

Question & Answer Summary

March 18, 2010 Webinar

Terminating the Employment Relationship: How to Prevent Lawsuits

On March 18, 2010, Miller Law Group presented our webinar on “Terminating the Employment Relationship: How to Prevent Lawsuits.” We examined recent legal developments in individual and group terminations and best practices to avoid lawsuits based on such terminations. We also discussed California’s final paycheck requirements, as well as how to draft severance, release and separation agreements that will stand up in court. The following are answers to frequently asked questions by webinar attendees.

Q. CAN YOU REVIEW THE CALIFORNIA RULES REGARDING THE TIMING OF FINAL PAYCHECKS?

A. California Labor Code sections 203 *et seq.*, set out strict rules for the timing of final paychecks when an employee is discharged (for any reason) or quits. Here is a summary of the rules and some guidelines for following those rules.

An employee who is discharged must be paid all of his or her wages, including accrued vacation, immediately at the time of termination and at the place of discharge. Most discharge decisions are made in advance, so employers should have the final paycheck in hand when giving the employee notice of his or her termination. In the event of an unforeseen or immediate discharge where a final paycheck is not prepared in advance, the employer should consider paying an additional number of days of wages representing the date the paycheck will be ready for the employee.

If an employee quits without giving prior notice, the employer has 72 hours to provide the employee’s final paycheck. Alternatively, at the employee’s request (and provided the employee designates a mailing address), the employer may mail/overnight the final paycheck to the employee as long as the date of mailing is within 72 hours of the notice of quitting. The 72-hour period is calculated as one contiguous 72-hour period that includes weekends and holidays. If the final pay is delivered by mail, it is advisable to use a means of delivery that provides tracking and confirmation of receipt.

If an employee gives at least 72 hours prior notice of his or her intent to quit and quits on the day given in the notice, the employee must be paid all of his or her wages, including accrued vacation, at the time of quitting. Thus, if on Thursday an employee gives notice that his last

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day of work will be the following Monday, he is entitled to receive his final wages by the end of his work shift on Monday.

An employer who fails to pay any wages due a terminated employee (discharge or quit) in the prescribed time frame may be assessed a "waiting time penalty." The waiting time penalty is an amount equal to the employee's daily rate of pay for each day the wages remain unpaid, up to a maximum of thirty (30) calendar days. An employee will not be awarded waiting time penalties, however, if he or she avoids or refuses to receive payment of the wages due.

Keep in mind that there are special rules for final paychecks for employees in certain industries, such as motion picture production, oil well drilling, and for seasonal employees in the curing, canning or drying of various fruit, fish or vegetables.

Q. DO THE FINAL PAYCHECK TIMING RULES STILL APPLY EVEN IF AN EMPLOYEE REQUESTS TO RECEIVE THE FINAL PAYCHECK ON THE NEXT REGULAR PAYROLL DATE?

A. Yes. An employer is not relieved of the deadline for providing final wages even if an employee requests, in writing or orally, to have the final paycheck issued on the next regular payroll date or at another time.

Q. CAN WE HONOR AN EMPLOYEE'S WRITTEN REQUEST TO HAVE HER FINAL PAYCHECK DIRECT DEPOSITED?

A. It depends. While direct deposits of wages to an employee's bank, saving and loan, or credit union account are permissible with the employee's written authorization, any such authorization is immediately terminated when an employee quits or is discharged. In any case, direct deposit of a final paycheck is permissible, pursuant to Labor Code section 213(d), if the employee has voluntarily provided written authorization for that specific deposit. It is important to keep in mind, however, that the rules regarding timing of final paycheck rules still apply in this situation, and employers are not relieved of compliance because they are directly depositing the final wages.

Q. IF WE TERMINATE A COMMISSIONED SALESPERSON, WHEN MUST WE PAY OUT THE FINAL COMMISSION?

A. If the commissions have been "earned" and are calculable on or before the date of termination, the employer must complete the necessary calculations and pay the commissions in the final paycheck -- and in compliance with the final paycheck timing rules. It is not permissible for the employer to wait until the customary time for calculating the commissions of current employees, nor is it permissible to delay payment of earned commissions until the next regularly scheduled payday. On the other hand, if the commission has not yet been earned or is not calculable at the time of termination (such as when the employer is awaiting the completion of some legal condition precedent like receipt of the customer's payment), the commission must be paid immediately after the condition occurs and the commission becomes ascertainable. It is advisable to review commission plans to ensure that they clearly define when a commission is "earned" to lessen the risk of claims for failing to properly pay out commissions on termination.

Q. SHOULD WE INCLUDE SEVERANCE PAY IN THE FINAL PAYCHECK?

A. No, severance pay should be provided separate from final wages. This helps to distinguish between the amount that is being paid as final wages for work performed through the date of termination and the severance amount, thus making it easier for the employer to demonstrate that the final paycheck was timely provided.

Q. IN CALIFORNIA, WHAT INFORMATION MUST AN EMPLOYER PROVIDE TO THE EMPLOYEE WHEN THE COMPANY TERMINATES THAT EMPLOYEE?

A. Whenever an employer discharges an employee, it must give the employee a written "change in status" notice. The notice must contain, at a minimum, the employer's name, the employee's name, the employee's Social Security number, the date of the action, and whether the action was a discharge, layoff, leave of absence, or change in status from employee to independent contractor.

It is important to note that the notice need not address the reason for the change in status. So, for example, if you are terminating an employee for "poor performance," there generally is no legal obligation to provide that reason in writing to the employee. Many employers, however, provide terminated employees with a "termination letter" explaining the reasons that an employee is being terminated and the steps that led to the decision to terminate the employee.

A written explanation for the termination memorializes the employer's rationale for the termination and may help an employer rebut claims of discrimination or retaliation or, better yet, deter a prospective plaintiff's counsel from taking on representation of a terminated employee.

Q. IF WE ARE CONDUCTING A GROUP TERMINATION, BUT NONE OF THE IMPACTED EMPLOYEES IS AGE 40 OR OLDER, DO WE NEED TO PROVIDE THE INFORMATION REQUIRED BY THE OLDER WORKERS BENEFIT PROTECTION ACT ("OWBPA")?

A. No. Under the OWBPA, if an employer terminates a "group" -- two or more -- of employees and seeks a release of all claims, including federal age discrimination claims under the federal Age Discrimination in Employment Act ("ADEA"), then the employer must provide employees with information about their rights in connection with a release of age bias claims. Because only employees who are at least 40 years old may bring claims under the ADEA, the OWBPA information must only be provided to employees age 40 and older. Thus, if the group termination does not include any employee age 40 or older, then an employer need not provide the OWBPA information to the employees selected for the group termination since none of the affected employees are protected by the ADEA. Let's say, however, that you have selected 20 employees for layoff pursuant to a group termination program that offers additional compensation in exchange for a complete release, and only one of the employees included in the program is over age 40. If you want that one older employee to release his potential federal age discrimination claims, you must provide the required OWBPA information to that employee only. If, however, you do not wish to have that sole employee release his federal age claims, you need not provide the data.

Q. CAN AN EMPLOYEE BE REQUIRED TO WAIVE THE RIGHT TO FILE A CHARGE OF DISCRIMINATION AS A CONDITION OF RECEIVING SEVERANCE PAY?

A. No. According to the U.S. Equal Employment Opportunity Commission ("EEOC"), an employee cannot be required to sign a release waiving his or her right to file a discrimination charge with the EEOC as a condition of receiving severance pay. Similarly, employees cannot be required to waive the right to testify, assist, or participate in an investigation, hearing, or proceeding conducted by the EEOC. Any provision in a severance or separation agreement that attempts to waive these rights is invalid and unenforceable.

Q. IN CALIFORNIA, HOW LONG DOES A FORMER EMPLOYEE HAVE TO FILE A DISCRIMINATION CLAIM?

A. Federal and state anti-discrimination laws give employees a limited amount of time to file an administrative charge of discrimination, a prerequisite for filing a lawsuit alleging statutory claims of discrimination. In California, an administrative complaint of employment discrimination under the California Fair Employment and Housing Act ("FEHA") must be filed no later than one year from the date that the alleged discriminatory act occurred. In other states, the limitations period may be different. Also, if an employee chooses to file an administrative complaint directly with the U.S. Equal Employment Opportunity Commission ("EEOC"), the employee must do so within 180 calendar days from the date the alleged discrimination took place, or 300 calendar days if a state (like California) or local agency enforces a law that prohibits employment discrimination on the same basis. Employees have one year after receiving administrative right to sue letters to file lawsuits alleging statutory claims of discrimination.

Miller Law Group exclusively represents business in all aspects of California employment law, specializing in litigation, risk management, wage and hour class actions, ERISA litigation, and appellate law. If you have questions about your workplace obligations, please contact Michele Ballard Miller (mbm@millerlawgroup.com) or Carolyn Rashby (cr@millerlawgroup.com), or call (415) 464-4300. To learn more about our firm, visit our website at www.millerlawgroup.com.

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