



**'Now You're Just Somebody That I Used to Know':**

**How to Perform  
Strategic, Defensible Terminations**

**Presented by:  
BY D. MICHAEL REILLY**

1420 Fifth Avenue, Suite 4200  
Seattle, Washington 98101-2338  
Telephone: (206) 223-7051  
Facsimile: (206) 223-7107  
Email: [reillym@lanepowell.com](mailto:reillym@lanepowell.com)

Copyright © 2020 Lane Powell PC

These materials are intended to provide general information and are not intended as legal advice applicable to any particular situation.

**D. Michael Reilly | Shareholder | 206.223.7051 | reillym@lanepowell.com**

Mike Reilly is the Co-Director of Lane Powell's Labor and Employment and Employee Benefits Practice Group. He represents small and large employers in employment litigation and provides advice in claims involving discrimination, wrongful discharge, ERISA and non-ERISA employee benefit claims, retaliation, wage/hour and disability claims. He has successfully tried over 75 jury trials, arbitrations and bench trials, and claims before the Equal Employment Opportunity Commission and Washington State Human Rights Commission. Mike has served as lead counsel in an employee raiding/trade secret case as reported in the *Wall Street Journal*, and defended companies in class action claims.

In 2019, Mike was named one of the "Top 100 Most Powerful Employment Attorneys in the Nation" by *Human Resource Executive*®. Mike also was named Seattle's 2012, 2015, 2017 and 2020 "Lawyer of the Year" for his work in employee benefits litigation by *Best Lawyers*®. *Seattle Business* magazine ranked Mike a "Top Lawyer" in Labor and Employment Law. *Chambers USA's Guide to America's Leading Lawyers for Business* listed Mike as a "Leading Lawyer,"—(Band 1—highest ranking of all employment lawyers). Mike's remarks on employment issues have been quoted in *Newsweek*, *Corporate Legal Times*, *Seattle Times*, *Employee Relations Law Journal*, *Puget Sound Business Journal*, *CFO.com*, and other professional journals and management publications.

Mike also serves on the Board of Trustees for Gonzaga University.

**Terminations are tough.** They can be very emotional, risky and expensive: a termination has been calculated as costing an employer about 21% of the employee’s salary in attendant costs. And, they are not all that infrequent. The typical employer has about a 19% turn-over rate—meaning if you employ 22, you should expect to lose about four (4) each year—some by resignation and some by termination. Acknowledging that there is no perfect way to terminate an employee, the following suggests some best practices that may decrease risk for employers.

**1. General Overview on Terminations.** Absent contract terms to the contrary, most employees are employed on an “at-will” basis.<sup>1</sup> This means that employers can fire employees at any time for any reason, or for no reason at all, provided that the reason is lawful.

If an employee is employed pursuant to a contract (whether an individual employment contract or a collective bargaining agreement), then the terms of the contract apply, and the company should carefully review the contract before making a decision to terminate an employment relationship.

It is unlawful to terminate an employee, or to take any adverse employment action against an employee (e.g., decrease in pay, diminished job responsibilities, etc.), because of the employee’s age, race, religion, sex, national origin, actual or perceived disability, or any other class protected by federal, state and/or local law. Examples of protected classes can include gender identity, marital status and partnership status, pregnancy, sexual orientation, status as a veteran or active military service member, arrest or conviction record, caregiver status, credit history, unemployment status, political affiliation, salary history and status as a victim of domestic violence, stalking and sex offenses.

Despite the fact that an employer may have a legitimate, non-discriminatory business reason for terminating an “at-will” employee, an employer may find itself to be the subject of a discriminatory or retaliatory termination lawsuit.

**2. Before the Termination Decision.** An important and common theme underlying many discriminatory termination lawsuits is that of perceived fairness: *Did the employer act reasonably and fairly under the circumstances?*

**Employee Handbook and Acknowledgement.** Employers should have a practice of requiring that employees sign and date an acknowledgement confirming receipt of the employer’s policies and procedures, so that employees cannot later claim they were unaware of a policy that they were alleged to have violated. Proper documentation and consistent application of an employer’s policies and procedures are essential to successfully avoiding or defending against wrongful termination claims.

**Have every new employee sign an express, written document confirming the at-will nature of the employment. Strongly consider having new employees sign valid written arbitration and class action waiver agreements.**

---

<sup>1</sup> This article addresses best practices for discharging an employee to alleviate the risk of potential exposure to a lawsuit and to maximize an employer’s ability to defend against a claim of discriminatory discharge. (*This article assumes that the employee is at-will and is not part of a unionized workplace, public employment or employed by contract.*)

**Documentation of Underperforming Employees.** Inaccurate performance reviews can hurt the employer's record for a justifiable termination. Being too rosy in a performance review will get you sued. In one notable case, the employee received positive performance reviews and was told he was qualified to be promoted to a supervisor position. When denied promotion, he sued... and won. With too rosy of a review, the employee can argue, he was deprived of the knowledge he needed to sign up for additional training that could help him cure his skill deficits. An honest review, highlighting opportunities for improvement, would have alerted the employee to seek those necessary skills, and may have avoided a lawsuit.

An honest review can create a good defense to a wrongful termination lawsuit. Regular, timely performance reviews, which detail areas for improvement, can be a big help when defending wrongful discharge, disability discrimination or retaliation claims. In one recent case the employer prevailed in a retaliation case solely because the performance issues flagged earlier proved the employer was not retaliating for the employee's complaint about safety.

Supervisors may be disinclined to provide negative feedback in a written performance review, only describing the positive aspects of the employee's performance. The supervisor's reluctance may create an issue later on if, for example, the employee's performance becomes untenable but the employer lacks the documentary evidence to support their poor performance and/or the documentation that does exist contradicts that the employee was a poor performer. Employers should also avoid including personal comments and speculation in an employee's performance evaluation, which may undermine the employer's credibility. (E.g. "*You should be ready soon to become CFO.*")

**Employee Investigations and the Weingarten Rule for Union Employees.** Sometimes an investigation is required before any final employment action may be taken. For example, if a sexual harassment complaint has been filed, the employer will want to review the allegations and gather information from both the accuser and the employee suspected of the harassment. If the suspect employee is a union employee, they have the right to have a union representative present during any investigatory interview, referred to as the *Weingarten* right, if the interview could reasonably lead to discipline or termination. *Weingarten* rights are available only during investigatory interviews. While the employee has the right to have a union representative present during the interview, the employer is not required to inform the employee of this right.

For non-union employees, in *IBM Corp. 341 NLRB No. 148* (2004), the National Labor Relations Board ruled that non-union employers may lawfully refuse an employee's request to have a co-worker present during an investigatory interview that the employee reasonably believes could lead to discipline.

**Fair Treatment of Employees and Documentation.** An employer should not impose more severe discipline on one employee compared to others that have engaged in the same misconduct, absent a legitimate reason (e.g., a repeat offender). Inconsistent application increases an employer's risk of exposure to a discrimination claim and undermines the employer's credibility.

If an employee is placed on a performance improvement plan, the plan should consist of specific, measurable action items for the employee, so that it is clear whether or not the employee has achieved the terms of the plan. If the employee fails to achieve objective performance criteria, this lays the proper groundwork for a sound termination. To this point, it is important to clearly define performance

expectations. Employees should understand the expectations and requirements of the job. If the employee is unable to meet those expectations, the employer should create a clear record of the employee's failure to do so.

Documentation becomes particularly important if an employee makes a complaint of discrimination or harassment. If the employee's performance was unsatisfactory prior to the complaint, but there is only a record of poor performance after the complaint, this may create the appearance of retaliatory animus (*i.e.*, "my supervisor gave me a negative performance review only after I made a complaint") and further undermine the credibility of the proffered reason for the termination.

Keep a thorough written record of warnings given to the employee and of any improvement or probation plans provided.

If you're only giving an "oral" counseling to an employee, you should document the fact that it was given and what the issue was. These oral coachings do not need to be placed in the employee's file, but can be part of a manager's running log of coaching for all employees. With consistent, written evidence of unsatisfactory performance in hand (or other offenses like absenteeism, misconduct or tardiness) you will increase your chances of mounting a winning defense should a suit be filed. Reviewing performance reviews and PIPS will be important.

**The Timing of the Discharge Decision and Alleged Retaliation.** What happens when you are about to discharge someone, but the employee files a complaint of harassment or retaliation just before the termination occurs? Two basic rules apply here.

Rule 1: Any adverse action you determined to do, or made, *before* you know of the employee's protected activity is probably ok (assuming it was legal to begin with AND you have documentation of the date of the decision to terminate).

Rule 2: Any adverse action you take *after* you know of the employee's protected activity is suspect and will be scrutinized by plaintiffs' lawyers, government agencies, judges, and juries. That doesn't mean it's retaliatory, but it does mean you will need to be able to justify your actions.

*Here are various scenarios in which the employer executed a defensible termination even though the employee had engaged in "protected activity."*

-The employer took action immediately after an EEOC charge was filed (or HR received a complaint), but the decision-maker on termination had not been notified about the charge or complaint. It's hard to retaliate for something you didn't know about.

-The employer took action, even though it knew about the EEOC charge or complaint to HR, because the employee committed a clear-cut termination offense---and the employer treats the employee the same way it has treated other employees committing the same offense.

-The employer previously planned to terminate the employee before the EEOC charge was filed, or an HR complaint was made, *and that plan was documented* (perhaps in an email exchange).

-The employer knew about the EEOC charge or HR complaint, and the employee thought she was now “protected” from termination and was insubordinate or came to work only when she felt like it, giving her employer ample grounds for a non-retaliatory termination.

**3. The “Same Actor” Inference Helps Disprove Discrimination.** The same actor inference reasons that a supervisor who hires or shows favorable treatment to an employee in a protected category will not later discriminate against the same employee. This inference provides strong support for an employer's motion for summary disposition. Before you decide the termination, consider having the same supervisor make the decision to terminate. This can help disprove discriminatory animus.

**4. The Decision to Terminate--Key Questions.** Many employers wonder why it is necessary to have a stated reason for termination if the employee’s employment is at-will. While it is true that at-will means that the employer is generally free to end the relationship without reason, the reality is that a reason may be required in fact.

First, you should assume the “reason” for termination will be requested. There is no general requirement that an employer provide an explanation for a discharge of an at-will employee. But Washington does require written notice of the reason for termination *if the employee makes a written request*. WAC 296-126-050. Once an employee requests such an explanation in writing, the employer has ten days to supply a written, signed statement that lays out the reasons for the termination and its effective date. WAC 296-126-050.

Most employees may assume that, when no reason for termination is given, they are being discriminated against or otherwise wrongfully let go. In employment litigation, even where the relationship was legitimately at will, the employer will need to explain to a trier of fact why the termination decision was made. For this reason, it is crucial to know that reason and ensure it is legitimate, consistent and legally defensible before acting.

*For a termination questions checklist, see attached list at the end of this article.* Here are a few pre-termination questions to consider.

- a. Confirm the information which is basis for termination. Did the employee engage in the misconduct? Did the employee perform poorly? Verify the facts and confirm the information.
- b. Review why termination, and not some lesser discipline (e.g., PIP, suspension), is necessary.
- c. Follow company policy? An important policy with respect to terminations is progressive discipline. Does the employer have a progressive discipline policy? If so, the employer should ensure that the policy is followed. If a company does not have a written policy, an employee should still experience some form of documented counseling and performance feedback over time, absent an egregious act by the employee, prior to the decision to terminate their employment. If it was an employee discipline issue, confirm your employee was aware of the policy. If your company has a policy for dismissing employees, be sure to follow it meticulously. Some separation of employment policies list specific steps to follow throughout the process. They should cover everything from running the

decision to fire an employee up the proper chain of command, down to how to settle on a date of separation.

- d. *“Is this the ‘right’ thing to do?”* Is this a fair decision both for the company and the employee? Am I being fair? Have a valid reason. Review your past practices and confirm you are being consistent with similar situations in the past.
- e. The timing of the documentation clock. Do you have emails or other tangible documentation showing that the decision to terminate occurred before protected activity? Map out the provable chronology of the decision to terminate the employee. Has the employee recently taken FMLA leave, sought disability accommodation, filed a worker compensation claim, or made a complaint to HR? Termination within three (3) months of such or similar types of conduct may be viewed as retaliatory. Reviewing emails discussing termination can help time/date stamp the decision to terminate the employee. This can also serve as evidence disproving causation of a discrimination or retaliation claim. Consider the ongoing word document method.
- f. Review for the “same actor” inference. Did the same manager decide to hire the employee and make the decision to terminate the employment? The law presumes the decision-maker is not acting in a discriminatory manner.
- g. Is the timing, and the basis for the termination, well-documented? Technically no paperwork is required to let someone go. However, documenting consistent underperformance is key when firing someone for not fulfilling their job duties.
- h. Review the Termination Decision Checklist, attached.

**5. The Business Justification Memo—Job Elimination.** Having an email or memorandum outlining the overall rationale for some terminations may be very helpful, especially when the decision involves job elimination.

**6. Where and When Should I Fire the Employee?** Can you fire on the phone? Can you fire while the employee is out on leave? It is best to wait until the employee returns to work from leave. Afford them the respect of a face-to-face exit interview. If possible, have an additional witness, preferably the same gender as the employee. In terms of which day is best to let someone go, most HR professionals recommend TUESDAY. This gives HR time to prepare documents on MONDAY, and the employee opportunities to discuss benefits information (and EAP assistance, if needed) the remaining part of the week.

**7. The Severance Agreement Checklist.** There are several circumstances when an employer may want a severance agreement with a terminated employee. It may be concerned about potential lawsuits, or wish to seek future restrictions of the employee—non-compete or no rehire/reapplications for employment. The standard severance agreement should address the following topics.

- Separation date
- Resignation (or termination) designation in personnel file
- Payment of regular wages and accrued vacation
- Reimbursement of business expenses

- Consideration (what amount of money is the employee receiving as severance)
- COBRA continuation coverage
- Termination of benefits
- Confidentiality provision
- Return of company property
- Defend Trade Secrets Act of 2016—Immunity provision
- List of released parties
- Waiver and knowing and voluntary release of all claims
  - (under age 40);
  - (over age 40)— The employer must give the employee at least twenty-one (21) days to sign the release unless the release is requested as part of an exit incentive or other termination program (more than one employee), in which case the employees are entitled to review the release for forty-five (45) days before signing. The release is revocable for seven (7) days after execution.
- Sometimes the employer allows the terminated employee to remain on premises after notification of termination and signing of a release. This might be done to allow the employee time to search for a job while still on the payroll. Make sure to have a second release that covers events that occur between the time of signing and the actual last day of employment.
- No right to reinstatement or rehire
- Recital of consideration
- Nondisparagement provision
- What will be said about job references
- Whether the employer will challenge unemployment benefit applications
- Incorporating prior restrictive covenants executed by the employee. This could include non-solicitation of clients or customers, non-compete agreements. --Assure compliance with new Washington and Oregon non-compete laws).
- Withdrawal of complaints/charges
- Nothing prohibits employee from reporting potential violations of the law or filing a charge but employee agree that she is not entitled to accept any monetary recovery directly from the employer as a result of filing such report, complaint or charge.
- Arbitration agreement to enforce severance agreement.
- Attorney fees to enforce severance agreement for breach (not)

**8. What to Say When Terminating the Employee?** There are various options/approaches found to be helpful in termination. Be purposeful in using the words “*transparency*” and “*respectful*” where appropriate. Various approaches will be discussed including:

The “upcoming decisional meeting” approach. *“I want to be as transparent and respectful as possible to you. There is some concern about your performance and there is a meeting scheduled on Wednesday to discuss your performance and whether you will remain in your position. I can’t tell you what they will decide then, but it doesn’t look good. In advance of that meeting I do not have any authority to offer a severance, but if you wish I can inquire about it for your consideration.”*

The “resignation in lieu of termination” approach. *“I want to be as transparent and as respectful as I can and I wanted to let you know that we have decided to let you go. Today is your last day. I have your final paycheck, covering payment through today [hand it to them].*



*As a courtesy to you we wanted to give you the opportunity to resign. If you choose not to do so, then we will proceed with the termination. If you choose to resign, we will need a letter of resignation from you. Thank you for the work you have done and I want to leave on friendly terms. I have some logistics to go over with you. Afterward, I can answer your questions. Also, could you please leave your laptop and keycard at your desk? We're not going to ask you to do any more work today.*

*If you'd like to take your belongings home right now, that's fine. I'm going to gather the team after this meeting and let them know what's going on.*

*Otherwise, you can come back tomorrow morning at 9am and I'll help you carry your things down.*

*My feeling is that you're leaving on good terms with everyone. This is a work day for us, but if you'd like to reach out to people on the team after work hours, I think they'd appreciate it."*

The "termination with severance" approach. *"I want to be as transparent and as respectful as I can and I wanted to let you know that we have decided to let you go. Today is your last day. I have your final paycheck, covering payment through today [hand it to them]. I also have a separation agreement for you [hand it to them]. If you sign the separation agreement, I can give you severance of \$X. [show envelope for that check.] I'd understand if you want to review the agreement. The separation agreement expires in 2 days [unless employee is over 40 and then with OWBPA language the employee has 21 days to consider the severance]. Also, could you please leave your laptop and keycard at your desk? We're not going to ask you to do any more work today.*

*If you'd like to take your belongings home right now, that's fine. I'm going to gather the team after this meeting and let them know what's going on.*

*Otherwise, you can come back tomorrow morning at 9am and I'll help you carry your things down.*

*My feeling is that you're leaving on good terms with everyone. This is a work day for us, but if you'd like to reach out to people on the team after work hours, I think they'd appreciate it.*

**9. Dealing with the Vocal Employee in the Termination Meeting.** Not every termination ends smoothly. The goal is to listen but not to get into a debate with the employee. Here are some approaches to respond.

The employee keeps offering rebuttals. If the employee needs to vent to defend himself or herself, allow them to do so. Listen to the person's intent but do not vary from your position. A response such as: "I understand what you are saying and that you tried to change this behavior. We did discuss this with you before and the performance did not change consistently. SO, we need to proceed with the action."

The employee threatens to sue or go to the EEOC. Don't argue with the employee; simply reinforce that it is their right to do so. If the employee claims the termination is in retaliation for some reason, it may trigger an investigation to determine what facts the employee has to

support a claim that their termination was wrongful. A response such as: “It is your right to seek an attorney or to contact the EEOC as an option. We agreed in prior conversations of your need to improve and we did not see consistent improvement. What specifically is it you are claiming is wrongful about your termination?”

The employee becomes hostile. Managers should watch for red flags that may indicate a propensity to violence. Some of these include: (1) A chronic inability to get along with fellow employees; (2) Mood swings and anger control issues; (3) Expressions of paranoia or persecution. Being a “victim”; (4) A history of problems with past jobs and and/or personal relationships; (5) An inability to get beyond minor setbacks or disputes at work; (6) A fascination with guns, weapons or violent events; (7) A sudden deterioration in work habits or personal grooming; (8) Signs of stress, depression, or suicidal ideation; and (9) A major life problem, such as divorce or legal problems.

If red flags surface, consider a professional threat assessment and/or refer the employee to the company’s Employee Assistance Program for anger management counseling and for an assessment so that any underlying mental health or personal issues are identified and addressed. If you suspect the employee will become hostile, or becomes hostile during the meeting, have back-up security support available outside the meeting room to escort the employee to his/her car.

**10. What if the Employee Lodges a Complaint During the Termination Meeting Asserting Discrimination or Retaliation?** Following your HR policies, this should trigger an investigation. Depending on the allegations, the questioning could begin at the time the employee raises the issue at the termination meeting. There may have to be considerations regarding suspension with pay, pending the investigation, and these decisions have to be made on a case-by-case basis.

**11. Post Termination Logistics.** Provide the terminated employee’s final paycheck and mail out an explanation of COBRA health benefits (if your company is governed by COBRA). You should pay any unused paid vacation and/or sick leave (in conformance with company policy) with the person’s last paycheck. If you plan to grant the employee severance pay, include that in the final payout as well. You’ll also want to arrange for the employee to promptly sign any necessary exit paperwork and return all company property, including laptops, I.D. cards, keys, phones, uniforms, etc. It’s critical to contact your IT department to disable the person’s company email and any other electronic access to company databases and other information systems. Employment records should be kept for at least three years. WAC 296-126-050.

**12. Paying Wages Due at Termination.** Generally, under Washington law, when employment is terminated, either voluntarily by the employee or by action of the employer, the state wage statute requires that all wages due the employee must be paid immediately at the end of the established pay period. RCW 49.48.010. The Washington Department of Labor & Industries regulations permit employers to issue a check for these wages on the regular pay date for that established pay period.

An employer may deduct any portion of an employee’s final wages under limited circumstances. For example, a deduction is allowed: (a) if required by federal or state law; (b) if required by court order. There are other exceptions, but it is best to review WAC 296-126-025 to confirm how and when deductions from the final paycheck are allowed.

**13. Terminated Employees Right to Personnel Records.** For two years after termination, a former employee has a right, upon request, to inspect all information in the employer’s personnel files concerning that individual. RCW 49.12.240. The inspection right extends not only to the official personnel file on each employee, but to any manager’s desk files, payroll or benefit records, or any other information about the employee at a location maintained by the employer. RCW 49.12.250. The former employee can even request that certain information be removed as irrelevant, or corrected, if erroneous. RCW 49.12.250. If the employer does not agree, the employer must allow the former employee to place a rebuttal or correction statement in the personnel file. RCW 49.12.250.

**14. What to Say to Other Employees?** Stop the rumor mill of speculation before it starts. Consider having a quick meeting to inform your team that an employee is not working here any longer. Don’t tell them the employee was terminated.

**15. What if you Receive a Letter from the Former Employee’s Attorney Alleging Discrimination or Retaliation?** This should trigger an investigation, and steps should be taken to attempt to interview the former employee about specific allegations. The results of the investigation will determine next steps. The best course of action is to be cordial and quick to refer the employee to your company’s human resources representatives and attorney.

**16. What if You Are Asked to Provide a Reference?** Under RCW 4.24.730, Washington employers are immune from civil liability if they provide *honest and accurate job* references on current or former employees. Washington law presumes an employer is acting in good faith if the disclosed information relates to: (a) the employee’s ability to perform their job; (b) the diligence, skill or reliability with which the employee carried out job duties and responsibilities; or (c) any illegal or wrongful act committed by the employee when related to the duties of their job.

The statute suggests, but does not mandate, that the employer keep a written record of the identity of potential employers who have sought and received this reference information for two years from the date of disclosure. If the employer creates these records, they must be maintained in the former employee’s personnel records and subject to inspection under RCW 49.12.250(3).

**Limit reference checks to the dates the employee worked for you and the position he or she held – nothing more, in the interest of limiting liability. Any additional information you provide is purely voluntary and “can be used against you.”**

# **ATTACHMENT 1**

## **CHECKLIST BEFORE YOU TERMINATE AN EMPLOYEE**

**By D. Michael Reilly, Lane Powell PC**

### **General Factors to Consider Before Terminating Employee**

*(If the answer to any of the following questions is YES, the employee may be able to state a claim for discrimination, retaliation or wrongful discharge.)*

1. Is the employee a member of a protected class?
2. Has the employee been off work as a result of birth or adoption of a child, the employee's own serious health condition, or the serious health condition of a spouse, child or parent?
3. Has the employee indicated, or is there credible, objective evidence that the employee is unable to perform all or some of the essential functions of the job due to an injury, illness or disability?
4. Has the employee filed for or received worker's compensation benefits?
5. Has the employee reported any illegal or unethical activity or a violation of company policy or rules?
6. Has the employee filed a complaint with an external agency (like the EEOC or Department of Labor) or filed a lawsuit regarding any work-related matters or participated in an external complaint investigation or other proceeding?
7. Is the employee eligible to receive a commission or bonus if he/she continues employment?
8. Is the employee retirement eligible or close to meeting the criteria for retirement eligibility?
9. Has the employee engaged in union activity (such as organizing or picketing) or other protected concerted activity?
10. Has the employee been complaining to the employer or others about safety concerns or other matters that would affect the public interest (whistleblowing)?
11. Were any promises (either written or verbal) made to the employee regarding continued employment, employment for a particular duration, or the reasons for which the employee may be discharged?
12. How do the recent performance reviews look? Is the stated reason for the discharge contradicted by any documentation pertaining to the employee's performance or work history (such as performance reviews, salary increases, bonus awards) or other documentation?

### **Factors in Performance-Based Discharges**

*(Before discharging an employee for poor work performance, answers to each of the following questions should be YES before proceeding to discharge.)*

1. Is the expected job performance consistent with the job classification?
2. Have the expectations been communicated to the employee?
3. Has the employee been provided the necessary training and other resources to perform at the expected level?
4. Has the employee's performance actually failed to meet the expected standard?
5. Has the employee been provided notice of the performance deficiency and given a reasonable opportunity to improve?
6. Has the employee been advised of the consequences of a failure to improve performance to the expected level?
7. Is there documentation of the performance issues and efforts to resolve the issues?
8. Have all employees with similar performance deficiencies been treated similarly?
9. The *Gambini* question: Is the performance problem not due to a disability?

### **Factors in Misconduct-Based Discharges**

*(Before discharging an employee for misconduct or work rule violations, answers to the following questions should be YES.)*

1. Is there a written work rule or policy?
2. Is the rule reasonably related to the safe and efficient operations of the employer?
3. Was the employee aware or reasonably should have been aware of the work rule or policy?
4. Was the employee given adequate warning of the consequences of a rule violation? (This may be shown by the employee's knowledge of the rule, communication of rule by the employer, consistent enforcement of rule and training.)
5. Was a fair and objective investigation conducted and the employee provided an opportunity to tell his/her side of the story?
6. Is there substantial evidence or proof of guilt based on the facts discovered during investigation, considering the employee's motives and the purpose sought to be achieved by the rule?
7. Is discharge a reasonable penalty, considering the seriousness of the offense and the employee's past record, length of service and intent?
8. Is discharge consistent with treatment of other employees under similar circumstances?

### **Factors in Terminations Due to Job Elimination**

*(Before discharging an employee due to job elimination, consider the following factors:)*

1. Is there an objective reason for the job elimination (such as decline in business, technological change, geographic relocation, etc.)?
2. Is there documentation of objective selection criteria for picking the employees whose positions are being eliminated (such as seniority, past documented performance, etc.)?

**The answer to the above questions should be YES before proceeding with the job elimination.**

3. Is there evidence to suggest that the job elimination is a pretext to discharge the employee for another reason?
4. Is there an intent to backfill the employee's position?
5. Does an analysis of the employees selected for job elimination indicate a statistically significant adverse impact on the basis of age, race or sex? (Note that adverse impact analysis should be conducted under guidance of legal counsel so that it may be protected under the attorney-client privilege.)

**If the answer to question 3, 4 or 5 is YES, discuss with legal counsel the risk of proceeding with a job elimination under such circumstances.**

6. Is the employee covered under a collective bargaining agreement that contains specific provisions relating to reduction in forces (such as required notice, manner of selection for a reduction in forces, eligibility for severance benefits, etc.)?
7. Is the job elimination part of a plant closing (the permanent or temporary shutdown of a single site of employment resulting in loss of employment for 50 or more employees) or mass layoff (an employment loss at a single employment site of at least 33 percent of the employees and at least 50 employees) such that notices under the Worker Adjustment and Retraining Notification Act (WARN) will be triggered?
8. Will the employee be asked to sign a release of employment-related claims in connection with an exit incentive or other employment termination (severance) program offered to more than one employee such that the requirements of the Older Worker Benefit Protection Act (OWBPA) will be triggered?

**If the answer to question 6, 7 or 8 is YES, consult with legal counsel to assure compliance with legal and contractually bargained for requirements.**

# ATTACHMENT 2

## EMPLOYEE EXIT CHECKLIST

The purpose of this checklist is to assist employees and departments with the process when an employee leaves the company. Employees leaving the company should be aware of pertinent information, rights and benefits that may affect them.

<b>Employee Name:</b>	<b>Empl ID:</b>
<b>Department Name:</b>	
<b>Termination Date:</b>	

### Company Responsibilities:

- Is Employee eligible for rehire? YES (proceed to next step) NO
- Submit electronic Personnel Action Form (ePAF) and attach appropriate documentation (e.g., resignation letter) on or before the last day of employment.
- Submit HR Security eform to remove ePAF, Payroll, or other HR security access.
- Audit leave records and verify all leave balances are correct.
- Disable voice mail.
- Disable Exchange Outlook email accounts. (Consider whether email/computer should be quarantined/preserved)
- Remove employee from authorized signature list(s).
- Ensure Company property has been returned:
  - Uniforms  PC's/equipment  Cell phones  Pagers  Radios
  - Gas Card  Purchase Card  Keys (return to Facilities Operations)  Other:
- Provide, if requested, an exit interview with department head or designee. Refer employee to Employee Exit Questionnaire (attached).
- Remove employee from UCF phonebook.
- Ensure employee has contacted Parking Services to settle outstanding fees.

Keep checklist in department files for at least three fiscal years; do not send to Human Resources.

Company Representative: \_\_\_\_\_ DATE: \_\_\_\_\_

Printed Name: \_\_\_\_\_

### Employee Responsibilities:

- Contact Parking Services and settle outstanding permit fees or fines.
- Complete Employee Exit Questionnaire and forward to Human Resources, (attached)
- If desired, request an exit interview with department head or designee.
- Consent to electronic W-2; Ensure a valid personal email address is listed for W-2 notification.

┌ Leave Payout Deferral – If interested in deferring any part of the leave payout to a voluntary retirement plan 403(b) Plan or 457 Deferred Compensation Plan, contact benefits.

Employee Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Printed Name: \_\_\_\_\_

(**Note:** If employee is not available for signature, complete the checklist to show that the Company has completed the termination process and write “signature not available” in the space above.)

**General Information:**

┌ Provide information regarding insurance coverage/COBRA benefits. Employees that are enrolled in health, dental or vision insurance at the time of termination are eligible for COBRA coverage. Since premiums are paid a month in advance, the employee may still have coverage through the month following termination. Once the termination is completed and sent in, COBRA information will be sent to the home address the employee has on file with the Company. To obtain COBRA coverage, the employee must complete the appropriate paperwork and return it within the specified time frame.

┌ Obtain information regarding retirement accounts including 401K