When It’s Not as Easy as Saying “You’re Fired!”
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Handling Difficult Terminations
- How to spot a potentially tricky termination.
- Gathering information and investigating before making a decision.
- When and why you might want to consult with or involve counsel.
- Considerations when making a final termination decision and how to communicate.

Spotting a Tricky Termination
What to watch for in the discipline and termination process.
Spotting a Tricky Termination

- Protected classes
- Protected leave
- Protected conduct
- Public policy
- "Hidden" employee rights
- The litigious employee

Spotting a Tricky Termination: Protected Classes

- Know your state!
- Not all terminations in this category are complicated—many are not. These protected classes nonetheless are relevant in evaluating planned terminations.
- Need to consider not only intentionally discriminatory treatment but also disparate impact.
- Make sure treatment is consistent with other non-protected classes.

Pumphrey v. City of Coeur D'Alene, 17 F.3d 395, 1994 WL 55541 (9th Cir. 1994).

City selected a Smith & Wesson .669 as its standard duty weapon.

Plaintiff was terminated because she could not qualify with the newly required weapon although she qualified without difficulty with a .357 revolver.

Plaintiff brought a claim alleging, among other claims, that the City's requirement had a disparate impact upon women because it has a large grip, making it more difficult for people with smaller hands to handle.

"The requirement that all officers use the large griped .669 is a facially neutral practice. But plaintiff's expert's testimony and common sense, however, illustrate that this facially neutral requirement would have a significantly discriminatory impact upon women, whose hands on average are smaller than men's." Id. at *1.

Ninth Circuit reversed summary judgment in employer's favor because, at that time, they made "no effort to justify the adoption of their weapon."
Spotting a Tricky Termination: Protected Leave

- Protected Leave
- FMLA
- ADA (ICRC)
- Pregnancy
- USERRA*

- Probably the most difficult category of terminations.
- Different considerations for employees on leave versus those returning from leave.
- Statutes give the employee the benefit of the doubt, so better to make sure you take the time to ensure compliance.

Spotting a Tricky Termination: Protected Leave

- Family Medical Leave Act (FMLA)
  - Provides 12 weeks of unpaid, job-protected leave for an employee's own or a family member's serious health condition, for the birth or adoption of a child and for military exigencies.
  - An employee must be returned to the same or equivalent job.
  - Time off cannot be held against employee in decisions such as hiring, promotions or discipline.
  - FMLA "Entitlement" claim — "where an employer refuses to authorize leave under the FMLA or takes other action to avoid responsibilities under the Act." Pulczinski v. Trinity Structural Towers, Inc., 691 F.3d 996, 1005 (8th Cir. 2012).
  - FMLA "Discrimination" claim — "when an employer takes adverse action against an employee because the employee exercises rights to which he is entitled under the FMLA." Pulczinski, 691 F.3d at 1006.

- Entitlement Claims
  - "An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment." 29 C.F.R. § 2510.216(e).
  - If you terminate an employee on leave, the employer will have the burden of proving the employee would have been terminated regardless of leave status.

- Discrimination Claims
  - Employee must prove that the employer was motivated by the employee's exercise of FMLA rights.
Spotting a Tricky Termination: Protected Leave

Sharif v. United Airlines, Inc., 841 F.3d 199, 201 (4th Cir. 2016).

Sharif and his wife (both United Airlines employees) travelled on vacation to South Africa March 16 to April 4. Their time off did not include March 30 to 31 when Sharif was assigned to customer service work in the United Airlines lounge. Sharif placed his schedule on the United Airlines shift-swap website and found someone to cover his March 31 shift. He was unable to cover his March 30 shift.

Sharif had been diagnosed with an anxiety disorder in 2009, and United Airlines had approved his request to take intermittent leave under the FMLA to handle panic attacks.

At 7:00 a.m., Cape Town Time (1:00 a.m. Eastern Standard Time), on March 30, Sharif called United Airlines to take medical leave under the FMLA. He had not made any advance reservations for a return flight. The next day, Sharif explained to United Airlines that he was on his way home standby. The return flight was cancelled due to severe weather, and at 3:00 a.m. Eastern Standard Time, on April 1, Sharif and his wife finally departed for Washington and arrived just in time for his wife's next shift.

United Airlines noticed the peculiar circumstances and investigated. When asked about his absence, Sharif sat in silence for a period of minutes before (1) replying he was not scheduled to work on March 30, (2) when asked why he had taken FMLA leave if he did not have a shift, responding he “did not recall being out sick this day or calling out sick,” then (3) saying he began trying to return home standby, and after a very stressful, failed attempt to do so, he grew anxious and was seized by a panic attack that lead to FMLA leave.

After being told he would be terminated for not being truthful, Sharif retired.

Then, of course, he sued!

The court is having none of Sharif's argument. The FMLA serves the important purpose of allowing employees to take leave for important family and medical needs, but it is not a right that can be fraudulently invoked. While a company may not deny valid requests for leave, and an employer cannot use allegations of dishonesty as a pretext for subsequent retaliation, it is equally important to prevent the FMLA from being abused. As the Department of Labor explains, “An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's... provisions.” 29 C.F.R. § 825.216(d). So it is here. The evidence taken as a whole plainly paints the picture of an employee who used FMLA leave to avoid interrupting his vacation, and then gave a variety of inconsistent explanations for his behavior upon his return. Sharif fails to meet his burden of showing that United Airlines' explanation for his discharge was pretextual, and therefore fails to establish a genuine dispute of material fact suitable for trial.

The court is having none of Sharif's argument.
Spotting a Tricky Termination: Protected Leave

Hansen v. Fincanteri Marine Grp., LLC, 763 F.3d 832, 834 (7th Cir. 2014).

May 3: Hansen obtains certification - doctor estimated the frequency of the flare-ups as 4 episodes every 6 months and the duration as 2-5 days.

May and June: Hansen requests numerous FMLA leaves.

July 1: Hansen requests his 8th episode of FMLA leave.

July 6: Employer faxes doctor stating the July 1 absence “is out of his frequency and duration. Please confirm item #7.”

#7 asks about the need for follow-up appointments or to work a part-time or reduced schedule due to the condition.

Employer probably meant #8, which was about estimated duration and frequency. Doctor responded, “Item #7 confirmed.”

Based on the response, Hansen’s request for FMLA leave is denied.

July 11-13, 18: Hansen requests his 9th and 10th episode of FMLA leave, which are both denied because his “frequency was exceeded.”

July 22: Employer meets with Hansen and terminates him for violating its attendance policy.

Told Hansen he “exceeded [his] frequency” where he could “miss 4 times every 6 months,” and that they called his doctor and there was no change in the certification.

July 26: Hansen’s doctor sends a letter indicating that he was modifying his original certificate.

Includes the entire year of 2011 and increases the frequency of episodes to once a month for a duration of 2-5 days per episode.

Employer does not change its mind on termination, so Hansen brings suit.

Not only does Hansen bring suit, he gets to trial because his employer terminated him without following the FMLA’s recertification rules.

Where did the employer go wrong?

The Employer should have asked for recertification before terminating Hansen.

The certificate is only an estimate.

An employer cannot argue that the FMLA leave is limited to the precise frequency and duration stated in the certification.

Have to provide employee opportunity to cure certificate.

Epilogue: at trial, the employer won. While juries can be unpredictable, an easy way to avoid the whole ordeal would be seeking recertification.
Spotting a Tricky Termination: Protected Leave

- Americans with Disabilities Act (ADA) and Iowa Civil Rights Act (ICRA)
  - ADA is a federal law covering employers with 15 or more employees, including state and local governments.
  - ICRA applies to employers with 4 or more employees.
  - Prevents employers from discriminating against employees or job applicants because they are a qualified individual with a disability.
  - Disability = A physical or mental impairment that substantially limits one or more major life activities; a record (or past history) of such an impairment; or being regarded as having a disability.
  - Requires an employer to reasonably accommodate an employee or prospective employee with a disability, which may include leave from work.

  - Walker told her employer that she would be having surgery and would be out for about 6 months.
  - Walker asked for and received 12 weeks of FMLA leave for the surgery.
  - At the end of her 12 weeks, Walker was unable to return to work, and her employer told her she could resign or be terminated.
  - Walker resigned and sued.
  - Jury found in Walker’s favor.

- What mistake did Walker’s employer make?
  “This employment-discrimination case arises at the intersection of the Americans with Disabilities Act and the Family and Medical Leave Act. The defendant employer apparently believed, in effect, that for an employee needing medical leave based on a disability, the FMLA displaced the ADA, so that granting 12 weeks of FMLA leave ended any need for a further accommodation for extended leave under the ADA. That is not the law.”

  Walker, 2016 WL 1714871, at *1 (emphasis added).
Spotting a Tricky Termination: Protected Leave

- Was Walker disabled for purposes of the ADA?
  - The Court says yes.
  - The amendments to the ADA have made the scope of the meaning of disabled very broad.
- Was the additional leave a reasonable accommodation in this case?
  - The Court says yes.
  - Employers could not accommodate an indefinite period of absence, but it was clear here that it would only be a single period of leave of about six months.
- Would it have caused the employer undue hardship?
  - The Court says no.
  - The employee’s position had frequent turnover and leave through her return date would not have imposed a burden.

Spotting a Tricky Termination: Protected Reporting

- Protected Conduct
  - Discrimination complaints
  - Unionization activity (or concerted activity)
  - Complaints to agencies (OSHA, DOT, etc.)
  - Workers’ compensation claims
  - Requests for accommodation
  - FMLA leave
- Merely engaging in protected conduct does not immunize an employee from termination:
  “The protection afforded by anti-retaliatory legislation does not immunize the complainant from discharge for past or present inadequacies, unsatisfactory performance or insubordination.”
  Teachout v. Forest City Cmty. Sch. Dist., 584 N.W.2d 296, 302 (Iowa 1998).

- But, where an employee has engaged in protected conduct, employers should be cautious about adverse action:
  - Temporal proximity
  - Negative comments
  - Affected parties as decision-maker
  - “New” issues after complaint
  - Consistent treatment
Spotting a Tricky Termination: Public Policy

- Public Policy Claims
  - Exception to the at-will employment doctrine
  - Created by courts, not statutory

- Iowa has recognized several public policy claims (examples):
  - Filing workers’ compensation claims
  - Reporting child abuse (Ducharme)
  - Refusing to commit perjury (Fitzgerald)
  - Refusing to operate day care center out of ratio (Jasper)
  - Reporting forged state mandated training documents (Dorshkind)
  - Reporting of OSHA violations (George)

To establish a claim:
1. existence of a clearly defined public policy that protects an activity,
2. discharge from employment would undermine the policy,
3. the plaintiff was discharged as the result of participating in the protected activity; and
4. lack of other justification for the termination.

Mahony v. Universal Pediatric Servs., Inc., 643 F.3d 1103, 1106 (8th Cir. 2011).

Spotting a Tricky Termination: “Hidden” employee rights

- "Hidden" employee rights
  - Weapons in cars
  - Various types of leave (public service, child/school leave)
  - Drug testing
  - Polygraphs
  - Recording
  - Social media

- Always check state law if terminating an employee out of state.
- Be careful before you investigate in unconventional ways.
- If you are going to do any kind of “testing,” make sure it is legally compliant.
Spotting a Tricky Termination: The litigious employee

- Litigious Employees
  - "I talked to my lawyer..."
  - "I'll just have to take this to my lawyer..."
  - "Can my lawyer attend my meeting?"

- If the attorney gets involved, you likely want to consult with counsel.
- Do not want to change behavior just because employees claim to have an attorney.
- You do not need to include an attorney in standard disciplinary meetings.
  - Unless you are using counsel, and your ethical rules prohibit an attorney from speaking with the represented party without their attorney.

Investigating

Gathering information and investigating before making a decision.

Investigating: Weingarten Rights

- The NLRA "creates a statutory right in an employee to refuse to submit, without union representation, to an interview which [the employee] reasonably fears may result in his discipline," NLRB v. J. Weingarten, 420 U.S. 251, 256 (1975) (summarizing NLRB decisions).
- Arises out of Section 7 right to act in concert for mutual aid and protection.
- Only where employee requests representation.
- Limited to situations employer reasonably believes interview will result in disciplinary action.
- May not interfere with legitimate, employer prerogatives.
  - The employer may refuse the employee's request, and then the employee can choose to continue without representation or not be interviewed.
  - Employer has no duty to bargain with union representative who attends.
Investigating: Weingarten Rights

- This is just a union thing?
- 1975: Weingarten Rights
- 1985: Sears, Roebuck & Co., 274 N.L.R.B. 230 - overruled Materials Research; Weingarten rights do not apply where there is no certified or recognized union.
- 1988: E.I. DuPont de Nemours, 289 N.L.R.B. 627 - overruled Sears; but declined to return to the rule under Materials Research. Thus, it did not extend Weingarten rights to nonunion employees.
- 1990: Epilepsy Foundation, 298 N.L.R.B. 477 - overruled Sears and DuPont; but returned to Materials Research - Weingarten applies equally to represented and unrepresented employees.
- 2004: Wal-Mart Stores, Inc., 351 N.L.R.B. 130 - refused to apply IBM retroactively and instead found Epilepsy Found. to be controlling, since the case started before IBM was decided.
- 2007:
- It was previously identified as a priority for the general counsel, but unlikely to change with this administration.

Investigating: Weingarten Rights

- Ralphs Grocery Co., 361 NLRB No. 9 (July 31, 2014): "[T]he Respondent violated Section 8(a)(1) by requiring Vittorio Razi to submit to a drug and alcohol test notwithstanding his request for representation, and by suspending and discharging Razi for his refusal to take the test without representation. Because the reason for Razi's suspension and discharge is inextricably linked to his assertion of Weingarten rights, with which the Respondent unlawfully interfered, we find that the judge's make-whole remedy is appropriate."
- Employer terminated employee when he demanded representation and refused to submit to test without representation. Because the reason for Razi's suspension and discharge is inextricably linked to his assertion of Weingarten rights, with which the Respondent unlawfully interfered, we find that the judge's make-whole remedy is appropriate.
- The Board acknowledged the time-sensitive nature of drug testing, but found that was not sufficient to override Weingarten.
- Critically, the Board noted that the employer did not rely on observations or other conduct - the termination was based on refusal to take test.

Investigating: Weingarten Rights

- If Weingarten rights are applicable:
  - Employer must give the employee adequate time to consult with the representative before the interview;
  - Employer must inform the representative of the subject matter of the interview; and
  - Depending on Board precedent (and theory for representation), the representative may be there as a witness or to provide assistance in the interview.
  - Some Board precedent suggests the employer may not require the representative to act as a silent observer.
  - Rights may be triggered during a non-disciplinary meeting if it becomes a disciplinary investigation.
Investigating

Fifth Grade Rules Apply

- Who
- What
- When
- Where
- Why
- How

Key Interviews

- The accused employee
- Involved employees
- Those identified by the accused

Investigations should be documented so you know key facts.

Maintain any hard evidence that might exist—take photographs or video if necessary.

Depending on the circumstances, consider having documentation from more than one source (i.e., witness statements or a third-party investigator).

Assume all documentation will one day be used as exhibits in litigation.

Professional
- Fact-based
- Neutral

Opinionated discussions should take place in person or over the phone, not email.

Supervisors should be cautioned that they should not discuss sensitive situations over email and should only relay facts.

Confidentiality

- Health information should be maintained as confidential.
- General information should be on a need-to-know basis.
- You cannot provide general instruction to employees that they must keep the investigation confidential.
- Limited confidentiality consistent with business purposes is permissible.

When do you have enough?

- Evaluate the scope of the investigation at the beginning, middle and end.
- Do you have evidence that makes your decision clear?
- What will you gain or lose from continuing your investigation?
Investigating: Beware of the Cat’s Paw

- “Cat’s Paw” doctrine imputes motives from a non-decision-maker onto the decision-maker.
- Allows a plaintiff to turn the attention away from the decision-maker and onto another employee.
- Makes independent investigation and review critical.
- The more involvement the decision-maker has with the employee through the discipline and/or performance review process, the harder it will be to show it was the biased party’s actions that caused termination.
- All supervisors who play a role in discipline should also receive training about protected status - not just harassment.

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Investigating: Beware of the Cat’s Paw

_Bennett v. Riceland Foods, Inc._, 721 F.3d 546, 548-51 (8th Cir. 2013).

- Plaintiffs alleged they were terminated in retaliation for filing internal grievances alleging supervisor Crane used racially discriminatory language.
- The grievances were processed through the company’s internal process and were determined to have no merit. Supervisor Jones, who conducted the first review of the grievance, tried to convince plaintiffs to drop the grievance and was reported as “mad” that plaintiffs would not do so.
- Shortly thereafter, the company’s CEO directed division heads to reduce headcount to reduce operating costs.
- Supervisor Jones recommended eliminating the two positions held by plaintiffs. The decision was reviewed by the division manager, HR, the vice president of the department and the CEO. Each determined the proposal had merit as a business decision and approved the reorganization. The warehouse superintendent testified the eliminations were a poor business decision and would not have occurred if plaintiffs had not filed grievances.

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Investigating: Beware of the Cat’s Paw

_Bennett_, 721 F.3d at 548-51.

- Plaintiffs argued retaliation under a “cat’s paw” theory. They argued supervisor Jones was “mad” they did not drop their grievances and influenced the decision to eliminate their employment even if he did not make the ultimate decision.
- A jury found Riceland retaliated against plaintiffs and awarded backpay and $300,000 in damages for emotional distress to each. The Eighth Circuit affirmed the award.
- The district court did not instruct the jury on punitive damages, concluding that, while the company’s review and investigation was not enough to avoid liability, it was enough to show an effort to prevent discrimination.
Involving Legal Counsel

When and why you might want internal or outside counsel.

Advantages of involving counsel:
- Legal advice
- Assistance with documentation/drafting
- Attorney-client privilege
- Relieves uncomfortable situations from HR or other internal investigator

Consider whether the need requires outside counsel.

Using legal counsel as an advisor:
- When you have spotted an issue that may complicate the termination;
- When you are unsure of a statute or other law's requirement; and/or
- When you are drafting documents or correspondence and are concerned about making sure they are compliant or concerned they may come up in litigation.
  - ADA requests for information.
  - Reports after an investigation.

Generally, if you have access to internal legal counsel, they can serve in this advisor role and evaluate if they also need to consult with external counsel.
Involving Legal Counsel

- Using legal counsel as an investigator:
  - When you may want to keep the investigation and its outcome privileged;
  - When it is of a high-level employee (i.e., CEO, CFO, COO, General Counsel, HR Director) and an internal investigator may be uncomfortable investigating their peer or superior;
  - When the investigation requires specialized knowledge (i.e., financial audit, legal compliance, etc.); and/or
  - When the complaint comes through a system designed to go around management (i.e., an audit committee).

- Generally, you will want to consider outside counsel for this role.
  - Creates a bright line for attorney-client privilege.
  - Provides a neutral which enhances credibility of investigation.

- Making it worth your money:
  - Provide legal counsel all information.
  - Discuss your timeline, goals and objectives.
  - What do you really need?
    - If you do not need a written report or a memo explaining the law, tell the attorney exactly what you want and in what form.
    - If you need something written so you can present it to decision-makers, make clear what those expectations are in your company.
  - Allow the investigator to be independent and conduct a complete investigation.
  - Help coordinate interviews and meeting. The more efficient and flexible witnesses can be, the less time you will pay an attorney to wait.

Deciding and Communicating

Considerations when making a final termination decision and how to communicate.
Deciding and Communicating

- Do you have enough information?
- Is everyone acting on information not on impulse or emotion?
- Is there anything that is likely to happen in the very near future that might change the situation?
  - Upcoming doctor’s appointment.
  - Return from leave.
  - Business change that will affect employee.
- Are they likely to get themselves fired no matter what?
- Is the documentation sufficient and in order?

Deciding and Communicating

Timing is Everything

Deciding and Communicating


- Blackwell worked on an assembly line at an ammunition plant. From 2004 to 2011, she received positive reviews and had a good record.
- In August 2011, Blackwell had a verbal altercation with a coworker. Both employees received a written warning.
- In November 2011, they had a second dispute when Blackwell claimed the coworker punched her with his shoulder as they passed each other in the hallway. HR concluded the contact was inadvertent after witnesses stated he “barely brushed” or “bumped into” Blackwell.
- In February 2012, Blackwell and another coworker, Yardley, exchanged insults during an incident at work, which was not reported. That day, they were involved in a second incident where the coworker reported Blackwell elbowed her in the back. A witness corroborated the report and signed a statement. The witness wrote it was intentional and drew a diagram.
- On March 15th, Blackwell was suspended. HR concluded its investigation on March 20th and, based on the complaint and witness, Blackwell was terminated April 4th.
On March 16 (the day after her suspension), Blackwell called an ethics hotline to complain about her suspension and the two incidents with Yardley. The employer began a separate investigation. Blackwell sent a follow-up email to a member of the committee investigating her complaint on the morning of April 4th. She was terminated that same day.

The committee investigating Blackwell’s complaint concluded HR had not violated any policies, but Blackwell herself had violated at least three policies by acting violently.

Blackwell sued for race, gender and age discrimination, retaliation and defamation. After she sued, the witness, who corroborated the elbow to the back incident, recanted and claimed he did not see the altercation.

Blackwell claimed her email to the investigator followed by her termination the same day supported retaliation: “Blackwell has shown nothing more than a coincidence. Before she initially called the ethics hotline, ATK had already suspended her for elbowing Yardley. Human resources manager Baker completed his investigation on March 20, 2012, two weeks before Blackwell was fired. Blackwell did not contest the fact that human resources Baker had completed his investigation and a detailed termination request form prior to her April 4 termination date. Blackwell therefore did not prove a causal connection between her April 4 follow up email and her termination.”

The court also discussed comparator evidence in concluding there was no evidence that any other coworkers had committed an act of physical violence, so they were not similarly situated to plaintiff.

In September 2012, Smith filed a report of discrimination with HR. She alleged Reed and Hurtis made racially charged and disparaging comments, including referring to her as “you people” and a “product of [her] environment.” She also alleged that, around the same time, Hurtis described President Obama as a “sock monkey” and said that Michelle Obama looked like a man.

Smith told Hurtis she would be filing a report based on their comments.

On September 26, 2012, after Smith filed her report, Reed and Paulson called Smith into a meeting. According to Smith, they warned her that she would face negative consequences if she filed any more reports against her supervisors.

Hurtis then hung a poster on her door depicting a kitten looking through the scope of a high-powered rifle captioned “The day the barking stopped.” Hurtis told Smith, “This is what we do to barking dogs in our neighborhood.” Smith interpreted that statement as a warning not to complain again.
Prior to her report, none of Smith’s supervisors ever gave her any “occurrences” or imposed discipline.

On September 26, 2012, they adopted a new attendance policy that gave supervisors the discretion to dispense “occurrences” to an employee who was late or absent without prior permission.

After the report, Reed began giving Smith occurrences.

Smith alleged other employees who behaved similarly did not receive occurrences.

Smith also alleged Reed began overloading her with work, and it was undisputed her workload was heavier than others. Notably, Smith completed all her work on time.

Upon learning Smith completed all her work, Hurtis sent Reed an email stating she “wanted to kill Smith,” and then Reed accidentally included the email in a department-wide email the next day.

Smith then alleged an HR representative told her Reed, Hurtis and another employee were out to get her and they were trying to get her fired. The HR employee helped her secure a different position, but was unsuccessful.

Reed gave Smith several more occurrences in quick succession.

Smith then switched to another supervisor and experienced medical issues. Although she asked her supervisor to start the FMLA process, instead of doing so, he gave her her last occurrence and she was then terminated by HR for reaching the maximum number of occurrences.

Smith filed an internal appeal, and the appeals committee concluded her termination was inappropriate because they failed to evaluate the FMLA. She was offered her job back but told she had to work for the same supervisor under the same conditions. Her request for a different supervisor was denied.

There are so many things going on in this case!!

Cat’s Paw – HR makes the termination decision, but they are looking at occurrences given by allegedly biased supervisors.

Potential disparate treatment with occurrences and workload.

Mayo actually wins this claim on summary judgment because Smith is able to show differing treatment but unable to connect that different treatment to her race.

Ooh, the retaliation!

Direct statements telling her there will be negative consequences to complaining.

Positive performance and attendance to occurrences after the complaint.

Literally, an email saying they wanted to kill her!
Deciding and Communicating: Severance Agreements

Is a severance agreement a good idea?
- Length of service
- Reason for termination
- Likelihood of litigation
- Normal practice
- Position in organization/expectation in industry
- Value of security/peace of mind
- Personal considerations (family, health, pregnancy)

Pros
- You obtain a release of claims - security you will not be sued.
- Can help end the relationship on a (more) positive note.
- Helps the employee with the transition out of the position.
- You can include other provisions if needed (i.e., non-solicitation) and not in other agreements.

Cons
- You have to pay the employee in exchange for the release.
- You generally still are assessed unemployment.
- Offering the agreement can be risky - you do not know if they will accept.
- Can set a precedent that all employees will expect at termination.
- If you always offer, you may have an ERISA plan.

Things you need to know:
- The key legal language you have in an agreement varies depending on the circumstances.
- Under 40 vs. over 40
- Group layoff vs. single termination
- Provisions regarding what constitutes consideration for the release vary depending on your policies and procedures.
- When and how you pay “severance benefits” and other end-of-employment compensation varies depending on the circumstances, your policies and state law
- Certain provisions are unenforceable and viewed very negatively by the EEOC.
- Different states require different language to make releases valid.
Deciding and Communicating

- Who communicates the decision:
  - No Cat's Paws
  - Lower the temperature
  - Go with experience
  - Two people (but no more)
- Give an “umbrella” reason
  - Definitely give a reason
- Provide a separation agreement if applicable and warranted.

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