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# Terminated Employees: Final Pay, Vacation and PTO Payouts

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## TOPICS INCLUDE:

- Major Issues when Terminating that are often Mishandled
- Post Termination Demands
  - Copy of Personnel File
  - Statement of Reasons
  - Wages to be Paid Within 24 Hours
- Unlawful Deductions from Wages



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# Mistakes Employers Make When Terminating Employees

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Employers often wonder, “I can terminate an employee for any reason, because they are ‘at-will’, right?”

While that may be partially true (you cannot terminate someone for a discriminatory reason), there are often ways you can plan ahead for a smoother termination and improve the subsequent discussions/submissions. Mistakes are often made, but many termination mishaps can be avoided with a little planning and knowledge.

# Mistakes Employers Make When Terminating Employees

## **1. The employer doesn't examine prior documentation.**

It is crucial that an employer review any documentation that relates to the employee, including performance reviews and contracts. While an at-will employee can be terminated for any reason that's non-discriminatory, it becomes problematic, for example, if an employee is told he is being terminated for poor attention to detail when he has just received high marks in that category on a written performance review.



# Mistakes Employers Make When Terminating Employees

The employer might also discover that the employee has a contract stating that he is entitled to severance pay unless there is a termination for “cause.”

***Practice Pointer:*** Examining documentation before the termination meeting will position the employer to better articulate and possibly adjust the termination reason.

# Mistakes Employers Make When Terminating Employees

## 2. The employer doesn't properly investigate the facts upon which the termination is based.

Even if an employer has credible evidence that an employee has exhibited poor judgment in a particular situation, it's a mistake to terminate without getting his or her side of the story. The employer is not able to make a determination regarding what really happened, or to assess the employee's credibility, if the employee isn't questioned.

***Practice Pointer:*** Get the employee's side of the story before terminating.

# Mistakes Employers Make When Terminating Employees

- 3. The employer doesn't think through or provide the employee with a coherent, precise explanation why he or she is being terminated.**

Employers often get into trouble when they have not given thought to why a person is being terminated, and as a consequence, provide long-winded or easily disputed termination reasons. Also, while an employer doesn't have to provide the employee with a reason for the termination during a termination meeting, we recommend that employers give one, provided it is thought-out and precise.



# Mistakes Employers Make When Terminating Employees

***Practice Pointer:*** Make a decision on why the employee is being terminated, keep it short and sweet, and stick to it.

# Mistakes Employers Make When Terminating Employees

## 4. The employer provides inconsistent explanations why the employee was terminated.

If the reason for termination keeps shifting, it makes it look like the employer's reason for the termination is false, or contains a pretext for discrimination.

***Practice Pointer:*** Make sure the termination reason is consistent over time—from the first meeting with the employee to the preparation of any documents submitted for unemployment, and possibly all the way to litigation.



# Mistakes Employers Make When Terminating Employees

## 5. The employer mishandles the termination meeting by apologizing or providing too much information.

An employer must plan for the termination meeting. It is not a pleasant task to terminate an employee, and it's human nature to say "I'm sorry," or to fill dead space in the conversation.

***Practice Pointer:*** Draft talking points, including the reason for the termination and the related logistics, and stick to it—avoid talking too much or apologizing.

# Mistakes Employers Make When Terminating Employees

## 6. The employer mishandles how the communication of the employee's departure internally and externally.

Employees often bring claims for defamation when internal or external people are told more information than necessary.

***Practice Pointer:*** Less is more. Tell others that the employee has left, and then focus on the logistics of how that employee's work will be handled. If pressed, the employer should simply state that that it is a confidential employment situation.



# Mistakes Employers Make When Terminating Employees

## 7. The employer mismanages the logistics of the termination meeting and the employee's retrieval of his or her belongings.

Allow the employee a graceful exit to the extent possible or appropriate.

***Practice Pointer:*** Try to terminate someone at the end of the day (and possibly the end of the week), don't make a scene walking the employee out, and arrange for a time when the employee can retrieve his or her personal belongings in a respectful way (or deliver the belongings to the employee.)



# Mistakes Employers Make When Terminating Employees

- 8. The employer is pennywise and pound-foolish in not paying severance pay. In some cases, severance should be paid to reduce risk.**

Even if an employer is not required to pay severance, at times it makes sense to pay some amount of severance in exchange for a release in cases where there is risk of a claim.



# Mistakes Employers Make When Terminating Employees

***Practice Pointer:*** In appropriate cases, discuss with your employment lawyer whether it would make sense to pay severance. If it does, get an up-to-date severance agreement and only pay severance pursuant to the terms of that agreement.



# Mistakes Employers Make When Terminating Employees

- 9. The employer mismanages the response to employee's request for the "truthful reason for termination" or a request for the employee's personnel file pursuant to the applicable Minnesota statutes.**

In Minnesota, if a personnel file is located in the state, the employer must provide it within seven working days after a written request, but what the employer needs to provide as the "personnel record" is defined by Minn. Stat. § 181.960, subd. 4.



# Mistakes Employers Make When Terminating Employees

An employee is also entitled to the truthful reason for his or her termination as long as it's requested in writing within 15 working days of the termination. The employer must then provide it within 10 working days.

***Practice Pointer:*** Provide the information on time; produce what records you have to (and ask for assistance if there are questions); provide the same termination reason you arrived at previously; and state in the letter that you are providing the reason pursuant to Minn. Stat. 181.933.



# Mistakes Employers Make When Terminating Employees

## **10. The employer doesn't seek assistance prior to terminating employee.**

In many cases it might be overkill to seek assistance on a termination because there isn't much risk, and in many cases the employee is not surprised. There are, however, many cases where a short conversation with an employment lawyer will be more than worth the cost of the call.

***Practice Pointer:*** Use your judgment and call for help on higher-risk terminations.



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# Post-Termination Demands



# Post-Termination Demands

There are three demands former Minnesota-based employees can make post-termination that should send all kinds of red flags to an employer. They are often made via email and seem like innocent enough requests. Not so!

Fun fact: terminated employees are entitled to demand three things post-termination: (1) a copy of their personnel file; (2) a statement of the reasons for their termination; and (3) all wages be paid within 24 hours.

# Post-Termination Demands

All three of these demands are statutory rights former employees have (meaning yes, they are entitled to it by law – and within a certain period of time). Many employees don't know this unless they have either been in litigation before, have an attorney or HR friend or relative in the background that they have been complaining to, or already have an attorney lined up to make a claim against the employer. Thus, the red flag. Let me break it down...



# Post-Termination Demands - Terminated Employee's Personnel File

## **Terminated Employee's Personnel File**

I know what you're thinking, in the words of MC Hammer – U Can't Touch This! Not so. Minnesota employees have the right, upon written request, to review their personnel file every six months.

Terminated employees have the right to review their personnel file once per year following termination, for as long as the personnel file is kept.

(Minn. Stat. 181.961.)



# Post-Termination Demands

## - Terminated Employee's Personnel File

As to terminated employees, an employer has 7 working days to make the file available for review, 14 working days if the file is maintained outside of Minnesota. If the terminated employee asks for an actual copy (which is almost always the case), the employer must provide a copy; even if they ask to review, it is often simpler to just send the employee a copy. An employer need not provide a current employee with a copy of his or her personnel file (review only is acceptable).



# Post-Termination Demands

## - Terminated Employee's Personnel File

Keep in mind, however, that a request for a copy of a personnel file is usually indicative of conflict brewing. Don't take this request lightly. Ensure that you produce all the "personnel record" documents as defined by Minnesota law (Minn. Stat. 181.960) – often employers will forget to produce records not normally stored in a hard copy personnel file such as payroll records, medical records, time cards, performance evaluations, unemployment documentation, grievances, time off requests, and the like.



# Post-Termination Demands - Terminated Employee's Personnel File

Honestly, the statute defining “personnel record” is horrible. It pretty much says this – everything related to an employee kept by the employer is a “personnel record” except...and then it lists all the things that are not part of such record.

# Post-Termination Demands

## - Terminated Employee's Personnel File

For example, an employer does not need to turn over information such as: written references; investigations (unless completed); certain education records; results of employee testing (except for cumulative test score); information relating to the employer's salary system and staff planning; written comments about other employees; privileged information; medical reports and records available to the employee from a health care services provider.



# Post-Termination Demands

## - Statement of Reasons for Termination

### **Statement of Reasons for Termination**

Terminated employees may request the “truthful reason” for his or her termination within 15 working days of termination. (Minn. Stat. 181.933.) Once the employer receives this written notice, the employer has 10 working days to inform the employee, in writing, of the reason why the employee was terminated. This statement is not subject to any action for defamation, libel or slander. This is the time, folks, to put “Minnesota Nice” on the back burner. You got it – it’s Hammer Time!



# Post-Termination Demands

## - Statement of Reasons for Termination

An employer's statement of reasons for termination is often "Exhibit A" in a MnDOLI or EEOC charge, demand, or lawsuit. Thus, it should be carefully drafted. For example, if an employer states in the statement that the employee was terminated due to a downsizing, and it was really poor performance, insubordination, and poor attendance – those reasons will not stand muster in a later defense. Simply, the employer has no credibility and the Courts are likely to give any other reason for termination deference.



# Post-Termination Demands

## - Statement of Reasons for Termination

If the facts and evidence support the employee was terminated for poor performance, insubordination, and poor attendance – that should be clear in the statement. This is not a one paragraph letter as I have seen! If applicable, it should have specific examples, citations to policies, references to prior warnings and the like.





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# Paying Terminated Employees Within 24 Hours

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An issue that I frequently get calls about (usually somewhat frantic) is a terminated employee's demand for payment within 24 hours. Unfortunately, too many employers without a dedicated HR professional (owner, accountant, office manager, CFO, etc.) are not aware of this quirky law and often get caught off guard when a former employee demands payment (wages and/or commissions – I'll just use "wages" to be short) within 24 hours – often including disputed wages such as PTO, commissions, overtime and bonuses.



# Paying Terminated Employees Within 24 Hours

The so-called “Minnesota Prompt Payment Act” or the “Minnesota Payment of Wages Act”) (I say this because there is no official name so plaintiff attorneys call it the first while defense attorneys tend to call it the latter), Minn. Stat. 181.13-.14, states that employees who quit are entitled to their final pay at the next regular payroll, so long as it is not more than 20 days from the last date worked. As with most wage and hour issues – there are always exceptions for employees covered by a collective bargaining agreement – I won’t go into that here, however.



# Paying Terminated Employees Within 24 Hours

Regardless, when an employer terminates an employee, the clock is ticking:

“the wages or commissions actually earned and unpaid at the time of the discharge are immediately due and payable upon demand of the employee.”



# Paying Terminated Employees Within 24 Hours

If you know you are terminating an employee ahead of time such as in a RIF, restructuring, or following a failed PIP, it is often easiest and most efficient to present the employee with his or her final paycheck at the termination meeting – just be clear what the check covers (maybe detail it in the termination letter as they won't remember much of the conversation).



# Paying Terminated Employees Within 24 Hours

All too often they don't see PTO payout, etc. and then believe they can't access the online payroll system and so they think they are being denied wages (and don't think they can verify it themselves and thus the employer must be trying to cheat them out of wages). If that is not possible, whether due to payroll issues or the termination being an on-the-spot discharge without warning, the employee must be paid those wages by the next payroll...unless they make a written demand in which case the employer has 24 hours to pay the employee the unpaid wages. Thus, the word "immediately" is really defined as "within 24 hours".



# Paying Terminated Employees Within 24 Hours

## **How Will You Know If A Written Demand Has Been Made?**

MNDOLI makes it very easy for employees to comply with the law – in fact, it provides on its website a sample letter for the employee to send to the employer. The substance of that letter is below:

# Paying Terminated Employees Within 24 Hours

“Re: Demand for final payment of wages

Dear [Employer name]:

This is a demand for my final wages. My last day of work was [Last day of work]. I have worked and not been paid for [Number of hours] hours and I am owed [dollar-amount owed] at this time.

Under Minnesota Statutes § 181.13, I am entitled to receive all of my final wages within 24 hours of this demand. Please mail my final wages to the address listed below within 24 hours of your receipt of this letter.

Failure to provide final wages within 24 hours of this demand may result in a penalty of up to 15 days of additional wages.”



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# Paying Terminated Employees Within 24 Hours

Note that while MNDOLI's form provides for the employee to state the amount of hours worked and believed wages, I think I have only seen such specificity once. While that information is sure handy to have, it is not required by the law. Thus, pretty much anything in writing will suffice. Most often I see the following to an HR professional or supervisor: "Dear Joe, please pay me all my wages due and owing to me within 24 hours."

Next, I get the frantic phone call.

# Paying Terminated Employees Within 24 Hours

## **What Should Employers Do After Receipt of a Demand for Wages?**

As a lawyer for employers, it is very advantageous when a client sends us a demand (before anything is responded to). Often we can tell based on the letter whether the former employee is represented by an attorney based on the wording – and often they will include mention of a statement of reasons for termination, or the “truthful” reasons for their termination. Keep in mind that too is something they can ask for under the law and are entitled to.



# Paying Terminated Employees Within 24 Hours

In fact – if they ask for the trifecta – (1) wages; (2) personnel file; and (3) statement of reasons for termination, the chances are good they either have an attorney, or have been through this process with an attorney before and all kinds of red flags should be shooting up that there is a much bigger issue brewing. Using counsel to assist with this process can be very beneficial as often those documents and responses are what an employer is stuck with through the course of the upcoming dispute.



# Paying Terminated Employees Within 24 Hours

Back to wages. If there are undisputed wages (i.e. you were just waiting for the next payroll), then payment should be made within 24 hours. If you paid the employee all wages you believed were due, and still got a demand, it would be prudent to ask the employee for clarification of what he or she believes to be owed. Sometimes it is just confusion over PTO, or payment of a bonus not earned because the employee was terminated before the bonus payout date. Sometimes a quick clarification can save a lot of headache and wonder.



# Paying Terminated Employees Within 24 Hours

## **What If Final Wages Are Disputed?**

If an employer disputes the amount of wages the employee claims to be due, and the employer pays the employee the disputed wages, the employer is not liable for any sum greater than that which the employer in good faith believes to be due – unless the employee recovers it in court. If the terminated employee was entrusted with handling money, the employer has 10 calendar days to audit and adjust the accounts of the employee before they are due. In reality, disputed wages get to be a very tricky issue and one I can't just write the answer to, unfortunately, as the resolution and/or next steps are often fact specific.



# Paying Terminated Employees Within 24 Hours

## **What Deductions Can Be Made to Final Wages?**

So, here's another issue that comes up a lot – what can an employer withhold or deduct from a discharged employee? The statute states:

“No employer shall make any deduction, directly or indirectly, from the wages due or earned by any employee, who is not an independent contractor, for lost or stolen property, damage to property, or to recover any other claimed indebtedness running from employee to employer, except as permitted by section 181.79.”



# Paying Terminated Employees Within 24 Hours

## **How Can Final Wages Be Paid?**

Probably the second question I get asked is how to actually effect the payment to the employee – can the employer direct deposit it? Make the employee pick it up when the employee drops off the company’s laptop or cell phone? Stick it in snail mail? Wages must be paid to the terminated employee in the “usual manner of payment” unless the employee requests it be mailed – in which case the date of the postmark of the check is the effective date of payment. Thus, unless instructed by the employee otherwise, just process it as usual.



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# Deducting Employee's Pay for Losses, Theft or Damage

# Deducting Employee's Pay for Losses, Theft or Damage

Quite often I will get asked by employers if it is okay to deduct certain items from either an employee's payroll or a final paycheck. In fact, in almost every termination that I walk a client through, this issue comes up – whether it is an outstanding credit card payment (the trouble employee was reimbursed months ago but still hasn't paid the company's card off), uniforms not returned, or other items “held hostage” by the employee that certainly has a value. While there is a bit of arm wrestling that needs to take place – it can be done!



# Deducting Employee's Pay for Losses, Theft or Damage

## Minnesota's Wage Deduction Laws

In Minnesota, there are only limited permissible deductions an employer can make from an employee's paycheck without the employee's permission. (Minn. Stat 181.79.) Specifically, an employer can't deduct an employee's pay "for lost or stolen property, damage to property, or to recover any other claimed indebtedness" unless the employee voluntarily agrees in writing to the deduction after the loss has occurred or the debt arisen. Note the word "voluntary" is very important – it is likely not voluntary if it is a "sign here or lose your job" option.



# Deducting Employee's Pay for Losses, Theft or Damage

Certainly, “normal” payroll deductions can be made if acknowledged in writing such as paying union dues, life insurance premium, health insurance, dental insurance, contributions to local arts councils or science counsel, political action committee, or membership dues of certain relief associations. (Minn. Stat. 181.06.)



# Deducting Employee's Pay for Losses, Theft or Damage

## Exceptions to the Rule

Of course lawyers love exceptions to rules. There are exceptions to the above for employees covered under a collective bargaining agreement (union employees) so we need to put those folks aside for now. Commissioned salespeople also have unique circumstances related to deductions, which is a topic for another post. Another exception to the above rule – an employee may agree to deductions for a loan or purchase (before the loan or purchase is made) from an employer if voluntarily agreed to in writing. Finally, no surprise here, but deductions may be made as a result of a Court order.



# Deducting Employee's Pay for Losses, Theft or Damage

A quirky deduction fact – employers can deduct up to \$50 from an employee's wages (without prior written permission – though it would be best practices to acknowledge it in a writing signed by both parties) for the following:

- Purchased or rented uniforms or specially designed clothes required to do the job (and which wouldn't generally be worn outside of work)
- Purchased or rented equipment used to do the job (but not tools of a trade, car or other equipment used outside of employment)
- Consumable supplies required to do the job
- Travel expenses (except those incurred traveling from work to home)

(Minn. Stat. 177.24.)



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# Deducting Employee's Pay for Losses, Theft or Damage

However, the \$50 (or whatever less was deducted) must be paid back to the employee at the time of termination. If the employer pays for any of the above and/or reimburses the employee full for it, the employer may require the employee to surrender those items at the end of employment. Accordingly, another best practice is to have a list of what the employee was provided at the beginning of his or her employment (and updated as appropriate) – signed by both the employer and employee – noting whether a deduction was made and in what amount. Thus, at the end of employment there is no dispute who owns the iPad, laptop, polo, cell phone, etc., and whether the \$50 is owed back to the employee.



# Deducting Employee's Pay for Losses, Theft or Damage

## **The Employee Agrees to a Deduction – Now What?**

Let's say the employee acknowledges the past debt (remember, the authorization has to be for a debt already occurred), now what? Well, don't forget that any deduction made cannot drop the employee's wages below minimum wage for that workweek. Accordingly, it is a good idea once the employee has agreed to the deductions, to set forth what payroll(s) the deductions will be made, and in what amount, showing that minimum wage will always be met.

# Deducting Employee's Pay for Losses, Theft or Damage

In addition, no deduction can be more than the amount allowed for garnishment or execution on wages – so be careful if the employee has numerous deductions and other garnishments such as child support – I have seen it where an employer could not deduct anymore given the priority in garnishments, etc. What's that all about? Yet another post...too much to digest it all here. Basically, if you have a large sum to deduct, you can only deduct a certain percentage of a person's paycheck at any one time (but it's much more complicated than that) and so you need to review those rules if that occurs.



# Deducting Employee's Pay for Losses, Theft or Damage

## **What if the Employee Refuses to Authorize a Deduction?**

Well, you now know that you can't mess around with an employee's wages outside of what is detailed above (generally). So, what's an employer to do? Discipline. Too often employers forget that an employee may be disciplined for theft, losses, faulty workmanship, etc. (it just can't then be in the form of a payroll deduction). So, while the employer will not recoup that money through a payroll deduction, certainly there are other non-monetary ways to get the point across.



# Questions?



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\*You may also reach Synergy Human Recourses by emailing [hr@northriskpartners.com](mailto:hr@northriskpartners.com)