



HK SCHOOL LAW CLIENT NEWSLETTER

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SERVING INLAND EMPIRE CHARTER SCHOOLS

How to Terminate an Employee

Terminating employees is one of the most unpleasant aspects of a business owner's job duties; however, it is also sometimes an absolute necessity in order to continue conducting a successful business, especially when operating a successful Charter School. But if terminating an employee is necessary, then it should be performed in the most ethical, and professional manner possible. Following the proper protocol in conducting the termination softens the blow to the terminated employee (who is very often surprised that they are being terminated); more importantly, it protects the business from potential litigation arising from the termination.

CURRENT LAW

California's Labor Code specifies that an employment relationship with no specified duration is presumed to be employment "at-will." This means, at least in theory, that the employer or employee may terminate the employment relationship at any time, with or without cause. There are exceptions to the at-will rule created by statute, the courts or public policy.

Whether the terminated employee was a good worker or a bad worker is irrelevant. The decision to terminate an employee, once made, sets in motion a number of duties of

the employer to handle the termination in a legally compliant and professional manner, thus preserving the dignity of the terminated employee and protecting the employer's interests. No one wants to see an angry former employee down the road in court and one of the simplest ways to avoid such a problem is to pay employees promptly according to *Labor Code* requirements.

First, be sure not to confuse laws governing employees that *quit* with those governing employees that are *terminated*. An employee who is terminated must be paid all of his/her wages immediately at the time of termination. *Labor Code* Section 201.

Employees who quit without giving prior notice must be paid their wages within 72 hours. Employees who provide at least 72 hours' notice of their intention to quit must be paid their wages on their final workday. *Labor Code* Section 202.

Direct deposits of wages to an employee's bank, saving and loan, or credit union account that were previously authorized by the employee may be immediately terminated when an employee quits or is terminated. If and only if the employee authorizes the employer to tender the employee's final paycheck by direct deposit may the employer do so (and then only if the employer complies with the provisions of Labor Code Section 213(d) relating to the payment of wages upon termination or quitting of employment); otherwise, cut a final paycheck to the employee to avoid any

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problems with final paycheck compliance statutes.

An employer who willfully fails to pay any wages due a terminated employee (whether that employee is discharged or quits) in the prescribed time frame may be assessed a waiting time penalty. The waiting time penalty is an amount equal to the employee's daily rate of pay for each day the wages remain unpaid, up to a maximum of thirty (30) calendar days.

An employee will not be awarded waiting time penalties if he or she avoids or refuses to receive payment of the wages due. If a good faith dispute exists concerning the amount of the wages due, no waiting time penalties would be imposed.

SEVERANCE AGREEMENTS

Severance agreements, sometimes called General Releases, Termination Agreements, Separation Agreements or Exit Agreements, may be offered to terminated employees, but employers are certainly not required to do so.

The idea behind severance agreements is simple: employers provide a severance payment in exchange for an employee's waiver of any and all legal rights/claims against the employer. In other words, a properly drafted severance agreement can avoid any later threats of a lawsuit arising out of the events leading up to the termination. An employer's release and waiver of claims agreement usually requires an employee to surrender all their legal rights and give up all liability for employment law violations connected with the employment relationship. Severance Agreements are simply *offers*, and are not additional pay either owed, or considered to be owed to a terminated employee. Terminated employees may choose to accept or reject the offer contained in a severance agreement; employers similarly may entertain or refuse to negotiate the terms of the severance agreement. The amount of time given to terminated employees under the age of 40 to consider whether or not to sign a severance agreement is solely within the employer's discretion.

However, there are special rules that apply to severance agreements offered to employees over 40. The Older Workers Benefits Protection Act (OWBPA), part of the Age Discrimination in Employment Act, imposes specific requirements regarding severance agreements, and particularly release provisions in severance agreements. Most importantly, terminated employees over the age of 40 must be given 21 days from the date of the final severance agreement offer to consider whether or not to sign the agreement.

WHAT YOU NEED TO DO

BEFORE TERMINATION

- ➔ Determine when you can obtain a final paycheck for the employee. That will dictate when to terminate the employee, as the employee **MUST** be paid all his/her wages at the time of termination.
- ➔ If you are considering a severance agreement, first contact counsel to discuss the terms of the agreement. Severance agreements should only be drafted by counsel.
- ➔ If offering a severance agreement, you must determine the age of the employee; If the employee is under 40, determine the timeframe you will allow the employee to consider the offer; if the employee is over 40, by law they are entitled to at least 21 days.

AT TERMINATION

- ➔ When presenting the severance agreement, be very clear how long the employee has to consider the agreement, and this timeframe should be explained clearly in the written severance agreement. Never tell an employee that they have NO time to review the agreement. All employees should be given the right to have a severance agreement reviewed by competent counsel.
- ➔ Once the signed agreement is returned to you, you will sign it and you may make a copy for the employee. Keep the original and send counsel a copy by email or fax.
- ➔ The termination may be effective immediately, thereby requiring the employee vacate the premises immediately.

- ➔ The employee should be asked to turn over any and all school property, including keys, computer passwords, materials, etc. Further, if he/she has a classroom, office or work space, a school staff member should escort him/her to that area to collect any personal belongings. If all belongings cannot be carried out at the time of the termination, make clear arrangements to surrender the employee's personal belongings as soon as possible at an agreed upon date and time.
- ➔ **Most Importantly**, you don't need to offer a detailed explanation of the reason for termination. You also don't need to explain anything about the nature of the At-Will employment agreement, and it's best not to try to explain what at-will employment means. You should simply say your position has been terminated. If they require or demand any additional information or explanation, direct them to counsel and provide our contact information.
- ➔ Provide all the necessary forms and information for: COBRA/ health insurance coverage, CalSters, CalPers, retirement benefits and unemployment insurance benefits. Make sure to review these notice requirements with your counsel before the termination occurs, as penalties and fines can accrue for failure to provide the proper notices upon termination.

QUESTIONS?

As always, if you have questions about the termination of an employee, please call us at any time for guidance.