

**CHECKLIST**

# Ending Employment Relationship

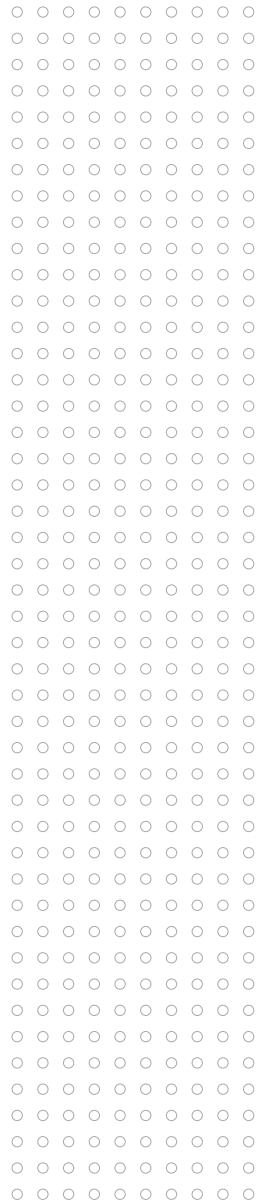
**Overview**

This checklist provides guidance regarding legal issues to consider when an employment relationship ends through an employee resignation or involuntary termination. Issues addressed include exit interviews, severance considerations and protection of confidential and trade secret information. It applies to a private, non-unionized workforce and addresses federal law.

**Best Practices at the End of the Employment Relationship**

Collect all documents Relating to the Employment Relationship:

- Personnel records, including attendance records, performance reviews, and any disciplinary records.
- Any additional documents supporting the employer's termination decision if the termination is involuntary. For example, if an employee is terminated for violating one or more of the employer's policies, the employer should collect the relevant policies, communications, and evidence of the violation.
- Employee handbooks and other policies in effect during the employment relationship, such as policies relating to:
  - Prohibited conduct, such as harassment, discrimination, and retaliation;
  - Required conduct, such as use of technology or confidentiality;
  - Bonuses;
  - Accrued but unused vacation and other paid time off;
  - Other payments or benefits on termination of employment and
  - Notice requirements.
- Offer letters
- Employment agreements (if any)
- Restrictive covenant agreements (if any), such as:
  - Confidentiality or non-disclosure agreements;
  - Non-compete agreements; and
  - Non-solicitation agreements



- Equitable and incentive compensation plans (if any), such as:
  - Bonus plans;
  - Stock option, restricted stock unit, or other employee stock plans; and
  - Deferred compensation plans
- Employee benefit plan documents (if any)
- Immigration-related documents, including any work authorizations or pending immigration petitions, sponsorships, or applications.
- All other documents relating to the employment relationship (if any). For example:
  - Internal complaints made by or about the employee and the related investigation files;
  - The employee's requests for leave plus any employer response; and
  - The employee's requests for reasonable accommodation plus any employer response.

## Determine the Employee's and Employer's Respective Rights and Obligations

At-will or for-cause employment provide different rights and obligations that the employer must consider.

Verify that the employee is at-will and there are no limitations on whether either the employee or employer can terminate employment with or without cause. If there are any restrictions, such as for-cause employment or mandated progressive discipline before termination, the employer should:

- Assess whether all requirements have been, or will be, met before termination; and
- Ensure any requirements that are triggered by the termination itself are met (for example, an employer may be obligated to pay severance if the employer terminates an employee without cause and that employee has an employment agreement containing a for-cause provision and severance obligation).

### Notice requirement

Determine if any documents (such as an offer letter or employment agreement) or regular employer practices require the employee or employer to provide a minimum amount of notice before termination.

### Pay in lieu of notice

When notice of termination is required, but the employer wants the employee to vacate the employer's premises immediately (for example, if the employee's continued presence during any required notice period would pose a security or litigation risk), consider whether pay in lieu of notice satisfies the employer's obligation. If so, have the employee acknowledge in writing that the notice requirement will be satisfied by pay in lieu of actual notice.

### Calculate final wages

The departing employee's final paycheck should include all wages through the termination date and any other compensation due to the employee, such as bonuses and commission payments. The employer also should assess any state or local wage requirements, such as whether accrued but unused vacation or other paid time off must be paid to the employee on termination of employment.

### **Pay final wages timely**

Determine whether any state or local laws dictate when and how final wages must be paid. For example, New York law generally requires employers to pay final wages:

- On or before the first regular pay day following the termination; and
- By mail on request from the departing employee.

### **Severance pay**

Assess whether the employee is entitled to severance pay (for example, under an employment agreement, offer letter, or severance plan or policy). If there is no written agreement, plan, or policy requiring severance, but the employer has a practice of paying severance, the employer should:

- Assess whether it has an obligation under the Employee Retirement Income Security Act or state law to pay severance consistent with its practice; and
- Treat all departing employees consistently to avoid claims of disparate treatment discrimination or retaliation.

### **Termination of employee benefits**

Review the governing plan documents and summary plan descriptions for the employee benefit plans in which the departing employee participates, such as a group health plan or life insurance plan, to determine:

- When the employee's coverage will cease; and
- Whether the employee has any entitlement to continued benefits coverage including conversion and/or portability rights.

### **COBRA notice**

Ensure that any notice required by the Consolidated Omnibus Budget Reconciliation Act (COBRA) is provided to the departing employee.

Consider also any state-based "mini-COBRA" rules

### **Immigration status**

Employers should review the immigration status of any departing employee and determine if:

- The employee is a foreign employee (an employee who is not a US citizen or lawful permanent resident (green card holder)); or
- The employer sponsored the employee for an immigration benefit.

### **Restrictive covenants and other post-employment obligations**

Employers should:

- Assess whether the employee is subject to any common law or contractual post-employment obligations, such as obligations regarding competition, solicitation of clients or employees, and the protection of confidential information and trade secrets;
- Remind the employee in writing of his common law and contractual obligations;
- Provide the employee with copies of any applicable agreements; and
- Investigate any suspicion that the employee has violated or may violate any continuing obligations.

## Document the End of the Employment Relationship

Ensure employees who resign submit resignation letters.

- These documents can be helpful if an employee later disputes that his termination was voluntary.

Document the reasons for the termination.

- If an employee is involuntarily terminated, document the reasons for the termination in an objective tone and ensure that there are sufficient supporting documents.

Determine whether a written notice of termination is required.

- State or local law may require the employer to provide written notice of termination to the employee. Employers should consult applicable law to determine what notice, if any, is required. For example, New York employers must:
  - Within five working days after the termination, provide written notice to the departing employee of the termination date and the date on which employee benefits will be cancelled; and
  - If covered by the unemployment insurance laws, provide certain unemployment insurance information to the departing employee.

## Disable Access to Employer Systems to Protect Against Theft, Misuse, and Security Breaches

To protect against theft of confidential and trade secret information, misuse of the employer's systems, and other security breaches, employers should revoke the departing employee's access to the employer's systems, including:

- Email;
- Voicemail;
- Passwords; and
- Remote log-ins.

## Ensure Employee Returns Employer Property and Records

Require the departing employee to return all employer property and records, such as:

- Desktop or laptop computers;
- Computer peripherals and accessories, such as external hard drives, speakers, fax machines, printers, and webcams;
- Cell phones and other electronic communication devices;
- Building key cards and passes;
- Electronic key fobs;
- Documents and files in any format, including electronic data; and
- Corporate credit cards.

Determine when the property must be returned. Generally, employers should require the return of their property on or before the termination date (or on another agreed-to date). For example, this date may be:

- Set in an employee handbook or policy;
- In a written agreement between the employer and employee; or
- Agreed to at the exit interview.

Obtain a written employee verification that all employer property and records have been returned.

### **Determine Social Media Ownership and Protocol**

If the employee used or maintained a social media account as part of his/her job duties, determine whether any policy or other agreement specifies who owns the account.

Determine whether any policy or agreement governs or limits the employee's post-employment social media usage.

Clearly communicate to the employee any limitations on his/her right to:

- Post on employer-owned social media accounts;
- Use contacts developed through employer-owned social media accounts; or
- Use social media to solicit clients or employees

### **Address Employee Debts or Outstanding Loans**

Determine whether the departing employee has any outstanding debts or unpaid loans to the employer.

Consider requesting payment for any amounts owed or agreeing to a voluntary repayment schedule with the employee.

Structure repayment arrangements (if any) to comply with wage and hour laws. In particular, some states, including New York and California, generally prohibit an employer from recouping outstanding debts through paycheck deductions.

### **Plan the Transition of Job Duties**

Schedule the employee's last day in the office.

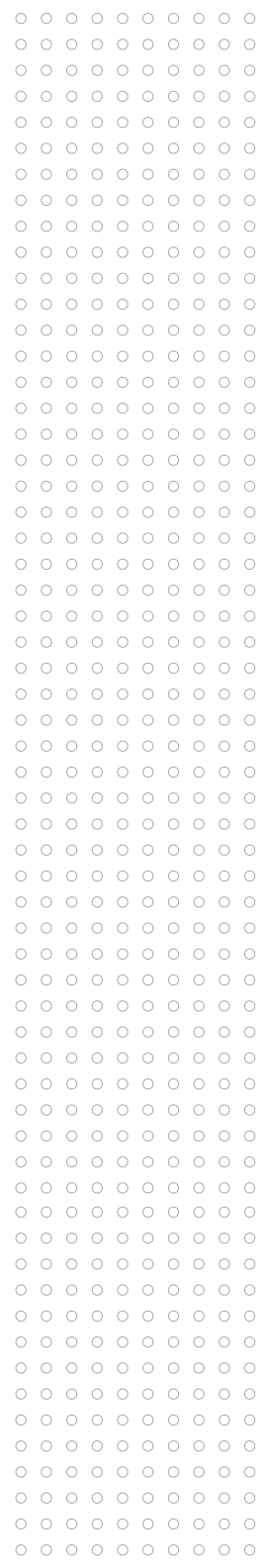
Determine if the employee should be involved in selecting and training a replacement.

Transfer the employee's responsibilities and knowledge regarding current projects to a replacement or co-workers.

### **Conduct an Exit Interview of a Resigning Employee**

Discover problems in the workplace. During an exit interview, an employer can gather information about problems in the workplace, such as sexual harassment, discrimination, and other inappropriate conduct. Ask the employee for feedback about his:

- Work experience;
- Supervisors and co-workers; and
- Reason for resigning.



Assess litigation risk. An employer may learn that the departing employee is considering filing a legal complaint against the organization. The employer should attempt to gather information and address the employee's concerns, if possible.

Remind the employee of his continuing obligations. For example, remind the employee of his common law and contractual obligations (if any) relating to:

- Competition;
- Solicitation of clients or employees; and
- The protection of confidential information and trade secrets.

Discover risks relating to confidential and trade secret information. Ask about the employee's future plans and whether the employee is going to work for a competitor and assess the likelihood the employee may:

- Violate any non-compete or non-solicitation agreements; or
- Misappropriate the employer's confidential and trade secret information.

Manage the departing employee's expectations. Increase the likelihood of a smooth transition and reduce the risk of disputes by informing the employee:

- When he/she will receive his last paycheck;
- Whether the employee will receive any pay for a bonus, commission, incentive compensation, or accrued but unused vacation or other paid time off; and
- When the employee's benefits coverage will terminate and that he/she should expect to receive a COBRA (or "mini-COBRA") notice.

## **Notify an Employee of an Involuntary Termination**

Communicate the decision in person and in private. Hold a termination meeting with the employee in a private area of the office away from office traffic and do not allow interruptions.

Invite a human resources or management representative. Have a human resources or management representative attend the meeting to take notes and be a witness.

Keep the message concise and clear. Effectively communicate the termination decision by:

- Preparing a message in advance of the meeting, rehearsing the message, and drafting talking points to keep the meeting focused;
- Being direct with the employee and ensuring they understand their employment has been terminated;
- Remaining professional, courteous, and fair throughout the meeting; and
- Focusing the message on the legitimate, non-discriminatory business reason for the termination decision and refraining from interjecting personal commentary, derogatory remarks, or other extraneous information.

Manage the employee's expectations. Inform the employee of any payments and benefits he/she may be entitled to receive, including:

- When he/she will receive his last paycheck;
- When employee benefits coverage will terminate; and
- That he/she should expect to receive a COBRA (or "mini-COBRA") notice, if applicable.

Anticipate security risks. If the departing employee may pose a security risk, implement appropriate security measures (for example, if the employee has made threats or has previously been violent in the work place).

## Consider Entering into a Severance Agreement with Departing Employee

Assess whether the employer can and should require a release of claims in exchange for severance.

Assess whether there is sufficient consideration to warrant a release of claims. Consideration is not sufficient if it is a payment to which the employee already is entitled.

Ensure the agreement explicitly releases the employer from legal claims the employee may otherwise have brought against the employer up to the date the employee signs the agreement, including all necessary federal, state, and local laws.

Ensure the agreement reminds the employee of any continuing post-employment obligations he/she may have (for example, non-compete, non-solicitation, non-disclosure, or non-disparagement obligations), and that the agreement does not unintentionally nullify or supersede any prior existing agreements or obligations the employer wants to remain in effect.

Ensure the agreement conditions the payment of severance on the employee's full compliance with any continuing obligations.

If the departing employee is 40 years or older, ensure the agreement complies with the [Older Workers Benefit Protection Act](#) (OWBPA).

Ensure the severance payments comply with [Section 409A](#) of the [Internal Revenue Code](#).

Ensure that the appropriate [Federal Insurance Contributions Act](#) (FICA) taxes are withheld from severance payments.

## Develop a Strategy Regarding Post-Termination Communication

Communicate the Departure to Current Employees.

Determine who will make the announcement. The best person to announce the departure varies depending on the specific circumstances (such as the departing employee's position within the organization, the reason for the departure, and the size of the organization). Consider whether the announcement may be better received if it is made by:

- The departing employee;
- A member of management;
- A human resources representative; or
- Another employer representative.

Determine how to disseminate the information. For example, consider the different effect on staff of:

- An organization-wide email;
- An in-person announcement; or
- One-on-one meetings with employees who are directly affected by the departure.

Consider whether the departure may impact employee morale.

## Develop a Public Relations Strategy

If the departing employee is a senior executive or the departure is otherwise newsworthy, consider minimizing workplace disruption, and negative publicity by:

- Developing a public relations strategy;
- Issuing a press release; and
- Consulting a public relations firm.

## Respond to Employee Reference Checks

Determine how to respond to future requests for employment references. For example:

- Implement a policy of verifying only job title, dates of employment, and compensation in response to a request for references;
- Direct all requests for references to one employer representative; or
- Provide a written reference letter to the employee for future use.

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