



This article presents general guidelines for Ohio nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.

Breaking Up is Hard to Do: Key Considerations for Separation Agreements and Employee Departures

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Terminating an employee is possibly one of the most uncomfortable aspects of employment law. Even if an employee has clearly been underperforming, causing problems, or violating policies, employers often struggle with how to let an employee go: *What do you say? How do you say it? When is the right time? What documents do I use?*

Preparation is key and should begin long before the ultimate decision to terminate an employee is made. When it comes to terminating an employee, employers should be careful to document the reason(s) for termination, consider whether to consult with an attorney, and prepare for the termination in advance rather than terminating an employee on the spot. Additionally, an employer should review the departing employee's file for documents, such as an offer letter or employment agreement, to see if there are any terms or other obligations that must be followed when terminating the employee. The consequences of not handling a termination properly can be a costly lawsuit or a drop in employee morale.

Separation Agreements

When an employee is terminated and receives severance benefits (money over and above what is owed), employers should consider having the departing employees sign a Separation Agreement and Release of Claims ("Agreement"). When crafting an Agreement, there are a few specific items employers should be mindful of:

- The Agreement should be written in a manner that the employee can understand; the language should not be misleading or too broad. If an employee cannot understand the language of the agreement that he or she signs, there may be an argument that the Agreement is not a valid one.

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- The Agreement should incorporate any necessary documents or terms as required by the documents in the employee's personnel file, including any offer letter or employment agreement.
- The Agreement should include a release of claims under federal, state and local law. Employers should check with counsel to see if any state or local laws require additional specific provisions in the Agreement.
- The Agreement should outline how the parties are to behave respective to each other—the former employee releases the former employer from liability associated with employment (and termination thereof) in exchange for the severance benefits received—as well as provisions like a confidentiality provision.
- The Agreement should be tailored to the age of the employee and the number of employees being terminated. If an employee is age 40 or over, there is specific language that releases claims under the Older Workers Benefit Protection Act that must be included in an Agreement, as well as certain time periods to consider the Agreement that makes the release valid. When employees age 40 and over are being laid off as a part of a group termination, these requirements change slightly and include specific disclosures that must be provided to the employees.

Because of these special requirements, there is no universal one-size-fits-all Agreement that is used in all employee terminations. Instead, best practice is to tailor the Agreement used to each specific termination and situation.

Tough Conversations

How the termination decision is communicated is also extremely important. Be clear as to why the employee is being let go, but avoid debating with the employee or trying to explain all of the reasons for the termination. Treat the departing employee with respect and dignity and try to schedule the meeting near the end of the day and/or work week if possible. Best practice is to have at least two people conduct the termination so that one person can take notes on what is being said. In addition, an employer may offer to help an employee during the transition with severance pay, outplacement services to assist in helping the employee find another job, a letter of recommendation (if deserved), or even a neutral reference. Helping a terminated employee move forward eases the transition process for both parties involved. Finally, make sure to retain all relevant documents that support the decision to terminate the employment relationship, including the employee's resignation letter (if provided).

Terminating an employee takes great effort on the part of the employer. To facilitate a smooth exit, employers should give careful consideration to the best method for terminating an employee in order to minimize legal risks and damage to the company's morale and reputation. While this article contains a brief overview of two aspects for employers to consider, it is not a comprehensive discussion on employee terminations. Because every termination is different and depends on the facts and circumstances of each situation, an employer should consult with counsel. This article should not be considered as a legal opinion.

If you are a client and would like to discuss your organization's particular situation or if you have questions regarding employee terminations, please contact us at info@pbpohio.org.

If you are not a client but would like to apply, please contact us at info@pbpohio.org.