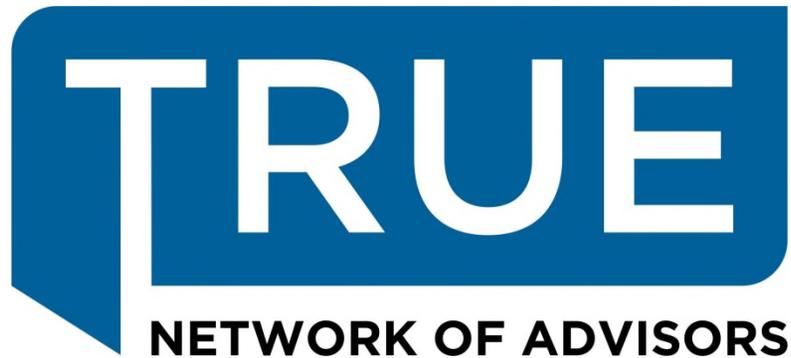


Best Practices for Employee Terminations



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Agenda

- ▼ Introduction to Dehiring
- ▼ Five Practical Tips for Progressive Discipline
- ▼ Five Biggest Mistakes Made In Progressive Discipline
- ▼ Dehiring and At Will Employment
- ▼ RIFs, Layoffs, Resignations, and Severance

Introduction to Dehiring



- A certain 1984 film has forever changed the meaning of termination.

Introduction to Dehiring

- Dehiring is not political correctness.



'Political correctness' is
tyranny with manners.

- Charlton Heston

Introduction to Dehiring



- Dehiring understands that hiring isn't cheap.

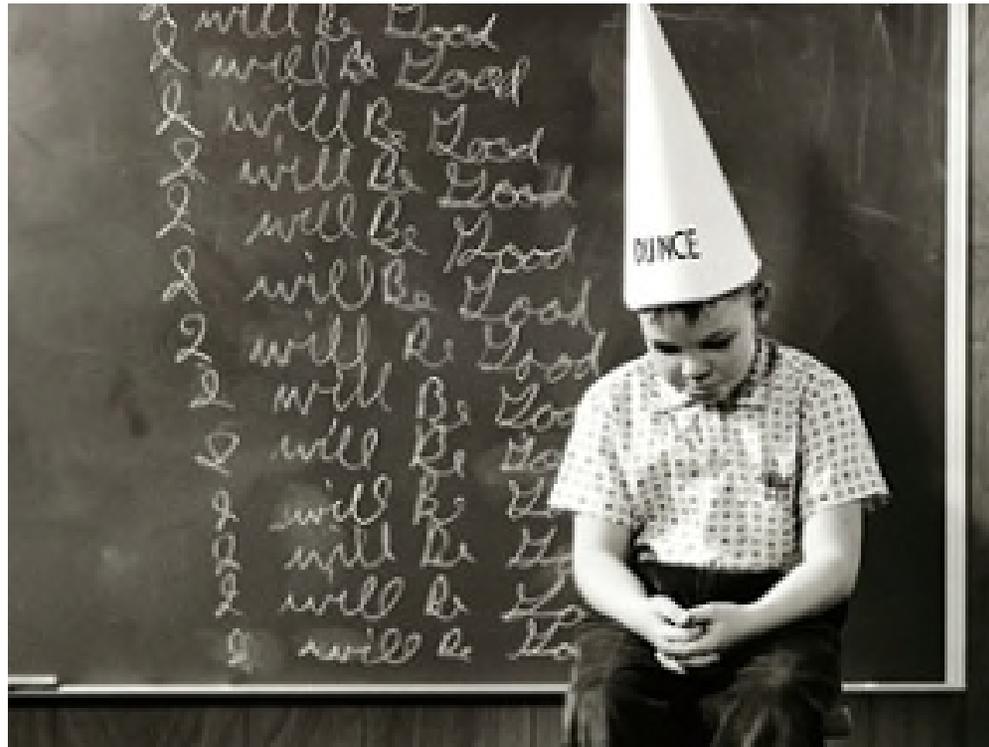
Introduction to Dehiring

- ▼ **Employers spend a fortune on making good hiring decisions**
 - ▼ Spend money to place ads
 - ▼ Host recruitment events
 - ▼ Attend industry ‘networking’ socials
 - ▼ Log countless hours reviewing resumes
 - ▼ Hosting interviews
 - ▼ Checking references
 - ▼ Performing background checks
 - ▼ Negotiating compensation and benefits
 - ▼ Onboarding
 - ▼ Training
- ▼ **Each part of this process is designed to answer the question: “Should we work together?”**

Introduction to Dehiring

- ▼ “Should we work together?” is the same question that influences the process of dehiring.
- ▼ It assumes that if we spent time and resources making the determination to offer you employment, why should we be so quick to discard it?

Progressive Discipline



- ▼ Traditionally, degrading has been referred to as progressive discipline or performance management

Progressive Discipline

- ▼ Most employers have some kind of progressive discipline policy and most employers do something to manage performance
- ▼ It also appears that most of the people responsible for these processes view them as utterly useless hindrances to moving the business forward

Progressive Discipline

- ▼ Both progressive discipline and performance management should have a single, common goal in mind.
- ▼ They should be designed to revisit the question of, “Should we work together?”
- ▼ When an employee engages in misconduct that warrants discipline or poor performance warranting performance management, the employee is telling you by his or her actions: “I don’t think we should work together.”

Progressive Discipline

With each stage of progressive discipline or performance management, ask the question, “Do you really want to work here?”

If the answer is “yes,” then things have to change in order for the relationship to continue.

5 Practical Tips For Progressive Discipline

1. All counseling or discipline that is verbal should also be written, and all counseling or discipline that is written should also be verbal.

5 Practical Tips For Progressive Discipline

2. Always reference the specific rule/standard (with page numbers, where applicable), the observable facts that led to a violation of the rule/standard, and what the employee has agreed to do to correct it.

5 Practical Tips For Progressive Discipline

3. Progressive discipline does not require you to treat all employees the same, but rather to treat all similarly situated employees similarly.

5 Practical Tips For Progressive Discipline

4. Listen.

5 Practical Tips For Progressive Discipline

5. Make sure the employee knows that his/her future with your organization is really up to him/her.

5 Biggest Mistakes Made in Progressive Discipline

- 1. Progressive discipline is not a punishment for bad behavior: it is an attempt to correct a problem.**

5 Biggest Mistakes Made in Progressive Discipline

2. Managers frequently wait too long to address a problem and then set standards too high for the employee to recover.

5 Biggest Mistakes Made in Progressive Discipline

3. Managers often fail to acknowledge improvements.

5 Biggest Mistakes Made in Progressive Discipline

4. Managers are too prone to generalize and use labels like “bad attitude” or “careless” and those labels stick.

5 Biggest Mistakes Made in Progressive Discipline

5. Managers often overlook their own responsibility for a subordinate's poor performance.

Dehiring and At Will Employment

At will employment means that an employer may terminate employment or an employee may quit for a good reason, bad reason, or no reason at all, so long as it is not an illegal reason.

Due process is the opposite.

Dehiring and At Will Employment

- ▼ *“I don’t have to tell her why she’s fired, this is an at will employment state.”*



Dehiring and At Will Employment

- ▼ **Regardless of whether employment is at will, have a good legitimate reason for a termination.**
- ▼ **Be willing to explain your reason and support it with evidence.**
- ▼ **Tell the employee your reason. An employee may not agree with it, but be willing to accept it.**
- ▼ **Be consistent with your reason in pre-termination documentation and post-termination documentation.**
- ▼ **Be consistent with your reason when confronted with similarly situated employees in similar circumstances.**

Dehiring and At Will Employment

- ▼ If you are dehiring, termination should never be a surprise.
- ▼ Don't pass the buck. If it was your decision to terminate, then you should communicate it.
- ▼ Don't let an employee's emotions sidetrack a business discussion about termination.
- ▼ Termination should not be a public shaming, but rather discrete and confidential.



Dehiring and At Will Employment

- ▼ **Anticipate employee questions upon termination**
 - ▼ **What is your policy on employment references?**
 - ▼ **Neutral: dates of employment and last position held**
 - ▼ **Directed to whom?**
 - ▼ **When can I clean out my desk/get my stuff?**
 - ▼ **Final paycheck, what's included and when do I get it?**
 - ▼ **Pending reimbursements?**
 - ▼ **Company-issued technology, passwords, accounts, trade secrets**
 - ▼ **What becomes of my benefits?**
 - ▼ **Pension/401(k)**
 - ▼ **Group Health Insurance**
 - ▼ **Will you challenge my unemployment claim?**

RIFs, Layoffs, Resignations & Severance



RESIGNATIONS

- ▼ A resigning employee does not have to provide written notice, but it's nice if you can get it.
- ▼ Consider having a written handbook policy stating that you will pay out accrued but unused PTO to employees who resign, provided they give you 2 weeks' written notice, return company property, etc.
- ▼ Explain in your resignation policy that the employer reserves the right to consider a resignation effective immediately upon notice.
- ▼ Think carefully about what you consider to be a resignation.
- ▼ What is your policy/practice on rescinding resignations?

RIFS & LAYOFFS

- ▼ These two terms are not the same. Do not confuse them, because they have different legal meanings and they imply a different status to the employee.
- ▼ **Reduction in Force (RIF):** We have eliminated a branch, department, job classification, or your particular job. We do not anticipate replacing it. Goodbye usually means goodbye forever.
- ▼ **Layoff:** We have had a decline in orders, customers, demand for our product, or a seasonal/cyclical slow down and are taking you off of a regular work schedule. We anticipate recalling you when orders, customers, demand, or the seasonal/cyclical slow down picks up.
- ▼ **WARN Act:** if terminating 50 employees or more, you may have a 60-day advance notice requirement.

SEVERANCE

- ▼ Severance serves **two** purposes:
 - ▼ Bridge an employee's gap in comparable employment
 - ▼ Give the employer peace of mind that legal claims have been waived
- ▼ There are generally **three** different severance scenarios:
 - ▼ **A reduction in force:** through no fault of your own, we no longer have a job for you.
 - ▼ **Layoff:** through no fault of your own, we will not have work for you for a period of time
 - ▼ **Oops:** we probably should have done a better job documenting and progressively disciplining for what really is a termination for cause, but we can't recreate the past and we want peace of mind

SEVERANCE

▼ Important Legal Framework:

- ▼ Employees cannot release claims that do not yet exist. So make sure they do not sign an agreement until after you've made any decision for which you want protection.
- ▼ Employees age 40 and over cannot lawfully waive age discrimination claims unless they are given a consideration and revocation period:
 - ▼ When asking only one employee age 40 or over to sign a severance agreement, the employee must be given 21 days to consider whether to sign it and, after signing it, 7 days to revoke that signature
 - ▼ When asking two or more employees age 40 or over to sign a severance agreement, the employees must be given 45 days to consider whether to sign it and, after signing it, 7 days to revoke, and they must also be provided with an OWBPA disclosure that lists criteria for the severance, and the job titles and ages of those eligible and not eligible for the severance.
- ▼ Note employees generally cannot release FLSA or workers' comp claims as part of a severance agreement.

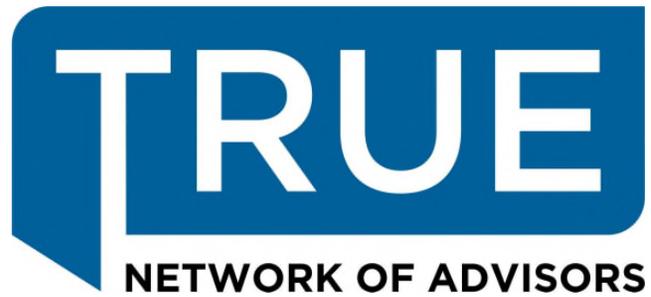
SEVERANCE

▼ Key Terms for Severance Agreement:

- ▼ General release and waiver of all claims. Note that some state laws may require express listing in the agreement
- ▼ Representations and warranties regarding FLSA and workers' comp
- ▼ No admission of liability
- ▼ Confidentiality of the terms of the agreement
- ▼ Restrictive covenants: confidentiality of trade secrets, non-solicitation of employees/customers, non-compete
- ▼ Return of company property
- ▼ Nondisparagement of the company, its products/services, personnel
- ▼ Cooperation with employer after severance

SEVERANCE

- ▼ **Terms for Employer Payment:**
 - ▼ Pay in lump sum and do not leave employee “on the books” as though he/she is an active employee
 - ▼ Severance is subject to normal withholdings, but generally not for voluntary deductions (i.e. 401(k) or health benefits)
 - ▼ Do not leave employee on your group health insurance or prepay any COBRA premiums
 - ▼ For former employees age 40 or over, hold your payment until at least the 8th day after you receive their signed agreement



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