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Terminating an Employee Gracefully and Legally

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... Continued from VBA's July Newsletter.

After the meeting, you should collect any property that the practice provided to the employee. Such property may include keys, ID badge, uniforms, pager, cell phone, employee handbooks, and client lists. Remember that the practice's property includes its data. If the employee has access to the computer system or has a company e-mail address, disable the account or login ID at this time. Finally, give the employee an opportunity to collect his or her personal property.

The terminated employee may want to say goodbye to colleagues before departing. It is best to discourage this and to tell him or her to call the remaining employees to say goodbye. The interaction is likely to be awkward, at best. Emotions are probably running high, and it may be difficult to predict how both the terminated and remaining employees will react.

Another question that frequently arises is what to say to other employees after the termination. It is best to provide a brief statement and offer as little information as possible. It is appropriate to say, "Jennifer no longer works here and is seeking other opportunities." Do not go into a detailed explanation, as you don't want to risk saying something that alienates the remaining employees or embarrasses the terminated employee.

The third step in the termination process is to mail the employee's final paycheck and notice of any continuing benefits for which the employee is eligible. In many states, it is illegal to withhold from the final paycheck money owed by the employee. It is also important to mail these items as promptly as possible. Some state laws place strict time limits on mailing final paychecks to employees.

The final step involves tying up loose ends in the aftermath of the termination. The terminated employee may ask you to provide a reference to prospective employers. The best practice is to institute a policy in the employee manual that all requests for references or employer inquiries be handled through human resources or by the practice manager and that the employee must authorize the disclosure and sign a waiver releasing the practice from liability in connection with the reference. It is wise to have a policy of only providing the employee's title and dates worked. If a prospective employer is seeking more information, you can explain that it is company policy to only provide this information about former employees. While the above is ideal, you must also use common sense. For instance, if the employee has a history of violent outbursts with clients or coming to work intoxicated or is

an animal abuser, you should warn the new employer. In some states, there is a legal duty to warn prospective employers and you may be liable for negligence if you fail to do so.

If you do decide to provide a substantive reference, you must tread carefully. If the employee was terminated due to performance or behavior issues and you provide a positive reference, it calls into question the true motives behind the termination and may support an employee's contention that he or she was terminated for illegal reasons. If you provide unfavorable information, even if it is true, you may expose the practice to a possible defamation lawsuit. However, some states have laws in place that grant immunity to employers who give honest and factual assessments when providing references. It is important to be aware of the risks inherent in providing information about the employee and to consider what type of reference you should provide.

Sometimes, the termination process is less straightforward. A high-risk termination is one in which an employee is likely to sue the employer in connection with the termination. The litigation risk is particularly great when the employee is a member of a legally protected class, is a difficult employee, has a relative who is an attorney, or is surprised by the termination. While all terminations require careful planning, high-risk terminations require even more thought and care.

Terminations of employees who are members of legally protected classes carry increased legal risk. Many classes of individuals are protected by federal and state laws. For instance, federal law prohibits discrimination on the basis of age (over 40), race, color, religion, sex, national origin, or disability. In addition, individual states may have laws that are more stringent. Employers may be vulnerable to anti-discrimination claims for statements made at any time during, prior to, or after the employee's tenure. For instance, the following types of statements may be made in everyday conversation: "I know that it must be hard to balance your job responsibilities with the new baby," or, "Most 50 year-olds would have trouble meeting the physical demands of this job." Such comments are likely to be made during a casual conversation, to express empathy for an employee's situation and with no discriminatory intent. However, these seemingly innocuous comments could lend credence to an employee's claim that he or she is being terminated for an illegal reason.

Terminations of difficult employees also pose unique challenges. Some employees are argumentative, obstinate, or refractory to guidance. Employers may provide constructive criticism, but these employees refuse to take responsibility for their performance. Instead, they become defensive or shift the blame to others. Employers may be reluctant to fire such employees because they fear the employees will retaliate, "make a scene" or, worse, harm people, animals, or property. Many veterinarians prefer to avoid confrontation, so practices often retain difficult employees far longer than they should. It is even harder to terminate an employee when he or she has been with the practice for many years. The final result is that the employee effectively holds the practice hostage. When the practice tries to break free, the employee is ready to retaliate, possibly with a lawsuit.

A third category of high-risk terminations involves employees with relatives who are attorneys. Even if the terminated employee was not planning to sue, an attorney relative may

plant the idea of a lawsuit. For most people, the cost of litigation is a major barrier to bringing a lawsuit. However, the attorney relative may be so outraged that he or she is willing to take up the employee's cause for free or a reduced fee. The employee has nothing to lose and is more likely to sue.

The fourth category of high-risk terminations involves employees who are surprised by the termination. When employees are not aware of performance problems, they have no warning that termination may be on the horizon. Such employees are receiving devastating information with no warning or chance to brace themselves. When these employees are abruptly terminated, they are more likely to legally challenge the termination.

Litigation, regardless of the merits, will cost time and money, and can cause significant harm to an employer's reputation. You can protect your practice by closely following all of the steps discussed earlier in this article. This means planning the termination process carefully, keeping the termination meeting brief, having two practice representatives present, preparing and following a termination agenda, providing a termination letter, ensuring the return of all property to its rightful owner, mailing the final paycheck and continuing benefits notice, and responding appropriately to requests for references and information about the terminated employee.

You can also protect your practice long before termination is even on the horizon. The simplest way to avoid litigation is to ensure that the termination is not a surprise. Your practice should draft and distribute an employee manual. The manual should spell out the duties and expectations of employees, provide for regular employee evaluations, and contain procedures for handling complaints by managers, clients, and employees. The manual should also provide for progressive discipline, setting forth specific disciplinary measures that will be taken in the event of policy violations. Then, you should follow all policies set forth in the manual and apply them equitably and consistently to all employees. This will prevent an employee from successfully arguing that he or she is being singled out and receiving disparate treatment.

In addition, you should conduct regular performance evaluations. Performance evaluations are particularly valuable in coaching employees and protecting a practice from termination-related litigation. Be candid in your feedback, provide constructive criticism, and keep written records of all evaluations. This is particularly important, as employers sometimes feel compelled to write positive reviews of employees to avoid confrontation or to spare the employee's feelings. When the time comes to take disciplinary action, the employer has no supporting evidence for the termination.

A problematic situation arises when the employee has received no performance evaluations or, worse still, glowing evaluations, and must be terminated. It is much harder to find evidence of performance deficiencies months or even years after the fact. Moreover, it is difficult to make a plausible argument that an employee is being terminated for performance when his or her reviews are overwhelmingly positive. If you find yourself in this situation, do not terminate the employee immediately. Instead, develop a paper trail. Keep written records of specific incidents where the employee's performance has not met your standards. Meet

with the employee, discuss the issues, and document the meetings in writing. This may have the desired effect of improving the employee's performance, and termination may not be necessary. If the employee's performance still does not meet your expectations, you can then safely terminate him or her. By creating such a paper trail, you can protect your practice from the employee's eleventh-hour challenges to the termination.

In conclusion, termination is one of the most difficult tasks you will have to perform. By planning the process and being aware of and avoiding the pitfalls, you can mitigate the risks associated with this unpleasant task.