EMPLOYEE HANDBOOK PROVISIONS RELATING TO EMPLOYEE PERFORMANCE, CONDUCT, EVALUATION, DISCIPLINE AND TERMINATION

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I. OVERVIEW

Employee handbooks commonly contain provisions relating to employee performance, conduct, evaluation, discipline and termination. These sections are important because they help define and measure employer expectations in areas that are critical to business success. Additionally, policies regarding post-termination issues are important as they help guide employer actions after the employment relationship ends, which is essential to managing expectations during this often difficult transition. Such provisions, however, must be thoughtfully and carefully drafted to avoid being construed as limiting an employer's right to terminate employees at-will, inadvertently creating contractual obligations, or otherwise increasing the risk of legal claims by employees. It is essential that employers retain complete discretion to discipline employees, up to and including termination, depending on the circumstances and the reasonable business needs of the employer in any situation. An effective Employee Handbook must be carefully tailored to the business and personnel needs of the employer, taking into account such factors as size of workforce, nature of business and workplace culture.

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[1] The authors would like to thank Marjorie F. Wittner for her assistance in drafting this article.

To reduce the risk of litigation, the cornerstone of addressing substandard performance and misconduct should be fairness. If an employee feels he or she has been treated fairly, the likelihood of costly litigation is drastically reduced. Although there is no way to absolutely prevent a lawsuit, the employer's goal should be to do everything reasonably possible to avoid legal claims, and if that unfortunately fails, to put itself in the best position to defend against possible claims. If an employer can demonstrate that it treated a particular employee fairly and reasonably, the risk of that employee bringing legal claims against the employer (such as wrongful termination or unlawful discrimination) will be substantially reduced and such claims will be more easily defeated if the employee does decide to pursue legal action.

When reviewing this article, employers should bear in mind that different policies are appropriate for different workplaces and different types of businesses. Because every workplace is different, not every employer will see the need to include all of the policies included here. Nor is this article intended to provide an exhaustive list of the types of performance related policies and post-termination policies that can be included in an Employee Handbook. The examples provided below are just that, examples, and are no substitute for consulting with experienced employment counsel. In addition to providing examples of policies, the authors have endeavored to provide practical tips for implementing many of the policies that are discussed.

II. PERFORMANCE EVALUATION AND DOCUMENTATION

There are many issues to keep in mind when developing performance evaluation and documentation policies. Regularly and competently administered written employee appraisals are an excellent tool for facilitating good communication between supervisors and employees. At the same time, when needed, written performance appraisals are key in creating helpful documentation, or a good "paper trail," in support of personnel actions including discipline and termination. Similarly, when problems arise, accurate and timely documentation of poor performance or misconduct when it occurs will help address and correct the problem while at the same time creating documentation in support of discipline or termination should such personnel action become necessary.

The foundation of every defensible disciplinary action, including termination, is good documentation. While documenting the events leading to termination of employment, and documenting the termination meeting itself are mandatory to defend the discharge, solid recordkeeping throughout an employee's tenure will buttress any disciplinary action by referring to pre-termination documentation in addition to the termination documentation that supports the discharge. Not surprisingly, timely, accurate and thorough documentation often provides the strongest defense evidence during trial, whereas belated, inaccurate or inadequate documentation can lead to liability.

Importantly, however, the documentation in itself cannot make up for poor management or decision making nor for an employer's failure to be thoughtful and appropriate when choosing to take disciplinary action. If the basis for the disciplinary action itself is not proper, documentation will not cure the defect.

Managers or supervisors, therefore, should be trained to evaluate employees honestly and accurately and to resist the temptation to give positive evaluations to avoid difficult conversations or spare the feelings of poor or mediocre performers. Review criteria should be based on accurate, updated job descriptions and should concern only job-related criteria that are necessary to effective job performance. To the extent possible, comments and grades should be supported by objective criteria, e.g., written warnings, customer evaluations, sales figures and employee work product.

Handbook provisions relating to performance evaluations should also take into account Massachusetts personnel records law, M.G.L. c. 149, §52C, which requires employers of twenty or more employees to keep performance evaluations in employee's personnel files. The statute also requires employers to permit employees to register their disagreement with their evaluations and if agreement is not reached, to place a written statement explaining their position in their personnel file. In addition, if employers put any information in an employee's personnel file that they know or should have known to be false, the

personnel records law grants employees remedies under a "collective bargaining agreement, other personnel procedures or judicial process."

To avoid limiting or destroying the at-will status of the employment relationship or creating other contractual obligations, performance evaluation policies should never state or imply that good evaluations will assure continued employment, promotions or pay raises. The following is an example of a performance evaluation policy:

> Performance Evaluation:
>
> To ensure that you perform your job to the best of your abilities, it is important that you be recognized for good performance and that you receive appropriate suggestions for improvement when necessary. Consistent with this goal, your performance will be evaluated by your supervisor on an ongoing basis. You will also receive periodic written evaluations of your performance. The Company endeavors to conduct written performance reviews of each employee's performance after his or her first three months of employment and annually thereafter, as long as you remain employed by the Company.
>
> All performance evaluations will be based on your overall performance in relation to your job responsibilities and will also take into account your conduct, demeanor and record of attendance and punctuality.
>
> In addition to the performance evaluations described above, your supervisor may conduct special oral or written performance evaluations at any time to advise you of the existence of performance or disciplinary problems.

III. PROGRESSIVE DISCIPLINE

Although the at-will employment relationship allows employers to discharge employees at any time for any reason (as long as it is not an unlawful reason) with or without notice, the reality is that most employee problems related to performance or conduct do not immediately present a situation warranting either discipline or termination of employment. When problems first develop, except in cases of egregious conduct necessitating immediate dismissal, every effort should be made to facilitate good communication between the supervisor and the employee to encourage and support improvement. Should problems not resolve quickly, progressive discipline is appropriate, including oral or written counseling over a reasonable period of time before termination is considered. This does not mean that employers should adopt a lock step approach to discipline in every situation. For a variety of reasons, the employer's approach must be flexible, based on the facts and circumstances of each particular situation.

A. Progressive Discipline Must be Flexible and Serve as a Guideline Only

An employer must be careful to avoid contractually obligating itself to follow each progressive discipline step before terminating an employee. *See Ferguson v. Host International, Inc.*, 53 Mass.App.Ct. 96 (2001). Although Massachusetts is an "at-will" state, employers can be found liable for breach of

an implied contract for failing to follow a progressive discipline policy. "The key inquiry is whether, in light of context of the [employee handbook's] preparation and distribution, as well as its specific provisions, it would be objectively reasonable for employees to regard the manual as a legally enforceable commitment concerning the terms and conditions of employment." *Ortega v. Wakefield Thermal Solutions, Inc.*, 2006 WL 225835 at *3 (Mass. Super. 2006).

Accordingly, in most cases, it is best practice not to include a progressive discipline policy in an Employee Handbook. Should an employer have reason to adopt in writing a progressive discipline policy in its Handbook, after consulting with experienced employment counsel, the employer must clear communicate in writing that the policy provides guidelines only and that the employer is not required to follow every step. To avoid inadvertent contractual obligations, it must be crystal clear that the employer retains the right to implement disciplinary action at any time, up to and including immediate discharge, at its sole discretion.

B. Elements of Effective Progressive Discipline

- ***Articulate Expectations of the Job.*** A progressive discipline policy is effective if it consistently informs the employee what is expected of him or her and where the employee stands with respect to those expectations. Make sure updated accurate job descriptions are in place at all times.

- *Centralization/Consistency.* If adopted universally, progressive discipline can promote centralization and consistency. Specifically, if the human resource group is involved, then particular performance issues will be addressed consistently throughout the organization. This helps prevent claims of discrimination.
- *Discipline Should be Progressive.* The underlying assumption of progressive discipline is that both employees and employer want the employees to be strong performers. If allowed a second chance, most employees will improve. That should be the goal of the progressive discipline system and it should be applied that way.
- *Commitment to Improvement.* Both the employee and the employer must be committed to performance improvement in order for a progressive system to work.
- *Acknowledgment.* Consistent with the commitment to improve, employers must acknowledge improvement.

C. Progressive Discipline Steps

The following steps are typical of a progressive discipline process:

- *Counseling.* Document conversations with employee regarding conduct or performance deficiencies.
- *Oral Warning.* An oral warning is the first and least severe from of discipline. Preferably, the human resource department will be consulted before an oral warning is issued. The oral warning should be documented on a simple form stating that continued non-compliance may lead to further discipline. The form should also record the reasons for the warning and what was said by both the supervisor and the employee. The supervisor should sign the form and it should be reviewed by the human resource department before it is placed in the personnel file.
- *Written Warning.* If the performance problems or misconduct continue, then the employer can give the employee a written warning. Preferably the human resource department should be consulted *before* a written warning is given to ensure accuracy,

consistency and objectivity. The written warning should contain the following:

- ❑ State the facts/reasons for the warning;
- ❑ State policies that have been violated;
- ❑ State necessary conditions to avoid further discipline;
- ❑ Elicit feedback and establish follow-up meetings to review progress;
- ❑ Inform employee that job is in jeopardy if the misconduct or performance deficiency continues;
- ❑ Employee and supervisor should sign the written warning and it should be sent to the human resource department for inclusion in the employee's personnel file.

➢ ***Termination of Employment.*** If the employee's misconduct or poor performance continues, the employee's employment should be terminated. Employee should not be discharged without consulting the human resource department.

D. When Progressive Discipline Policy is Included in Employee Handbook

Again, in most situations, it is unnecessary and inadvisable to include a written progressive discipline policy in an Employee Handbook. Depending on the characteristics of the particular workplace and the business needs of the employer, in certain instances, when an employer is able to uniformly enforce such a policy, the employer may determine after consulting with counsel that it is appropriate to include a progressive discipline policy in its Handbook. Under such circumstances, to preserve the at-will nature of its employment relationships and avoid creating contractual obligations, the employer must

include language in the policy to clearly communicate that the progressive discipline steps serve only as guidelines and that the employer retains complete discretion at all time to determine the appropriateness of disciplinary action and/or termination in every instance.

IV. PROBATIONARY PERIODS

Traditionally, employers have used probationary periods as trial periods to assess a new employee's skills and suitability for the job. The difficulty with probationary periods is that they can lead employees to believe that if they survive probation, they can be terminated only for cause. To avoid this problem, many employment attorneys recommend eliminating probationary periods altogether or renaming them "introductory" periods. At a minimum, handbook provisions containing such policies should emphasize that employees remain at-will, both during and after the introductory period. The following sample provision contains this clarifying language:

> Introductory Period:
>
> The introductory period is intended to give new employees the opportunity to demonstrate their ability to achieve a satisfactory level of performance and to determine whether the new position meets their expectations. The Company uses this period to evaluate employee capabilities, work habits and overall performance. Either the employee or the Company may end the employment relationship at will at any time during or after the introductory period, with or without cause or advance notice.

All new and rehired employees work on an introductory basis for the first 90 days of their employment. Any significant absence from the job that they were originally hired for will automatically extend an introductory period by the length of the absence. If the Company determines that the designated introductory period does not allow sufficient time to thoroughly evaluate the employee's performance, the introductory period may be extended for a specified period. The company reserves the right to lengthen or shorten the introductory period at its discretion.

V. PROFESSIONAL CONDUCT AND GUIDELINES FOR APPROPRIATE CONDUCT

The need to spell out what constitutes appropriate workplace behavior will vary from employer to employer. Some employers may see no need to include this section at all or provide only very broad behavioral guidelines; others may find it necessary to provide a laundry list of unacceptable behaviors. Examples of both types of policies are set forth below. Employers are encouraged to consider carefully which type of policy works best for them. Under either approach, this section should be carefully drafted to avoid any implication that the employer will discipline or terminate employees only for the reasons stated in the policy. Instead, the provision should clearly state that the list is not exhaustive and reiterate the employer's discretion to terminate employees for any reason at any time.

Professional Conduct:

As an integral member of the Company, every employee is expected to accept responsibility, adhere to appropriate expectations of personal conduct and exhibit a high degree of personal integrity at all times. This not only involves sincere respect for the rights and feelings of others but also demands that you refrain from any behavior that might be harmful to you, your co-workers, customers and/or the Company, or that might be viewed unfavorably by others.

All employees are expected to comply with the Company's policies, standards of behavior and performance expectations. Non-compliance must be remedied, and any employee may be subject to disciplinary action, up to and including termination, as decided by the Company in its sole discretion.

While the foregoing establishes Company expectations, it does not alter the right that both you and the Company have to terminate the employment relationship at any time, and for any reason, with or without notice.

Guidelines for Appropriate Conduct:

[Same first two paragraphs as above. The third paragraph could state:

Certain types of behavior and conduct may be so detrimental as to warrant immediate termination. While it is impossible to list all such conduct or behavior, the following are some examples of such conduct or behavior:

1. *Falsifying employment or other Company records.*
2. *Violating the Company's nondiscrimination and/or sexual harassment policy.*
3. *Soliciting or accepting gratuities from customers or clients.*
4. *Engaging in excessive, unnecessary, or unauthorized use of the Company's supplies, especially for personal purposes.*
5. *Possession consumption or being under the influence of alcohol or illegal drugs at work or on company premises.*

6. *Illegally manufacturing, possessing, using, selling, distributing or transporting drugs.*
7. *Fighting or using obscene, abusive or threatening language or gestures.*
8. *Stealing property from coworkers, customers or the Company.*
9. *Having unauthorized firearms on the Company premises or while on Company business.*
10. *Disregarding safety or security regulations.*
11. *Engaging in insubordination.*
12. *Failing to maintain confidentiality of Company, customer, or client information.*
13. *Unauthorized taking of Company funds or property or unauthorized charges against a Company account.*

In addition, if your performance, work habits, overall attitude, conduct or demeanor is unsatisfactory in the judgment of the Company, you will be subject to disciplinary action, up to and including immediate dismissal. **Nothing contained in this policy, however, should be construed to be a promise or guarantee that particular action will be taken in any particular circumstance nor is it intended to alter that you are employed at will.**

VI. ATTENDANCE AND PUNCTUALITY

Different workplaces will have different expectations and levels of stringency when it comes to regular attendance and/or tardiness. Some employers use the carrot approach with respect to absences, granting employees a bonus for perfect attendance or payment for unused sick/personal days. Others may indicate that discipline or discharge will result from excessive absenteeism or tardiness. Employers with strict attendance policies should take care not to run afoul of the Americans with Disabilities or Family and Medical Leave Acts or similar state laws if the policy calls for discipline for excessive

absenteeism without regard to the reason for the absence. Following are two sample policies:

> Attendance:
>
> The Company expects all employees to assume diligent responsibility for their attendance.. Recognizing however that illnesses and injuries may occur, the Company has established sick/personal time to compensate employees for certain time lost for legitimate business reasons, including time off to secure necessary treatment for a disability.
>
> If you are unable to work because of illness, you must notify your supervisor or the personnel department at least one hour before your scheduled start time. Failure to properly notify the Company results in an unexcused absence.
>
> If you are absent for more than three consecutive workdays, a statement from your physician is required before you will be permitted to return to work. In such instances the Company also reserves the right to require you to submit to an examination by a physician designated by the Company in its discretion. In addition, the Company may require you either to submit a statement from your physician or be examined by a Company-designated physician in other instances at its discretion, such as where abuse is suspected.
>
> Absenteeism that is unexcused or excessive in the judgment of the Company is grounds for disciplinary action, up to and including dismissal.
>
> Punctuality:
>
> To maintain a safe and productive work environment, the Company expects employees to be reliable and punctual in reporting for scheduled work. Tardiness places a burden on other

employees, customers and the Company. In rare instances when an employee cannot avoid being late to work, the employee must notify his/her supervisor as soon as possible in advance of the anticipated tardiness. Excessive tardiness may be grounds for discipline, up to and including dismissal.

VII. DRUG, ALCOHOL AND SMOKING POLICIES

In addition to policies governing employee conduct generally, it is also advisable to consider policies regarding other types of conduct that may be of concern to the employer.

A. Drugs and Alcohol

Massachusetts currently has no state laws addressing or restricting drug testing in the workplace. However, the Massachusetts Privacy Act, M.G.L. c. 214, §1B,[2] can provide the basis for claims that an employer's drug or alcohol testing violated an employee's privacy rights. There are also several federal laws that address drug testing and use in the workplace. The Drug-Free Workplace Act of 1988 applies to employers with federal contracts of at least $25,000 and employers receiving federal grants of any amount. This Act requires employers to meet a variety of criteria to continue to be eligible for federal aid or contracts, including publishing a drug policy that prohibits distributing, possessing, manufacturing, or using drugs in the workplace and requiring employers to distribute this policy to employees. This statute also requires

[2] This statute provides that "[a] person shall have a right against unreasonable, substantial or serious interference with his privacy" and grants the Superior Court jurisdiction to enforce this right.

employers to inform employees of the penalties for drug abuse at work, including possible termination.

The federal Department of Transportation maintains very broad drug and alcohol testing rules for employers and employees in the transportation-related industries. Although alcoholism or drug addiction may constitute a disability, the Americans with Disabilities Act expressly permits employers to prohibit the illegal use of drugs and alcohol in the workplace and to require that employees not be under the influence while at work.

In light of the above, employees are encouraged to adopt drug and alcohol policies that are consistent with state and federal requirements and the nature of their business. A sample policy from the handbook of a non-transportation industry employer follows:

> Drug and Alcohol Policy:
>
> The Company is committed to maintaining a drug-free workplace and prohibits:
>
> 1. The use, sale, purchase, delivery or possession of illegal drugs at any time or at any place (on or off the job) while employed by the Company;
> 2. The abuse of prescribed drugs;
> 3. The failure to report any known adverse side effects of medication or prescription drugs, which an employee may be taking that may affect safety; and
> 4. Possession or consumption of alcohol while working or reporting to work under the influence of drugs or alcohol.
>
> Violation of this policy may result in discipline up to and including immediate termination.

B. Non-smoking

The Massachusetts Smoke-Free Workplace Law, M.G.L. c. 270, §22 requires all workplaces to be smoke-free. Designated smoking areas or smoking rooms are no longer permitted, with certain limited exceptions. Employers violating this law may receive fines ranging from $100 to $300 for permitting smoking. A sample smoke-free workplace policy is set forth below:

> Smoke-free Workplace Policy:
>
> It is the Company's policy to provide its employees, customers and visitors with a safe and health environment free of passive smoke.
>
> Smoking is permitted only outside the Company's building and beyond 30 feet of any building, entryway or window that opens. This policy includes non-business hours, such as weekends and evenings. This policy applies to all persons who are on Company, property whether or not they are employees. It is the responsibility of all employees to ensure that their visitors comply with all provisions of this policy.
>
> No time off from work is authorized for smoking. Employees who choose to smoke must do so off premises during meal and other break times.
>
> Violations of this policy may subject employees to discipline, up to and including termination.

VIII. OTHER WORKPLACE CONDUCT POLICIES

Many diverse conduct-related policies can be included in an Employee Handbook. Depending on the type of company, workplace culture and reasonable business needs of the employer, a variety of policies may be appropriate. Importantly, the policies and practices included in an Employee

Handbook must be consistent with the actual policies and practices of the employer. Establishing expectations in written form that are not uniformly enforced in the day to day of your business operations can give rise to legal claims and should be avoided. As with any other aspect of an Employee Handbook, workplace conduct policies should be drafted with care, in consultation with experienced employment counsel. Following is a list of some conduct related employment policies that might be appropriate for inclusion in an Employee Handbook.

- *Confidential Information*
- *Email and Internet Access*
- *Personal Telephone Calls*
- *Workplace Safety*
- *Dress Code*
- *Outside Employment*
- *Conflicts of Interest*
- *Company Property*
- *Company Vehicles*
- *Expense Reimbursement*
- *Company Credit Cards*
- *Travel, Meals and Entertainment*
- *Solicitation in the Workplace*
- *Inclement Weather*

IX. TERMINATION OF EMPLOYMENT

Inevitably, some employees must be fired. The circumstances that lead to the decision to fire can vary widely, from a reduction in force, poor performance or a single incident of gross misconduct. Regardless of the particular circumstances, certain ground rules should be followed when deciding to terminate and notifying the employee of the decision. The most important of those is reviewing existing policies to ensure the termination is not contrary to any existing policies. Moreover, once the decision to terminate has been made, it is essential to comply with any policies in place that govern post-termination issues.

A. Deciding to Fire

Even in a pure "at-will" state, where the law states that an employer does not need a reason to fire an employee, few employers take such drastic action without having a basis for doing so. Accordingly, when making the decision, it is helpful if the decision-maker imagine he or she is sitting in a deposition one year in the future and the employee's lawyer asks, "why did you terminate my client?" The decision-maker must be able to answer that question, decisively, succinctly and truthfully. More importantly, the answer to this question cannot be formulated *after* the termination has been made. Quite simply, until an employer can answer that question without hesitation, the employee should not be terminated.

Accordingly, it is advisable that an employer never fire an employee on the spot. It is generally advantageous for the employer to have some time to consider whether or not discharge appropriate. Discharge decisions should be carefully considered, with all relevant facts assessed and appropriate policies and procedures reviewed.

B. Policy Regarding Suspension Pending Investigation

In situations where the employer feels the need to immediately remove the employee from the workplace, the employer should suspend the employee pending further investigation. The suspension can be with or without pay depending on the employer's practices.

As part of this investigative process, an employer should review all the relevant documents pertaining to the employee. For example, if an employer uses a progressive discipline policy, have all the steps been followed? Is there documentation showing that the steps have been followed? Was the employee given a chance to actually improve? Further, it is always advisable to inquire as to how other employees in similar circumstances have been treated. Finally, in a case of alleged gross misconduct, has the employer investigated all the facts?

Assuming that the decision has been made to terminate, the employer must also consider a variety of other issues before meeting with the employee. For instance, the employer must review its policies to assess:

- ❑ What is an appropriate last day;

- ❑ What severance benefits, if any, will the employee receive;
- ❑ Will the employer contest a claim for unemployment compensation;
- ❑ What kind of reference will the employer provide;
- ❑ Is the employee eligible for COBRA;
- ❑ Will the employee be bound by any restrictive covenants.

Obviously, the termination meeting is not the appropriate place to consider these issues. Indeed, if the employer is going to offer a separation agreement, the paperwork should be prepared in advance of the meeting. Also, the attendees at the meeting should be prepared to answer other logistical and administrative questions.

X. REFERENCES

References can be a sensitive topic and can be dealt with in a variety of ways by employers. It is advisable to have a policy that describes the employer's practice regarding references. For example, if the employer's policy is to only state the former's employee's dates of employment and job title, the policy should state so. Similarly, if the employer's policy is to send all reference requests to a particular person or department (human resources, for example), the policy should so state.

XI. RETURN OF COMPANY PROPERTY

Employers may not make deductions from an employee's paycheck once the wages are earned. Rather, the better way to handle the situation is to create a "Check List" of items that each employee is expected to return and a member and someone from the management group or the human resource department should go through the list with the employee during the termination meeting or some point thereafter.

Example policy:

> *Employees are responsible for all company property, materials and written information issued to them or in their possession or control. Employees must return all property in satisfactory condition immediately upon request or upon voluntary or involuntary termination of employment. To the extent permitted by law the company may deduct from an employee's current or final paycheck the cost of any items that are not returned when requested or upon termination of employment*

A. The Termination Meeting

Generally speaking, there are five (5) objectives to a termination meeting:

- ❑ Communicate the decision, providing the facts clearly and simply;
- ❑ Present the decision as an irrevocable one;
- ❑ Explain separation benefits;
- ❑ Discuss logistics of work transition;
- ❑ Encourage employee to take positive steps.

Depending on the nature of the termination, some of these objectives may take on more emphasis than others. For example, in a reduction-in-force,

an employer may want to focus on the separation benefits or the need to take positive steps going forward. In a case where an employee has engaged in misconduct, it may be more important to describe the reasons for the termination and post-employment issues such as applying for unemployment compensation and selection of COBRA benefits.

As previously discussed, there are many factors to consider in planning a separation meeting. The meeting should be well thought out ahead of time so that all necessary business can take place during the meeting. Although each situation is unique, several criteria should always be followed:

- ***Keep it Short.*** Straightforward, "brass tacks" delivery of information is crucial. The information, which must be conveyed is simple and should be stated clearly and concisely. The "notifier" (*i.e.* the person informing the employee) should not dwell on any one issue.
- ***Proper Tone.*** Adopt a business-like tone. It will not be helpful if the "notifier" becomes too emotional or personal. Showing too much emotion may permit the meeting get off course and unnecessarily prolong it.
- ***Have a Second Person Present.*** One person should notify the employee of the decision to terminate. A second person should be in the meeting who can act as a witness. Also, if the second person is from the Human Resources Department, that person can discuss post-termination issues such as COBRA selection and applying for unemployment compensation. If an employer conducts a termination meeting without a witness, there is a chance that the terminated employee might bring a charge or complaint against the company and misrepresent the discussion which took place at the meeting.
- ***Do Not Embarrass the Employee.*** Employees should never be fired in front of their coworkers. Termination meetings should

occur in private areas ideally at times when few if any employees are around. Regardless of the reason, an employee who is fired is going to be upset; there is no reason to exacerbate those feeling by embarrassing the employee.

Employers must also be aware of refraining in conduct that "would tend to hold the [employee] up to scorn, hatred, ridicule or contempt." *Phelan v May Department Stores Co.* 60 Mass. App. Ct. 843, 847 (2004) (*quoting Stone v Essex County Newspapers, Inc.*, 367 Mass. 849, 853 (1975)). In *Phelan* a jury concluded that the employer's conduct of holding an employee for over 6 hours and escorting him around the office caused his coworkers to believe the employee engaged in criminal misconduct. *Phelan*, 60 Mass. App. Ct. at 848. Because the employee had not engaged in criminal misconduct, the Appeals Court affirmed the jury's conclusion that the employer's conduct constituted defamation of the employee.

XII. POST-TERMINATION ISSUES

Employers vary on how to treat an employee after he or she has been terminated. Typical steps include:

- Locking the employee out of the company's computer network immediately before or during the notice to the employee of the termination;
- Requiring the employee to leave the premises directly from HR;
- Having a security officer accompany the employee to his/her work area to collect personal belongings to ensure the employee does not take or damage any property (note: as previously discussed, this type of conduct, if not done properly may give rise to a claim of defamation. *See Phelan v May Department Stores Co.* 60 Mass. App. Ct. 843, 847 (2004));

- Changing locks.

These are not the type of issues that are contained in an employee handbook; nor should they be. It certainly would not boost employee morale to explicitly state that the company, as a matter of policy, changes locks and has security present whenever an employee is terminated.

Rather, whether any or all of these steps should be followed depends on the particular circumstances. It is advisable to take whatever reasonable steps are necessary to protect the company's trade secrets and confidential information. On the other hand, exacerbating an already tense situation may cause the disgruntled employee to seek legal counsel. Thus, an employer must attempt to strike the appropriate balance.

Another issue to consider is how to communicate the termination to other employees. Although supervisors, executives, and corporate officers are conditionally privileged to publish defamatory material if it is "reasonably related to the employer's legitimate business interest," employers must also be mindful of an individual's privacy interests and exceeding the privilege. *See Sklar v. Beth Israel Deaconess Medical Center*, 59 Mass. App. Ct. 550, 558 (2003). Thus, although an employer may wish to send a message that certain conduct will not be tolerated, the employer must also be mindful of the terminated employee's interests. Again, the employer must strike the appropriate balance between these potentially competing interests.

Finally, one other important post-termination issue is the continuation of health benefits. Under COBRA, a federal law, employers with twenty (20) or more employees must allow employees and their dependents to continue group health plan coverage at their own expense. The employee has sixty (60) days from the termination date to decide whether to elect coverage. The employer must provide notice to the employee and his or her dependents in writing of the right to select continued coverage. COBRA coverage may continue for up to eighteen (18) months. Employers should rely on experienced human resource professionals and/or legal counsel to ensure they are complying with all the appropriate notification requirements of COBRA.

XIII. SEPARATION AGREEMENTS

The first consideration is whether the employer has a severance policy. Many employers have written policy but this can often create separate obligations imposed by the Employee Retirement and Income Security Act ("ERISA").

Employers commonly seek to avoid future litigation by requiring terminated employees to sign a waiver and release of claims at the time of termination. Given the legal significance of entering a release agreement, it is strongly advised that employers have counsel assist in the preparation of such agreements. Regardless, employers should consider the following issues when preparing separation agreements:

- *The Separation Agreement Must be Supported by Consideration.* The employee must receive something beyond what is already due under the employer's wage and benefit policies. Usually, this will take the form of an additional payment in the form of salary continuation or a lump sum payment.

    - From an administrative perspective, lump sum payments may be more desirable for employers. On the other hand, if an employer is concerned that an employee may violate other ongoing restrictive covenants, salary continuation can be used as a way of assisting with enforcement of those obligations. In other words, if an employee breaches his or her non-compete obligation, the employer can stop making the salary continuation payments.

- *Incentive Compensation.* Severance pay generally is tied to base salary and typically does not include bonuses, commissions and other forms of incentive compensation. Again, this depends on whether a policy or practice exists. Employers often will take the position that the employee is not eligible for quarterly or year-end bonuses, because he or she will not be employed on the date such payments are calculated and may not have contributed to the sales or financial performance on which such calculations are based. Settlement and separation agreements should spell out with specificity to what commissions and bonuses the employee will be entitled.

- *Health Insurance and COBRA.* Will the employer continue to carry the individual as a regular employee under the employer's group health plan following the termination? This is not advisable unless the employer and counsel have carefully reviewed the employer's group health plan. The risk of wrongfully taking this approach is that the employer can become a self insurer of the ex-employee's health. A better approach is to refer in the agreement to the employee's rights under COBRA and, if desired, to provide that, should the employee make a COBRA election, the employer will pay for a certain portion of the employee's cost of the COBRA continuation coverage.

- ***Other Benefits.*** Often an employer and former employee will negotiate such economic benefits, which can constitute consideration for the agreement, such as: outplacement assistance; moving expenses; reimbursement for legal fees incurred in negotiating the agreement; indemnification. To the extent these benefits are part of the severance policy or separation package, the employer should include them in the separation agreement.
- ***Confidentiality.*** Employers often will desire language providing that the terms of the separation agreement will be kept confidential. Such provisions typically provide that the employee can share the terms with family members and legal and financial advisors.
- ***Non-Disparagement Provision.*** Employers should insist that the agreement provide that the employee will not make derogatory, false, disparaging and/or damaging statements about the employer, its products and/or its personnel. Employees will often ask for a mutual non-disparagement provision. It is advisable that the employer only agree to a non-disparagement provision limited to specific named individuals with knowledge of the facts and/or employees of specific groups or departments. Otherwise, the employer may be held liable for persons over whom it has no control.
- ***Who Should Be Released.*** From the employer's standpoint, the critical component of a settlement or separation agreement is the employee's provision of a release of all claims the employee has or may have against the employer. Putting aside specific requirements imposed by certain laws, the basic requirement for enforceability of a release is that it is knowing and voluntary in exchange for valuable consideration.

    - From the employer's perspective, the release should apply to the employer, its agents, representatives, successors, subsidiaries and affiliates. In addition, it is advisable to include in the definition of the released party, the employer's officers and directors.

- ***Certain Claims Cannot Be Released.*** Certain kinds of claims cannot be waived. These include claims relating to: worker's compensation rights under Massachusetts law (M.G.L. c. 152 § 75B(3)), unemployment benefits (M.G.L. c. 151A § 35) pension

or retirement benefits covered by ERISA and claims under the Fair Labor Standards Act without approval of the Department of Labor or a court.

- ❑ There is a split of authority as to whether claims under the Massachusetts Wage Payment Law, M.G.L. c. 149 § 148 *et seq.*, may be waived. *Compare Dobin v. Cioview Corp.*, 16 Mass. L. Rptr. 785 (2003) *with Gordon v. Millivision Holdings, LLC*, No. 03-086 (Franklin Sup. Ct. January 18, 2005).

➢ ***Specific Requirements of OWBPA.*** The Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626(f), imposes a number of requirements to obtain a valid waiver of claims under the federal Age Discrimination in Employment Act ("ADEA"). A release that does not comply with OWBPA is considered not knowing and voluntary. The ADEA applies only to employers with twenty (20) or more employees; smaller employers need not comply with its requirements in order to obtain a release of age discrimination claims under M.G.L. c. 151B. OWBPA requires the following:

- ❑ Waiver must be in plain language;
- ❑ No future claims may be waived;
- ❑ The employee must be afforded 21 days (or 45 days if part of a group termination or exit incentive program);
- ❑ The employee must be provided a seven-day revocation period following execution of the waiver;
- ❑ The employee must be advised in writing to consult an attorney prior to signing;
- ❑ The waiver must specifically refer to the ADEA;
- ❑ The agreement must contain a statement that benefits paid under the agreement are beyond anything the employee was already entitled to receive.

➢ OWBPA imposes additional requirements in the context of an exit incentive or employment termination program offered to a group or class of executives. First, the employee must be

afforded a 45-day period to consider signing the release. Second, the employer must provide information relating to job titles and ages of those eligible for the program, and the corresponding information relating to the employees not eligible or not selected for the program. Failure to comply with these requirements can lead to the conclusion that the release of the age claim is invalid. *See Kruchowski v Weyerhauser Co.*, 423 F.3d 1139 (10th Cir. 2005).

XIV. CONCLUSION

This article only touches on many of the personnel and legal issues that arise when drafting policies related to employee performance, conduct, discipline and termination. Establishing and enforcing clear, well-defined policies in these areas can contribute significantly to a smoothly running workplace, improve communication and morale, and help to avoid a host of legal problems. Unfortunately, poorly conceived or sloppily drafted policies or inconsistent implementation can be destructive and create a variety of legal problems. To avoid these problems, it is therefore advisable to consult with experienced employment counsel to developing policies that are appropriate for your workplace and draft your Employee Handbook. Counsel can also assist in ensuring that staff is adequately trained to properly put into practice and enforce employment policies.

9/12/07