example, under federal and state employment discrimination statutes. It should not purport to release any prospective claims, and it should be “knowing and voluntary.” That means you should give the employee a few days to think about it before asking them to sign, and advise them to consult with an attorney.

Important: If the employee is over 40 years old, there are stricter requirements which you should be careful to follow closely, or you may end up paying severance and a judgment after the release is successfully challenged in court.

In those exceptional cases where severance is offered in exchange for a release of claims, it is good to have in mind a ballpark figure, such as a week’s pay for each year of service. Also consider other monetary and non-monetary benefits you can offer to ease the employee’s transition out of the workforce: continuing healthcare coverage; “bridging” an employee’s termination date to allow vesting of options or other benefits; continued use of the bank vehicle, cell phone, or laptop; or outplacement consulting services.

Details to preserve dignity

In my experience as an employment litigator, a lawsuit is often the result of the way the termination was carried out, rather than because the employee contests the basis for it. Carefully plan when and where the termination interview will take place, as well as what will be said. Have a third party present to observe. Typically this will be an HR representative who has helped prepare the documentation.

1. Make the basis clear. Start the interview by identifying the policy, standard, or rule at issue, and running quickly through the history--the “notice and opportunity” discussed above, which you’ve been building.

2. Make the status clear. State that you regret that the termination is necessary--but do not leave any doubt in the employee’s mind that the decision has been made, is final, and not open to debate.

Give the employee an opportunity to speak. Some will vent angrily. Some will argue persuasively. Some will sit silently in shock; in spite of all that has gone before, they didn’t see this coming.

Whatever the employee’s response, do not be drawn into dialog. Repeat that the decision has been carefully made after much deliberation in light of the history.

3. Address housekeeping details. Set a time for the employee to return to clear out his or her desk; pick up a final paycheck; or return bank property that’s at home. The employee will be leaving the premises immediately after the interview has ended.

Explain about COBRA or other post-termination benefits, but say that written materials will be mailed as well, as the employee may not be able to take it all in then.

Go over the bank’s reference policy, and set out how the departure will be communicated to co-workers. Remind the employee of their continuing confidentiality obligations. If you are offering severance in exchange for a release of claims, now is the time to present that document. Again, make sure that the employee does not think his refusal to sign the release and to forego severance means he can negotiate a different outcome.

Unless there is an imminent threat of violence, do not have the terminated employee escorted out of the bank premises. This “perp walk” is humiliating for the employee and demoralizing for co-workers.

Beware social media exposure

Also, consider this: In these days of Facebook and Twitter, the bank’s reputation is on the line more than ever before. The damage done by a hasty, poorly-based, or undocumented termination, especially if it is carried out without proper regard for simple human dignity, far exceeds even the costs of defending a wrongful termination lawsuit.

But there are also high costs to perpetuating the employment of an individual who truly merits firing. All these costs can be avoided with carefully thought-out policies and procedures which are consistently followed and properly documented.

Disclaimer: This article does not provide, nor is it intended to substitute for, professional legal advice.

About the author

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