

EMPLOYMENT,  
LABOR &  
WORKERS'  
COMPENSATION

ADVICE  
SOLUTIONS  
LITIGATION

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**LANDEGGER | BARON | LAVENANT | INGBER**

A L A W C O R P O R A T I O N

## **HOW TO DISCIPLINE AND TERMINATE WITHOUT GETTING SUED**

### **A Proven Method for Analyzing Any Situation**

#### **Employment Law Workshop**

**By**

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The attached material must not be considered legal advice. The sample forms and policies are for educational purposes only. We strongly recommend that you consult with legal counsel before adopting or implementing any of the attached sample forms and policies so as to avoid potential liability.

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## **EMPLOYEE RELATIONS POLICY WITH ACKNOWLEDGMENT**

### **A. POLICY AGAINST DISCRIMINATION.**

\_\_\_\_\_ (the "Company") is committed to providing a work environment that is free of discrimination. In keeping with this commitment, the Company maintains a strict policy prohibiting unlawful discrimination. This policy applies to all employees of the Company, including supervisors and non-supervisory employees. The policy also, applies to non-employees of the Company including clients, customers, vendors and any other person doing business with the Company.

All aspects of employment with the Company will be governed on the basis of merit, competence and qualifications and will not be influenced in any manner by an individual's race, ancestry, color, religion, national origin, marital status, sex (including sexual harassment and gender identity), sexual orientation, disability (physical or mental including HIV/AIDS diagnosis), pregnancy, medical condition (cancer and genetic characteristics), age or exercising the right to any legally provided leave of absence in the application of any policy, practice, rule or regulation.

All decisions made with respect to recruiting and hiring, evaluations and promotions for all job classifications will be based solely on individual qualifications as related to the requirements of the position. Likewise, all other personnel matters such as compensation, benefits, transfers, lay-offs, training, educational opportunities and programs, will be administered free from any illegal discriminatory practices.

### **B. POLICY AGAINST HARASSMENT, INCLUDING SEXUAL HARASSMENT.**

The Company is also committed to providing a work environment that is free of harassment, including sexual harassment.

Sexual harassment includes:

1. Unwanted sexual advances;
2. Offering employment benefits in exchange for sexual favors;
3. Making or threatening reprisals after a negative response to sexual advances;
4. Visual conduct: leering, making sexual gestures, displaying of sexually suggestive objects or pictures, cartoons or posters;
5. Verbal conduct: making or using derogatory comments, epithets, slurs, and jokes;

6. Verbal sexual advances or propositions;
7. Verbal abuse of a sexual nature, graphic verbal commentaries about an individual's body, sexually degrading words used to describe an individual, suggestive or obscene letters, notes, or invitations; and
8. Physical conduct: touching, assault, impeding or blocking movement.

**C. COMPLAINT AND INVESTIGATION PROCEDURE.**

Any form of discrimination or harassment, including sexual harassment, is absolutely prohibited. Any incident of possible discrimination or harassment should be brought immediately to the attention of the Human Resources Department of the Company which will thoroughly investigate the matter in confidence. After reviewing all the evidence, the Company will make a determination concerning whether reasonable grounds exist to believe that harassment has occurred.

Disciplinary action, up to and including discharge, will be taken against any employee who is found to have engaged in harassment.

No employee shall be subjected to any form of retaliation for reporting any violation of this policy truthfully and in good faith.

**HARASSMENT BY NON-EMPLOYEES.**

In addition, the Company will take all reasonable steps to prevent or eliminate sexual harassment by non-employees including customers, clients and suppliers who are likely to have workplace conduct with our employees.

**EMPLOYEE RELATIONS POLICY ACKNOWLEDGMENT  
EMPLOYEE RELATIONS POLICY ACKNOWLEDGMENT**

I have read and received a copy of the Company's Employee Relations Policy, including the policies against discrimination and harassment, including sexual harassment, and fully understand my obligations and responsibilities as outlined therein.

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

Witness: \_\_\_\_\_

Date: \_\_\_\_\_

## **POLÍTICA DE RELACIONES DE EMPLEADOS CON RECONOCIMIENTO**

### **A. POLÍTICA CONTRA LA DISCRIMINACIÓN**

La Compañía está comprometida a proveer un ambiente libre de discriminación. Para cumplir con este compromiso, la Compañía mantiene una política estricta prohibiendo la discriminación ilegal. Esta política se aplica a todos los empleados de la Compañía, incluyendo supervisores y empleados que no son de supervisión. La política también se aplica a personas que no son empleadas por la Compañía, incluyendo clientes, suministradores y cualquier otra persona que tenga contacto de trabajo con la Compañía.

Todo aspecto de empleo con la Compañía será gobernado a base de mérito, aptitud y capacidades y no será influenciado de ninguna manera por raza, ascendencia, color, religión, origen nacional, estado marital, sexo (incluyendo acoso sexual e identidad de género), embarazo, orientación sexual, incapacidad (física o mental incluyendo diagnóstico de HIV/SIDA), condición médica (cáncer y características genéticas), edad o por ejercer el derecho a cualquier ausencia legal en la aplicación de cualquier política, práctica, regla o regulación.

Todas las decisiones hechas acerca de reclutamiento y empleo, evaluaciones y promociones para todas las clasificaciones de trabajo serán basadas solamente en las capacidades individuales relacionadas a los requisitos de la posición. Igualmente, todos los demás asuntos del personal como compensación, beneficios, transferencias, despido temporal, entrenamiento, oportunidades y programas educativos serán administrados libre de cualquier práctica discriminatoria ilegal.

### **B. POLÍTICA CONTRA EL HOSTIGAMIENTO, INCLUYENDO ACOSO SEXUAL**

La Compañía también está comprometida a proveer un ambiente de trabajo libre de hostigamiento, incluyendo acoso sexual.

Acoso sexual incluye:

1. Avances sexuales no deseados;
2. Ofrecer beneficios de empleo a cambio de favores sexuales;
3. Hacer o amenazar de represalias después de recibir una respuesta negativa a un avance sexual;
4. Conducta visual: mirada de reojo lasciva; hacer gestos sexuales; desplegar objetos o retratos, caricaturas o carteles sexualmente sugestivos;
5. Conducta verbal: hacer o usar comentarios, epítetos, calumnias o chistes derogatorios;

6. Avances o proposiciones sexuales verbales;
7. Abuso verbal de una manera sexual, comentarios gráficos verbales acerca del cuerpo de un individuo, palabras sexualmente degradantes usadas para describir a un individuo, cartas, notas o invitaciones obscenas o sugestivas; y
8. Conducta física: tocar, asaltar, impedir o obstruir el movimiento.

C. **PROCEDIMIENTO DE QUEJA E INVESTIGACIÓN**

Cualquier tipo de discriminación o hostigamiento, incluyendo el acoso sexual, es absolutamente prohibido. Cualquier incidente de posible discriminación o hostigamiento debe ser llevado de inmediato a la atención del Director de Recursos Humanos quién investigará completamente el asunto en confianza. Después de revisar toda la evidencia, la Compañía determinará si existen motivos razonables que indiquen que el hostigamiento o acoso sexual ha ocurrido.

Acción disciplinaria, hasta e incluyendo despido del trabajo, será tomada en contra de cualquier empleado que se determine ha participado en hostigamiento o acoso sexual.

Ningún empleado será sujeto a alguna forma de represalia por reportar honestamente y de buena fe cualquier violación de esta política.

**HOSTIGAMIENTO O ACOSO POR MEDIO DE NO-EMPLEADOS**

Adicional mente, la Compañía tomará todas los pasos razonables para prevenir o eliminar el hostigamiento o acoso sexual por medio de no-empleados incluyendo clientes y suministradores quienes tengan contacto de trabajo con nuestros empleados.

**RECONOCIMIENTO DE LA POLÍTICA DE RELACIONES DE EMPLEADOS**

Yo he recibido y leído una copia de la Política de Relaciones de Empleados de la Compañía, incluyendo las políticas en contra de la discriminación y el hostigamiento, incluyendo el acoso sexual, y entiendo completamente mis obligaciones y responsabilidades bajo esta política.

Firma: \_\_\_\_\_

Fecha: \_\_\_\_\_

Testigo: \_\_\_\_\_

Fecha: \_\_\_\_\_

March 12, 2012

Alfred J. Landegger  
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Dear Clients and Friends:

***Re: Employment Practices Liability Insurance Update***

Every January I attend the Employment Practices Liability Insurance conference in New York to meet with carrier, underwriters, defense attorneys and attend programs as to the legal trends. There are national trends but nothing compares to the increase in litigation in California. You can expect major increases in the cost of new EPLI policies and renewals as a direct result of the increase in litigation. The carrier's will be more closely monitoring their claims to reduce costs and will be less willing to accommodate your request for your choice of counsel in the event of a claim unless we are on the panel list or you have asked for our firm in the event of a claim. If you do not ask for our firm at the time of purchase or renewal or if we are not on the carrier's list, we will be unable to assist you.

There continues to be a non stop increase in litigation in several areas: (1) wage and hour class actions; (2) disability discrimination and failure to reasonably accommodate disabled employees; and (3) sexual harassment. Please go to our website and obtain our workshop material "How To Discipline and Terminate Without Getting Sued.". This material will assist you in preventing costly claims.

The economic climate has increased litigation as disgruntled and out of work employees are looking to "cash in." There appears to be no relief in sight relating to the number of claims employers are seeing on an annual basis. We are experiencing an increase in Charges of Discrimination being filed with the U.S. Equal Employment Opportunity Commission and the California Department of Fair Employment and Housing; wage and hour audits being conducted by the U.S. Department of Labor and the California Division of Labor Standards Enforcement; and, wage and hour class actions and civil actions for wrongful termination being filed by current and former employees. Our firm has successfully defended our clients in 2011 and has a record in favorably settling the most complex wage and hour class action cases.

If you want our firm to represent and defend you, please be sure that you ask for our firm to be designated as defense counsel when you renew or purchase your policies. Tell your insurance broker that our firm is panel counsel for many carriers and has established good working relationships with others. We see the relationship between our clients and the insurance carrier as a partnership and not an adversarial relationship. As a result, if you ask for our firm at the time of renewal, it is likely that

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the carriers will agree. We accept the carrier's reasonable billing rates and litigation guidelines. We recommend that you give your broker a copy of this letter with a request that we be designated as counsel.

Also, be sure to discuss with your broker the availability for a wage and hour endorsement to cover your attorney's fees in the event of a wage and hour dispute or civil action. With the increase in class actions, you should explore this coverage.

Of course, if you have any questions, please feel free to contact me.

Very truly yours,



Alfred J. Landegger, Esq.  
LANDEGGER | BARON | LAVENANT | INGBER  
A Law Corporation



## **RULES OF DISCIPLINE**

1. **FAIRNESS.** Ask yourself the following question: Is it fair to discipline this employee based upon the quality and quantity of the facts before you?
2. **CONSISTENCY.** In the past has the Company imposed the same discipline in similar situations?
3. **UNIFORMITY.** The Company has an employee handbook, so employees know what is to be expected of them and what the Market provides for them for benefits. As a supervisor you must promote the understanding of such policies to each employee.  
  
Examples:   Excessive absenteeism.  
                  Insubordination.
4. **HONESTY.** During discipline it is essential that you are candid and direct with the employee regarding performance and performance appraisals. Never tell any employee they are being laid off when performance is the real issue.
5. **BE OBJECTIVE.** To demonstrate validity and legality of actions.
6. **FOLLOW RULES 1, 2, 3, 4 and 5.** Be in a position to demonstrate all of the above. Imagine yourself in the witness chair. This is what you want to portray to the judge or the jury.

## **REGLAS DE DISCIPLINA**

**IMPARCIALIDAD.** Pregúntese a sí mismo la siguiente pregunta: ¿Es justo disciplinar a este empleado basado en la calidad y la cantidad de hechos que usted está considerando?

**CONSISTENCIA.** ¿En el pasado, ha impuesto el Mercado la misma disciplina en situaciones similares?

**UNIFORMIDAD.** El Mercado tiene un manual para empleados para que los empleados sepan lo que se espera de ellos y lo que el Mercado les ofrece en forma de beneficios. Como supervisor, usted debe promover el entendimiento de esas pólizas con cada empleado.

Ejemplos: Faltas excesivas  
Insubordinación

**HONESTIDAD.** Durante la disciplina, es esencial que usted sea franco y directo con el empleado con respecto al rendimiento de trabajo del empleado y la evaluación de ese rendimiento. Nunca le diga a un empleado que se le esta dando "lay off," cuando la verdadera razón es la calidad o el rendimiento de trabajo del empleado.

**SEA OBJETIVO.** Para demostrar validez y legalidad de acción.

**SIGA LAS REGLAS 1, 2, 3, 4 y 5.** Póngase en la posición de poder demostrar todas las reglas de arriba. Imagínese que usted esta atestiguando. Estas reglas es lo que usted quiere poder demostrar a un juez o a un jurado.

# Record of Supervisory Discussion

Employee Name

Position

Dept

Supervisor

Date of occurrence

**Describe the problem:**

Frequency of the problem: ☐ 1st time ☐ 2nd time ☐ 3rd time ☐ more than 3 times

**Describe employee's response:**

Action taken: ☐ Discussion only ☐ Verbal reprimand ☐ Written reprimand  
☐ Suspension: \_\_\_\_\_ days ☐ Discharge

**Explain reason for action taken:**

Further action(s) of a similar nature will result in additional disciplinary action up to and including termination of employment.

Supervisor's signature

Date

2<sup>nd</sup> level Supervisor's signature

Date

I have read and received a copy of this memo.

Employee's signature

Date

# Record of Disciplinary Action

Employee Name

Position

Dept

Supervisor

Date of occurrence

**Describe the problem:**

Frequency of the problem: ☐ 1st time ☐ 2nd time ☐ 3rd time ☐ more than 3 times

**Describe employee's response:**

Action taken: ☐ Written reprimand ☐ Suspension: \_\_\_\_\_ days ☐ Discharge

**Explain reason for action taken:**

Further action(s) of a similar nature will result in additional disciplinary action up to and including termination of employment.

Supervisor's signature

Date

2<sup>nd</sup> level Supervisor's signature

Date

I have read and received a copy of this memo.

Employee's signature

Date

**PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE**

**DISCRIMINATION ALLEGATION/EVENT REPORTING FORM**

**TO:** Alfred J. Landegger, Esq. Michael S. Lavenant, Esq.

**FAX NO.** (818) 986-5147 (805) 987-7148

**COMPANY:** LANDEGGER, BARON, LAVENANT & INGBER

**FROM:** \_\_\_\_\_

**DATE:** \_\_\_\_\_

**CC:** \_\_\_\_\_

This form must be completed by the Branch Manager, Supervisor or by the corporate Human Resource Department no later than the next business day after any allegation of harassment or discrimination in the workplace.

**1** Please complete the attached First Report of Event or Circumstance. When interviewing the employee, do not feel compelled to ask the questions in the same order. Feel free to ask additional questions. Always be a good listener and take accurate notes. Never label the behavior, statement or allegation as “sexual harassment” or “discrimination”. Document the words used by employee. No further investigation is to take place until instructed to do so by \_\_\_\_\_ and Landegger, Baron, Lavenant & Ingber;

**2** Attach a copy of the personnel file of the employee making the allegation of harassment or discrimination; and

**3** Attach the personnel file of the employee(s) against whom the allegation of harassment or discrimination has been made.

If you have any questions concerning this Discrimination Allegation/Event Reporting Form, or the attached First Report of Event or Circumstance, please contact Alfred J. Landegger, Esq. at (818) 986-7561 or Michael S. Lavenant, Esq. at (805) 987-7128.

## **FIRST REPORT OF EVENT OR CIRCUMSTANCE**

**Date:** \_\_\_\_\_

1. Name of Employee Being Interviewed: \_\_\_\_\_
2. Name of Interviewer: \_\_\_\_\_
3. Name Facility or Location: \_\_\_\_\_
4. Tell Me What Happened: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
5. Who was involved? \_\_\_\_\_
6. When did the incident(s) happen? \_\_\_\_\_
7. Where did the incident(s) happen? \_\_\_\_\_
8. Were there any other incident(s)? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
9. How did this incident make you feel? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
10. Was your work affected? \_\_\_\_\_
11. Was this the first time this had happened? \_\_\_\_\_

**FIRST REPORT OF EVENT OR CIRCUMSTANCE**

**Page 3**

12. Were there any previous incidents of inappropriate behavior? \_\_\_\_\_

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13. Have you kept any records, such as written notes, tape recordings or anything else?

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**(If so, please attach.)**

14. Do you know of any other employee(s) who had similar experiences? \_\_\_\_\_

Who: \_\_\_\_\_

When: \_\_\_\_\_

15. Have you discussed this with anyone at work? \_\_\_\_\_

Who: \_\_\_\_\_

When: \_\_\_\_\_

16. Have you discussed this with anyone outside of work? \_\_\_\_\_

Who: \_\_\_\_\_

When: \_\_\_\_\_

17. Did you participate in the incident? \_\_\_\_\_

**FIRST REPORT OF EVENT OR CIRCUMSTANCE**

**Page 4**

18. If yes, tell me how you participated: \_\_\_\_\_

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19. How would you describe your relationship with the employee about whom you are complaining? \_\_\_\_\_

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20. Are there any other issues we should discuss? \_\_\_\_\_

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21. Were any other facts or other information that you think I should know? \_\_\_\_\_

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22. Who do you think I should talk to? \_\_\_\_\_

---

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**FIRST REPORT OF EVENT OR CIRCUMSTANCE**

**Page 5**

23. Do you have any suggestions as to how best to resolve the situation? \_\_\_\_\_

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---

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\_\_\_\_\_  
Type/Print Name of Person  
Conducting Interview

\_\_\_\_\_  
Signature of Person Conducting Interview

Date: \_\_\_\_\_

**PRE-TERMINATION OF EMPLOYMENT  
CONSULTATION FORM**

To: LANDEGGER, BARON, LAVENANT & INGBER  
A Law Corporation  
15760 Ventura Boulevard  
Suite 1200  
Encino, California 91436  
(818) 986-7561  
[www.landeggeresq.com](http://www.landeggeresq.com)

Send: By Facsimile to (818) 986-5147 or  
By e-mail to [alfred@landeggeresq.com](mailto:alfred@landeggeresq.com)

From: Name of Company: \_\_\_\_\_  
Contact Person: \_\_\_\_\_  
Phone Number: \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_

Date: \_\_\_\_\_

This communication, including all attachments, is protected by the attorney client privilege and/or work product doctrine. The purpose of this communication is to seek a preliminary legal opinion concerning the potential termination of an employee.

Landegger, Baron, Lavenant & Ingber will advise you if the termination creates a potential for legal exposure and whether you should seek additional legal advice. Our goal is to provide you with advice so as to avoid employment related claims. Landegger, Baron, Lavenant & Ingber cannot advise you whether this is a reportable event to your Employment Practices Liability Insurance carrier or Directors and Officers Insurance carrier without reviewing the policy.

## PRE-TERMINATION OF EMPLOYMENT CONSULTATION FORM

1. Name of Employee: \_\_\_\_\_
2. Date of Hire: \_\_\_\_\_
3. Current Position: \_\_\_\_\_
4. Rate of Pay: \_\_\_\_\_
5. State in detail the reason that you wish to terminate this employee:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
6. Do you think that this Employee is likely to file a legal claim? If so, why?  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
7. Is the employee in any protected class? Please identify each applicable category and provide as much detail as is available.  

Age (over 40):	_____
Race:	_____
Color:	_____
National Origin:	_____
Religion:	_____
Sex:	_____
Physical or Mental Disability:	_____
HIV/AIDS:	_____
Sexual Orientation:	_____
Gender Identity:	_____
Medical Condition ( <i>cancer or genetic characteristics</i> ):	_____
Pregnancy Disability:	_____
Marital Status:	_____

## PRE-TERMINATION OF EMPLOYMENT CONSULTATION FORM

8. Has the employee reported a work-related injury or have a record of a Workers Compensation claim?

Yes: \_\_\_\_\_ No: \_\_\_\_\_

*If yes, please attach available documents including DWC 1 Forms and doctor's notes.*

9. Has the employee requested or taken time off for medical reasons, military, Pregnancy Disability Leave or Family and Medical Care Leave?

Yes: \_\_\_\_\_ No: \_\_\_\_\_

*If yes, please attach available documents including LOA forms and doctor's notes.*

10. Has the employee received prior verbal or written counseling? *If so, please attach.*

Yes: \_\_\_\_\_ No: \_\_\_\_\_

11. Has the employee violated a written rule or policy contained in your employee handbook? *If so, please attach a copy of the policy.*

Yes: \_\_\_\_\_ No: \_\_\_\_\_

12. Do you have an oral or written agreement with the employee concerning any term or condition of employment?

Yes: \_\_\_\_\_ No: \_\_\_\_\_

13. Do you have a formal or informal progressive discipline policy?  
*If so, please attach or describe.*

Yes: \_\_\_\_\_ No: \_\_\_\_\_

14. Are there any additional facts or factors that are relevant to this proposed termination?

Yes: \_\_\_\_\_ No: \_\_\_\_\_

*Please state the additional facts or factors.*

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## PRE-TERMINATION OF EMPLOYMENT CONSULTATION FORM

15. Have you considered a Final Written Warning, demotion, transfer or further training? If not, why? \_\_\_\_\_  
\_\_\_\_\_
16. What type of discipline has been imposed on other employees involved in similar circumstance(s)? \_\_\_\_\_

I agree to the above terms and conditions and verify all of the above information is accurate and complete.

\_\_\_\_\_  
[Signature of person sending form]

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A L A W C O R P O R A T I O N

## Discipline and Employee Separations

### Main Office

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*Discipline and Employee Separations*

**I. At-Will Employment**

- A. Presumption in California (Labor Code §2922)
- B. Overcoming presumption of employer's right to terminate at will
  - 1. Statutory limitations on the employer's right to terminate
    - a. California Fair Employment and Housing Act ("FEHA") (Govt Code §§12900–12996) prohibits covered employers from discharging or disciplining employees because of their:
      - i. race
      - ii. religious creed
      - iii. color
      - iv. national origin
      - v. ancestry
      - vi. physical or mental disability
      - vii. medical condition
      - viii. marital status
      - ix. sex
      - x. age
      - xi. sexual orientation (Govt. Code §12940(a)), or
      - xii. pregnancy, childbirth, or related medical conditions (Govt. Code §§12943, 12945)
    - b. "Whistleblower" statutes prohibit covered employers from discharging or disciplining employees for reporting, among other things:
      - i. Discriminatory conduct (Govt Code §12940(h))
      - ii. Regulatory violations or illegal activity (Labor Code §1102.5)
      - iii. The employer's submission to the government of a false or fraudulent claim for payment or other fraudulent records (Govt Code §12653)

*Discipline and Employee Separations*

- iv. Unsafe working conditions (Labor Code §§6310, 6312)
    - v. Industrial injuries (Labor Code §132a), and
    - vi. Patient abuse (Govt Code §12940(e))
  - c. California's Labor Code also protects employees from discipline or discharge because of
    - i. Jury duty (Labor Code §230), and
    - ii. Political activity (Labor Code §§1101, 1102)
- 2. Violation of public policy
  - a. A "fundamental" public policy expressed in a statute or a constitutional provision must be at stake
  - b. Policy must benefit public at large, rather than an individual employee or employer
  - c. Policy must apply to the defendant employer
  - d. Retaliatory terminations deemed to violate public policy
    - i. Termination because the employee refused to violate the law
    - ii. Termination because the employee was performing a statutory obligation
    - iii. Termination because the employee exercised a statutory right or privilege (*Note: an employer may not demote, suspend, or discharge an employee for lawful conduct during non-working hours away from the employer's premises (Labor Code §96(k).)*)
    - iv. Termination because the employee reported an alleged violation of a statute of public importance
- 3. Contractual limitations
  - a. Express contracts to terminate only for good cause
    - i. "Good cause" for termination is defined as a termination for a "fair and honest cause or reason, regulated by the good faith" of the employer.



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- ii. May be oral or written
- b. Implied-in-fact contract not to terminate the employment relationship except for good cause
  - i. The employer's personnel policies and practices
  - ii. The employee's longevity of service
  - iii. Other communications or actions by the employer assuring the employee of continued employment
  - iv. The practices of the industry in which the employee is engaged.
- c. Covenant of good faith and fair dealing

**II. Disciplinary Actions**

- A. Handbook references
  - 1. Disciplinary action may include, but is not limited to, the following:
    - a. Verbal warning
    - b. Written warning
    - c. Unpaid leave/suspension
    - d. Probationary period
    - e. Reassignment/demotion
    - f. Transfer
    - g. Termination
  - 2. The choice of any disciplinary action is within the complete discretion of the company and will not alter the employee's at-will employment relationship with the company
- B. Uniformity
  - 1. Try to be consistent
- C. Document, document, document
  - 1. It is absolutely essential that there is sufficient documentation in the file to support a termination

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2. Oral warnings should be memorialized
  - a. At the very least, document that oral warnings were given on particular dates
3. Written warnings
  - a. Ask the employee to sign the warning. If the employee refuses to sign, supervisor should sign the memo and note, "refused to sign" and date it.
4. Catch-up memos
  - a. May be used to rehash the prior 6 months or more of oral warnings that were never documented
5. Supervisor/co-worker memos
  - a. Have supervisors memorialize the problems with a particular employee.
  - b. Co-worker memos and testimony are often effective at trial to counter an employee's claim of discrimination.
- D. Leaves of absence and disciplinary action
  1. Employers may discipline despite an employee threatening or actually being on a leave of absence
  2. Workers' compensation claims are often filed immediately prior to or after disciplinary action is implemented
    - a. Send the employee who is out on leave a letter indicating that disciplinary action was contemplated and that the issues will be dealt with when the employee returns from the leave
- E. Demotion
  1. Usually an effective alternative to termination
  2. An offer of a lesser position may make the company look more compassionate
  3. Employee may reject offer and resign
  4. May include a pay cut

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F. Probation

1. Prepare a 5-step memo
  - (1) Identify specific incident or situation
  - (2) Identify the corrective steps required
  - (3) Suggest methods for achieving these goals
  - (4) Specify the time frame for improvement
    - Include language that you need to see immediate and sustained improvement during the probationary period, or it will end early and termination will occur
  - (5) Specify possible result
    - Termination if no sufficient improvement
    - Extension of probation
    - Off probation
2. Include language at the end of the memo noting that “putting an employee on probation (or any other disciplinary action) does not change the at-will employment relationship between an employee and the company.”

**III. Termination**

- A. If it's a termination, don't call it a “layoff,” especially if only one employee is affected
- B. Severance Agreements
  1. In exchange for a release of all potential claims
- C. Checklist of items to consider
  1. Have all company procedures been followed?
  2. Wages owed? (Same day vs. 72 hours)
  3. Paid time off, vacation or sick leave
  4. Written employment contract
  5. Advances, loans, negative vacation bank
  6. Stock options

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7. Pension plan or “golden parachute”
8. Is the employee also an officer or director?
9. Unpaid expenses, commissions, bonuses or other perks?
10. Deductions from final check
  - a. Loans
  - b. Advances
  - c. Overpayment
  - d. Unreturned equipment
11. Discrimination, disability or whistle-blower issues
12. Workers’ compensation
13. Severance package & release
14. Consistent with prior reviews? Is review now due?
15. Sufficient documentation?
16. Confidentiality or non-compete agreement?
  - a. Does employee have proprietary information regarding the company?
  - b. In California, covenants not to compete are generally prohibited
  - c. Alternatives:
    - i. Choice-of-law provisions
    - ii. Negative covenants
      - (a) Employee may be prohibited by contract from working for anyone other than his former employer
      - (b) Employee’s services must have a “special, unique, unusual, extraordinary, or intellectual character” giving them “peculiar value.” (Civil Code §3423(e))
    - iii. Financial disincentives

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- iv. Non-solicitation covenants
  - (a) An employee non-solicitation covenant prohibits a former employee from soliciting his former co-workers from leaving their jobs to work for his or her new employer.
  - (b) A customer non-solicitation covenant prohibits a former employee from soliciting his former employer's customers for their business.
- v. Confidentiality agreements
  - (a) A former employee may not disclose or use his employer's (past or present) trade secrets. (The Uniform Trade Secrets Act, Civil Code §§3426–3426.11)
- 17. Company property retrieval (e.g. company car, computer, etc.)
- 18. Damage control with customers/vendors
- 19. Security issues
  - a. Retrieval of personal belongings
  - b. Change locks, passwords, etc. and prevent access to modem
  - c. Computer files
  - d. Security guard
- D. Exit interviews
  - 1. Timing
  - 2. Two people present (15 – 20 min.)
  - 3. Document the meeting
  - 4. Present basic reasons for termination and any supporting documents
  - 5. Determine if new job accepted and reasons for departure (if voluntary termination)
  - 6. Sign confidentiality acknowledgment
  - 7. Final pay and benefits

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8. Notifications
  9. Escort to office
  10. Return of company equipment including files
  11. Personal items
  12. Escort off premises
  13. Hope for the best!
- E. Post-termination issues
1. References
  2. Employee return to site to visit friends, etc.
  3. Retention of records
  4. Eligibility for rehire
  5. Compliance with terms of severance agreement
  6. Post-termination benefit administration (COBRA, retirement benefits, etc.)

**IV. Layoffs/Reductions in Force**

- A. Planning a Reduction in Force ("RIF")
1. Do not substitute a "layoff" for a termination for cause
    - a. If it's a job elimination *and* performance issue, reference both in any relevant documents
  2. Consider alternatives to layoff and termination in exchange for a release of all claims
    - a. Early retirement plans
    - b. Severance plans
    - c. Enhanced benefit plans
  3. There is no prohibition against offering a more favorable severance plan to employees who sign releases or waivers of claims

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4. Establish neutral criteria for termination
  - a. Merit
  - b. Versatility
  - c. Seniority
  - d. Salary
  - e. Prohibited criteria
    - i. Age
    - ii. Sex, race, color, religion, or national origin
    - iii. Pregnancy
    - iv. Marital status
    - v. Sexual orientation
    - vi. A pension about to vest
    - vii. Disability
    - viii. Medical condition
    - ix. Injury in the course of employment or filing a claim for workers' compensation
    - x. The employee's exercise of a protected right, such as filing a discrimination claim or unfair labor practice charge, or reporting a suspected violation of the law.
- B. Worker Adjustment and Retraining Notification Act ("WARN") (29 USC §§2101 - 2109)
  1. Background
    - a. Enacted in 1988 in response to the great number of plant closures and mass layoffs through the 1980s
    - b. Provides employees, their families and communities to prepare for the plant closure of mass layoff by requiring the employer to provide advance notice of the decision

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- c. California's WARN statute is analogous to the federal WARN
  - i. California WARN defines a mass layoff as a layoff of 50 or more employees during a 30-day period, regardless of whether the layoff involves 33% of active employees
- 2. Who is covered?
  - a. Does not apply to federal, state or local governments and federally recognized Indian tribal governments
  - b. Employers that employ 100 or more employees (excluding part-time employees *unless* they work an aggregate of 4000 or more hours per week)
- 3. Triggering events
  - a. Plant closure
    - i. The permanent or temporary shutdown of a single site of employment that affects 50 or more employees
  - b. Mass layoff
    - i. Federal definition
      - (a) A reduction in force that results in an employment loss at the single site of employment during any 30-day period, for (1) at least 33% of the employees and at least 50 employees; or (2) at least 500 employees.
    - ii. California definition
      - (a) A layoff during any 30-day period of 50 or more employees at a covered establishment (no 33% layoff threshold)
- 4. Notice
  - a. Required recipients
    - i. Affected employees
    - ii. Employment Development Department
    - iii. Local Workforce Investment Board



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- iv. Chief elected official of each city and county government within which the termination, relocation or mass layoff occurs
  - b. Contents
    - i. The name and address of the employment site
    - ii. A statement of whether the plant closing or mass layoff is permanent or temporary
    - iii. The expected date or a 14-day period in which the terminations or layoffs are expected to occur
    - iv. An indication of whether bumping rights exist
    - v. The names and job titles of employees who will be affected, and
    - vi. The name and telephone number of a company official to contact for further information
  - c. Timing
    - i. At least 60 calendar days in advance of the first individual termination that is part of the plant closing or mass layoff
  - d. Service
    - i. Any reasonable means of delivery (e.g. first class mail, personal delivery, insertion into employee pay envelopes)
- 5. Liability for violations
  - a. WARN provides stiff penalties for noncompliance
  - b. Employer may be forced to pay wages and benefits to each aggrieved employee for each day of violation, up to a maximum of 60 work days.
  - c. Failure to provide notice to the local unit of government subjects the employer to a civil penalty of up to \$500 per day
  - d. Attorneys' fees

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- C. Continuing health insurance benefits
  - 1. The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA")
    - a. Employers employing 20 or more employees must offer an election of continuing health care coverage to qualified beneficiaries when there is a "qualifying event"
  - 2. Cal-COBRA
    - a. Provides up to 36 months of COBRA coverage after the exhaustion of the 18-month coverage period provided under federal law
    - b. For employers not subject to federal COBRA, Cal-COBRA provides a 36-month coverage period for qualified beneficiaries, including the employee.
- D. National Labor Relations Act ("NLRA") compliance
  - 1. Special issues arise when the workforce involved in a plant closing, plant relocation or RIF is unionized
  - 2. Employer may have statutory duty to bargain with the union over its decision or the effects of its decision and whether it must satisfy any other obligations under its collective bargaining agreement
- E. Bankruptcy issues
  - 1. RIF often the result of financial difficulties
  - 2. Consult a specialist in bankruptcy law