

37. EMPLOYMENT TERMINATION CHECKLIST* SUPERVISOR/MANAGER INTERVIEW

This article was written by Susan Rocha, city attorney of Boerne, Texas, for the Mar/Apr. 2000 Municipal Lawyer magazine, published by the International Municipal Lawyers Association.

Readers should also consult the articles “Due Process and Public Personnel Discipline” and “Practical Guidelines for Discipline and Termination of a Municipal Employee” in this publication.

On a regular basis, city attorneys are involved in the process of terminating an employee. More often than not, the in-house counsel is brought in at the last minute to determine whether or not there are any problems in firing a particular employee. This places the city attorney in the position of having to ask the right questions, with very little time or information, about the recommendation for termination. Often, after approving an employee’s termination, the city attorney gets after-the-fact, crucial information that would have tempered the recommendation or at least the suggested procedure for termination. This checklist has been developed to assist municipal attorneys when they meet with the supervisor or manager who is recommending an employee’s termination. It contains key topics that should be discussed with that supervisor or manager, regardless of the reasons given for the termination. This is *not a complete legal analysis* of employment termination law and is *only meant to trigger discussions* about issues and possible complications in the termination of an employee. **If enough concerns are raised by the checklist, take the time to investigate more closely - look before you leap.**

NOTE: Although this article was written for municipal attorneys, officials should review this checklist and be prepared to answer these questions with their municipal attorney.

I. Employment Status

A. Current Status

Yes	No	
___	___	1. Is the employee a full-time employee?
___	___	2. Is the employee a probationary employee?
___	___	3. Has the employee voluntarily abandoned the job?
___	___	4. Local policies - does your city charter contain provisions that govern employment separation, reduction in force, grievances, or reasons for termination?

B. Union/Contract Employees

Yes	No	
___	___	1. Is this employee covered by a collective bargaining agreement?
___	___	2. Is this employee covered by a civil service statute?
___	___	3. Is this a contract employee not covered by your personnel policies?

C. Previous Employment Actions

Yes	No	
___	___	1. Has this employee been disciplined previously?
___	___	2. Has the employee received a disciplinary action, demotion, suspension or previous recommendation for termination?
___	___	3. Has the employee received evaluations in the past:
___	___	a. five years?
___	___	b. last year?
___	___	c. last six months?

4. d. last month
 Have these evaluations, if any, identified any problems?

II. Title VII¹ (General)

Yes	No		
<input type="checkbox"/>	<input type="checkbox"/>	1.	Is the employee a member of a protected class - race, color, religion, sex or national origin?
<input type="checkbox"/>	<input type="checkbox"/>	2.	Do any of the reasons for termination include a reason based on the employee's race, color, religion, sex or national origin?
<input type="checkbox"/>	<input type="checkbox"/>	3.	Has this employee ever filed a complaint with the EEOC?
<input type="checkbox"/>	<input type="checkbox"/>	4.	Has this employee participated or assisted in an EEOC investigation involving another employee?
<input type="checkbox"/>	<input type="checkbox"/>	5.	Has this employee previously complained about or reported discrimination of <i>any</i> kind?
<input type="checkbox"/>	<input type="checkbox"/>	6.	Do you have a state antidiscrimination statute that would cover employees and contract employees?

A. Sex and Sexual Harassment

Yes	No		
<input type="checkbox"/>	<input type="checkbox"/>	1.	Has this employee ever complained to a supervisor, the human resources department or to any other employee, to your knowledge, regarding sexual harassment or discrimination based on sex?
<input type="checkbox"/>	<input type="checkbox"/>	2.	Has the employee ever mentioned or complained about sexual harassment or a hostile environment - whether or not it involved them personally? (Includes same-sex harassment.)
<input type="checkbox"/>	<input type="checkbox"/>	3.	Has this employee complained about quid pro quo sexual harassment?
<input type="checkbox"/>	<input type="checkbox"/>	4.	Has this employee been involved with any supervisor or someone who has the power to evaluate and promote? (" <i>Involved</i> " meaning <i>any romantic or dating situation</i>).
<input type="checkbox"/>	<input type="checkbox"/>	5.	Has the employee had a sudden drop in evaluations after the end of a relationship, or refusal to enter into a relationship:
<input type="checkbox"/>	<input type="checkbox"/>		a. with a supervisor?
<input type="checkbox"/>	<input type="checkbox"/>		b. with a fellow employee?
<input type="checkbox"/>	<input type="checkbox"/>	6.	Has the employee been notified of the right to file a complaint regarding sexual harassment and who in the city he or she can report to about the incident?
<input type="checkbox"/>	<input type="checkbox"/>	7.	Did the employee follow your employer policy regarding reporting sexual harassment?
<input type="checkbox"/>	<input type="checkbox"/>	8.	Have you investigated this complaint?
<input type="checkbox"/>	<input type="checkbox"/>	9.	How quick was your response? _____

B. Religion

Yes	No		
<input type="checkbox"/>	<input type="checkbox"/>	1.	Has this employee complained about being required to work on certain religious holidays?
<input type="checkbox"/>	<input type="checkbox"/>	2.	Has the employee complained that certain job requirements conflict with his or her religious beliefs?
<input type="checkbox"/>	<input type="checkbox"/>	3.	Has this employee complained about a supervisor or fellow employee's attempts to proselytize about, or convert this employee to, their particular religion?
<input type="checkbox"/>	<input type="checkbox"/>	4.	Does the state have a Religious Freedom Restoration Act?

C. National Origin/Race

Yes	No		
<input type="checkbox"/>	<input type="checkbox"/>	1.	Is this employee the only woman or African American, Hispanic, Asian or other ethnic minority in the department?

- | | | | | | |
|-----|-----|--|--|--|---|
| | | | | | 2. If the answer to the question above is "no," how many other women or ethnic minorities work in the department? _____ |
| ___ | ___ | | | | 3. Are any of them supervisors or managers? |
| ___ | ___ | | | | 4. Have only minorities been recommended for termination by this department or manager in the past? |
| ___ | ___ | | | | 5. Is the employee a non citizen? |
| | | | | | 6. How many non citizens work in the department? _____ |

III. Injury or Illness

These questions involve any recommendation for termination of an employee who has suffered an injury or illness and is unable to return to work due to that injury or illness.

A. Family and Medical Leave Act (FMLA)²

- | | | | | | |
|------------|-----------|--|--|--|---|
| | | | | | |
| Yes | No | | | | |
| ___ | ___ | | | | 1. Have you provided the employee with FMLA notice and leave? |
| ___ | ___ | | | | 2. Has the employee received a return to work certificate? |
| ___ | ___ | | | | 3. If a mental illness is involved, has the employee been allowed to seek medical assistance? |
| ___ | ___ | | | | 4. If there is a dispute regarding the return to work, have you requested an evaluation by a different physician? |

B. Workers' Compensation

- | | | | | | |
|------------|-----------|--|--|--|--|
| | | | | | |
| Yes | No | | | | |
| ___ | ___ | | | | 1. Was the employee's injury/illness a result of an on-the-job injury? |
| ___ | ___ | | | | 2. Has the employee filed a workers' compensation claim? |
| ___ | ___ | | | | 3. Has the injury resulted in a disability? |
| ___ | ___ | | | | 4. Is this a refusal to rehire based on the injury? |

IV. Constitutional Issues

A. First Amendment Rights

- | | | | | | |
|------------|-----------|--|--|--|--|
| | | | | | |
| Yes | No | | | | |
| ___ | ___ | | | | 1. Has the employee participated in any First Amendment covered activity? |
| ___ | ___ | | | | 2. Has the employee's speech been directed at public policy rather than the employee's own salary or conditions of employment? |

B. Political Affiliation

- | | | | | | |
|------------|-----------|--|--|--|---|
| | | | | | |
| Yes | No | | | | |
| ___ | ___ | | | | 1. Is this employee affiliated with a particular faction or party of the governing body? |
| ___ | ___ | | | | 2. Is this employee a political appointee? |
| ___ | ___ | | | | 3. Is this employee considered to be in a position of trust and confidence with the governing body? |

C. Right to Privacy

- | | | | | | |
|------------|-----------|--|--|--|--|
| | | | | | |
| Yes | No | | | | |
| ___ | ___ | | | | 1. Was any part of the investigation leading to the termination recommendation the result of a search of the individual's desk, computer, locker or office area? |
| ___ | ___ | | | | 2. Does the city have a policy regarding privacy and notice to employees regarding possible searches? |
| ___ | ___ | | | | 3. Was the employee allowed to explain the items or information that were obtained in the search? |

V. Whistleblowing

Yes No

____ ____
____ ____
____ ____
____ ____

1. Has this employee reported any wrongdoing by any fellow employee, supervisor/manager or public official?
2. On what date and to whom? _____
3. Was it reported to a:
a. supervisor/manager?
b. anyone in the city?
c. to outside agencies?
4. Has the employee's report of wrongdoing been addressed by a supervisor or manager?

VI. Due Process

Yes No

____ ____
____ ____
____ ____
____ ____
____ ____
____ ____
____ ____
____ ____
____ ____
____ ____

1. Have you followed your personnel policies regarding notice, grievance, and discharge?
2. Does your policy provide for progressive discipline?
3. Has the employee been informed of the reasons for the recommendation for termination?
4. Has the employee been notified of the specific provisions of the personnel policies that he or she has violated?
5. Has the employee been afforded an opportunity to respond to the charges and give his or her side of the story?
6. Has the employee been afforded a chance to clear his or her name regarding the charges and allegations?
7. Does the city or personnel policies provide for an employee appeal to a higher supervisor regarding the recommendation for termination?
8. Has the employee been informed of the appeal process?
9. Has the employee had the right to representation of his or her choice in any of the termination proceedings?

VII. Association and Nepotism

While these questions may not have "legal" implications, the answers would be good to know ahead of time in order to prepare.

Yes No

____ ____
____ ____
____ ____
____ ____
____ ____

1. Is the employee involved with a particular association or group of individuals?
2. Has this influenced the supervisor's recommendation for termination?
3. Does this employee have close ties to the media (newspaper, radio, TV)?
4. Is this employee related to a member of the governing body?
5. Is this employee related to any other public official in the city?

VIII. Defamation, Libel and Slander

Yes No

____ ____
____ ____
____ ____
____ ____

1. Has information regarding the reasons for termination been discussed with other individuals not in the chain of command or with a need to know?
2. Are the allegations verifiable?
3. Do the allegations include criminal activity?
4. Do your personnel policies require a referral to the district attorney for any suspected criminal activity?

IX. Violating Employer Policies

A. Criminal Activity and Violence

- | Yes | No | | |
|-----|-----|----|--|
| ___ | ___ | 1. | Has this employee threatened clients, other employees or supervisors on the job? |
| ___ | ___ | 2. | Has this employee been involved in fighting or other violent behavior on the job? |
| ___ | ___ | 3. | Has this employee been involved in fighting or altercations outside the workplace with other employees or with other people? |
| ___ | ___ | 4. | Has the employee been charged with any criminal activity on the job? |
| ___ | ___ | 5. | Has this employee been charged with or convicted of with any criminal activity off the job? |
| ___ | ___ | | a. misdemeanor? |
| ___ | ___ | | b. felony? |
| ___ | ___ | 6. | Has there been a report of criminal activity to the district attorney's office? |
| ___ | ___ | 7. | Is there a possible malicious prosecution claim? |

B. Drugs and Alcohol

- | Yes | No | | |
|-----|-----|----|---|
| ___ | ___ | 1. | Has this employee been suspected of drug or alcohol use on the job? |
| ___ | ___ | 2. | Has this employee tested positive for drugs or alcohol on the job? |
| ___ | ___ | 3. | Is the positive drug/alcohol test within the range for disciplinary action? |
| ___ | ___ | 4. | Prior to the drug test, was the employee informed of the need for the drug test based on a reasonable suspicion or based on Department of Transportation (DOT) rules? |
| ___ | ___ | 5. | Did the employee have prior notice of the city's regulations prohibiting drug and alcohol use on the job? |

X. Other Federal Laws

A. Americans with Disabilities Act (ADA)³

- | Yes | No | | |
|-----|-----|----|--|
| ___ | ___ | 1. | Does this employee have a disability or a perceived disability? |
| ___ | ___ | 2. | Has the employee been provided with a reasonable accommodation for a disability? |

B. Age Discrimination in Employment Act (ADEA)⁴

- | Yes | No | | |
|-----|-----|----|--|
| ___ | ___ | 1. | Is this employee over 40 years of age? |
| ___ | ___ | 2. | Is the replacement that will be considered for the position under 40 years of age? |

C. Retaliation

- | Yes | No | | |
|-----|-----|----|--|
| ___ | ___ | 1. | Has this employee filed a workers' compensation claim? |
| ___ | ___ | 2. | Is this employee involved in union activities? |
| ___ | ___ | 3. | Has this employee been involved in whistleblowing activities? |
| ___ | ___ | 4. | Is this employee reporting discrimination under Title VII? |
| ___ | ___ | 5. | Is this employee reporting discrimination under Title VII involving another employee? |
| ___ | ___ | 6. | Has this employee filed a claim under the Fair Labor Standards Act ⁵ ? |
| ___ | ___ | 7. | Has the employee reported or exercised any right under the Occupational Safety and Health Act ⁶ ? |

D. Employment At Will

- | Yes | No | | |
|-----|-----|----|------------------------------|
| ___ | ___ | 1. | Is this an employee at will? |
| ___ | ___ | 2. | Is this a contract employee? |

___ 3. Do the reasons for termination include any violation of public policy?

XI. Resolutions

A. Continuation of Employee Benefits

Yes	No	
___	___	1. Has this employee been notified of his or her COBRA option?
___	___	2. Has the employee been given the option of termination or resignation?
___	___	3. If the employee is resigning, has the employee requested a recommendation?
___	___	4. Has the employer determined what the recommendation will be?

B. Open Records

Yes	No	
___	___	1. Has the employee requested a copy of his or her personnel file?
___	___	2. Is the termination process tape-recorded?
___	___	3. Has the employee requested these tapes?

C. Questions to Ask the Supervisor

Yes	No	
___	___	1. Do you have a grudge against this employee?
___	___	2. Were you dating this employee?
___	___	3. Have you ever tried to date this employee?
___	___	4. Has this employee ever done anything to you personally that has made you mad? Specify: _____
___	___	5. Is there a recommendation of who will fill the position held by this employee? Is it: a. a relative? b. a relative of a member of the governing body, political ally? c. a supporter of yours?
___	___	6. Is there documentation (e.g. written reprimands) supporting your recommendation to terminate?

D. Possible Resolutions in Lieu of Termination

Yes	No	Are these alternatives possible:
___	___	1. Resignation?
___	___	2. Reduction in force?
___	___	3. Transfer and reassignment?
___	___	4. Probation with certain requirements?
___	___	5. Arbitration or mediation?

*** Official Disclaimer: This Termination Checklist attempts to list various areas of law that govern the employment relationship. It is not meant to be a legal treatise, nor is it an exhaustive review. The legal consequences are not explained. This is simply a tool to help you. You should adapt this checklist to your local policies.**

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, 29 C.F.R. 1614 (1964).
2. 29 U.S.C. § 2601 *et seq.*; 29 C.F.R. § 825 (1993).
3. 29 U.S.C. § 12101 *et seq.*; 28 C.F.R. 36.101 (1990).
4. 29 U.S.C. §§ 621 *et seq.*; 29 C.F.R. 1625 (1967).
5. 29 U.S.C. § 201 *et seq.*; 29 C.F.R. § 825 (1938).
6. 29 U.S.C. §§ 651 *et seq.*; 29 C.F.R. §§ 1904 (1970).

INDEX WORDS – 37 EMPLOYMENT TERMINATION CHECKLIST .

Employees

Termination

Employment Termination Checklist

Termination of Employees