NATIONAL ASSOCIATION OF
Community Health Centers

Important Content Note:

This technical assistance resource was developed prior to the August 2017 release of the Health Center Compliance Manual by the Health Resources and Services Administration's (HRSA) Bureau of Primary Health Care (BPHC). The BPHC Compliance Manual, issued August 2017, indicates where PINS, PALs and other program guidance are now superseded or subsumed by the BPHC Compliance Manual.

See: https://bphc.hrsa.gov/programrequirements/pdf/healthcentercompliancemanual.pdf

NATIONAL ASSOCIATION OF Community Health Centers

HR

Information Bulletin #4

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Note that in all Information Bulletins:

The term **"health center"** refers to public or private nonprofit entities that: (1) receive grants under Section 330 of the Public Health Service Act (Section 330), including Sections 330(e), 330(f), 330(g) and 330(h) (collectively "Health Center Program Grantees"); and (2) entities that have been determined by the Department of Health and Human Services (DHHS) to meet the Section 330-Related Requirements to receive funding without actually receiving a grant ("health center look-alikes").

The term **"Section 330-Related Requirements"** refers to requirements set forth in:

- Health Center Program Statute: Section 330 of the Public Health Service Act (42 U.S.C. §254b),
- Program Regulations: 42 CFR Part 51c and 42 CFR Parts 56.201-56.604
- Health Center Program Requirements: http://www.bphc.hrsa.gov/programrequirements/index.html

The term **"Grant Requirements"** refers to Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards: 2 CFR Part 200, as adopted by DHHS at 45 CFR Part 75.

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The Do's and Don'ts of Employee Terminations

Terminating an employee is an often unpleasant but necessary part of operating a health center, which relies heavily on the skills, reliability, and trustworthiness of its employees. It may be necessary for a health center to terminate an employee for a host of reasons, including misconduct, poor performance, or budgetary constraints. This Information Bulletin addresses the thorny topic of how health centers can terminate an employee in a manner that minimizes the legal risk associated with such terminations.

Specifically, this Information Bulletin:

- Distinguishes between the two major types of employer-employee relationships and what each relationship means in terms of a health center's obligations regarding termination:
  1. At-will employees (*i.e.,* employees who can be terminated for any legal reason and without cause) and
  2. Employees with contractual protections (*i.e.,* their employment contracts or employment contracts "implied by law" protect against termination without cause);
- Discusses common types of actions that can result in wrongful discharge litigation; and
- Provides tips on how to terminate an employee legally, including, but not limited to:
  1. Drafting appropriate personnel policies or employee handbook provisions;
  2. Properly documenting misconduct and/or poor performance;
  3. Knowing what to say and not say when terminating an employee; and
  4. Executing an employee separation agreement.[1]

1 This Bulletin does not address the particulars of health centers that have a unionized workforce. To the extent that a health center has unionized employees, the collective bargaining agreement negotiated between the union and the health center will govern personnel actions and the union's representatives will often be involved in disciplinary actions and termination proceedings. Some health centers may have a partially unionized workforce, in which case the principles discussed herein will be useful only with respect to non-unionized employees.

AN IMPORTANT DISTINCTION: AT-WILL VERSUS CONTRACT EMPLOYEES

Upon termination, "at-will" employees have vastly different rights than contract employees. Accordingly, it is critical that health centers, as employers, understand the difference between the two types of employees in order to understand what legal obligations the health center has towards both.

At-Will Employees

In the absence of a written employment contract, in virtually every state, employees are presumed to be "at will." This means that the employee may resign at any time, for any reason or for no reason, and the employer may terminate the employee at any time, provided the reason for the termination is not unlawful (i.e., in violation of anti-discrimination laws, or other laws prohibiting termination as a matter of public policy, such as "whistleblower protection" statutes).[3]

Many health centers require that new employees submit to a "probationary period" often lasting a few to several months. It is important to note that this "probationary period" is, in many respects, a legal fiction because the employer does not intend to change an employee's at-will status after he or she completes a probationary period.

Nevertheless, there is a risk that in establishing probationary periods, an employer creates an expectation that completing "probation" gives employees greater job protection, thus potentially leading to creation of an implied employment contract.[4] Consequently, to avoid creating false expectations on the part of employees, it is advisable to refer to the probationary period as an "introductory period" (perhaps warranting evaluation at its conclusion) and to notify employees that successful completion of the introductory period does not alter their at-will status.

Contract Employees

If an employee signs an employment agreement that provides specific circumstances under which an employee can be terminated (*e.g.,* for "cause"), unlike "at will" employees, that employee is a contract employee and can only be terminated in accordance with the terms of the contract. For example, typical employment contracts specify the term of the employment (*e.g.,* three years) and specific grounds for termination (*e.g.,* substance abuse, gross misconduct, etc.).

TYPES OF WRONGFUL DISCHARGE ACTIONS

It is important for health centers to understand the legal principles underlying the most common wrongful discharge claims in order to avoid behavior that may result in litigation. This section briefly describes various theories of wrongful termination. However, because many (but not all) of these legal theories are grounded in state law, which varies from state to state, it is important that each health center consult with a qualified attorney in its particular state regarding the specific state laws governing the center.

2 Every state, except Montana, recognizes the at-will doctrine through case law or statute. Where recognized, however, its scope varies from state to state. Consequently, your health center should consult with legal counsel familiar with state employment law on the specific parameters of your state's at-will doctrine.

3 Note that in states recognizing implied employment contracts, at-will employees cannot be fired in violation of any implied contracts existing between the employee and employer.

4 For additional information on the potential consequences associated with implied contracts, see the section below entitled "Types of Wrongful Discharge Actions."

Discrimination

The most common wrongful termination claim made by employees is that an employer fired the employee for an illegal, discriminatory reason. There are numerous federal laws that protect employees from discrimination and prohibit employers from terminating employees for discriminatory reasons. Of particular importance is Title VII of the Civil Rights Act.[5] Under Title VII, an employer may not discipline, treat differently, or terminate an employee because of that individual's race, gender, religion, or national origin. Additionally, the Americans with Disabilities Act[6] prohibits discrimination based on an individual's disability and the Age Discrimination in Employment Act[7] protects employees over age 40 against discrimination.

Most states and many municipalities also have enacted civil rights statutes which provide greater protections than those found under Federal law. For example, in some states it is illegal to discriminate against, and thus fire, an employee based on personal appearance, sexual orientation, family responsibilities, political affiliation, or veteran status.

Breach of Contract

A second common cause of action for wrongful termination is breach of employment contract. Specifically, an employee may allege that he or she was terminated in violation of an employment contract. A breach of contract claim generally arises in one of two ways.

Breach of a Written Contract

Breach of contract claim may be based on an explicit written employment contract between a health center and an employee. For example, an employee's written employment contract specifies that the employee will be employed for a five-year term and can only be fired before the end of that term for certain specified reasons (*e.g.,* "for cause," such as substance abuse on the job, gross insubordination, etc.). If, however, the health center fires the employee after two years of service for a reason not explicitly specified in the employment contract or in any other manner not in accordance with the employment contract, the health center may be accused of breaching, or not fulfilling their obligations under, the contract and the employee might bring a wrongful discharge case based on that legal theory.

Breach of Implied Contract

The second type of breach of contract claim is based on a legal theory called breach of an "implied contract." Specifically, an employee may attempt to establish that the employer's written promissory language in an employee handbook, or the employer's written or oral promises elsewhere, created an enforceable contract that the employer breached by terminating him or her.

There are several ways a health center can create a binding implied contract and, therefore, expose itself to a wrongful discharge claim based on an alleged breach of the implied contract. For example:

- An implied contract may be deemed to exist if a supervisor or manager of a health center makes oral promises to an individual or group of employees regarding the health center's disciplinary or termination procedure. To illustrate, if a supervisor says to an at-will employee that "no one gets fired from this health center except for cause (for example, *really messing up*)," the employee could potentially argue that the supervisor's statement created an expectation that he/she (the employee) has greater job protection than an "at will" relationship in that he/she can only be fired "for cause." If that same employee is later discharged without cause, he/she may argue that the supervisor's oral promise created an implied contract between the employee and the employer, who, in turn, breached that contract by firing him or her when he/she never *"really messed up."*

- An implied contract may be deemed to exist due to an employee's reliance on language in the health center's employee manual or handbook. While the success of this claim varies widely from state to state, success is more likely if an Employee Manual includes a "welcome letter" signed by the Chief Executive Officer ("CEO")/Executive Director or Human Resources Director. This signature, combined with the employee's signed acknowledgement that he or she received the manual, may be sufficient in some states to create a contract, thereby binding both parties to all of the contents of the employee manual.

Retaliatory Discharge/ Whistleblower Claims/ Violations of Public Policy

An employee who believes that the employer discharged him or her in retaliation for exercising a legal right may file a claim for retaliatory discharge, as a result of "whistle-blowing."

Many federal and state statutes contain "whistle-blower" protections which prohibit employers from retaliating against an employee (*e.g.,* disciplining, demoting, firing) who reports the employer to an authority (*e.g.,* a federal or state agency/commission) for violation of a particular law or regulation, or who participates in an audit or investigation involving the employer. For example, the Occupational Safety and Health Administration ("OSHA") administers the employee whistleblower provisions of 14 different federal statutes, which protect employees who report workplace safety and environmental/ occupational safety concerns to OSHA authorities.[8] Similarly, the Federal False Claims Act contains an explicit whistleblower provision protecting employees who initiate or participate in a false claims investigation or lawsuit against the employer.[9]

Moreover, in many states, employees have won lawsuits after being discharged based on the following actions: filing a Worker's Compensation claim, serving on jury duty, and refusing to commit perjury.

Constructive Discharge

Although the elements of constructive discharge will vary depending on state law, to establish a claim, generally an employee must demonstrate that he or she was forced to resign due to actions or conditions so intolerable that any reasonable person in that employee's position would have resigned. In other words, the employee was, in effect, fired because, given the intolerable conditions, no reasonable employee would have remained in that position. In many states, the employee must also demonstrate that his or her employer: 1) knew of the intolerable actions and conditions, 2) could have remedied the situation, but 3) did not.

TIPS FOR CONDUCTING A SUCCESSFUL TERMINATION

Starting from the Beginning: Personnel Policies

A health center's personnel policies, which often are incorporated into an employee manual or employee handbook, form the foundation for a successful termination process. In particular, if the policies are well written and consistently followed, they may (if a health center is otherwise acting legally) provide the health center with a valid and successful defense

8 For example, OSHA administers the whistleblower provisions of the Occupational Safety & Health Act, 29 U.S.C. 660(c), The Clean Air Act, 42 U.S.C. § 7622, and the Safe Drinking Water Act, 42 U.S.C. 300j-9(i).

9 31 U.S.C. § 3730(h).

against allegations of wrongful termination. Each health center's personnel policies will vary depending upon the health center's size and complexity, as well as its particular operational circumstances. Nevertheless, every health center's personnel policies should:

1. Clearly notify employees that, unless there is a written employment contract between the health center and an employee, the employee is considered at-will.[10] Here is a sample provision establishing an at-will relationship:

   It is the Health Center's policy that all employees who do not have a written employment contract with the Health Center for a specific term of employment are employed at-will. The Health Center's personnel policies are not intended to create, nor do they create, a contract of employment. These personnel policies do not confer contractual rights on the employee and do not create contractual obligations enforceable against the Health Center. Employment with the Health Center is for an indefinite length of time and either the employee or the Health Center may terminate employment at any time, for any lawful reason, or for no reason.

2. It is further advisable to include a disclaimer stating that no statements in the personnel policies (including in the employee manual/ handbook if applicable) or elsewhere, or the completion of any "introductory periods," modify the at-will relationship. Here is a sample disclaimer regarding the modification of the at-will relationship:

   The statements contained in the Health Center's personnel policies and any other Health Center materials are not intended to modify the at-will relationship. Supervisory and management employees shall not make any statements or representations that alter the at-will employment relationship or imply that employees may only be terminated "for cause." In any event, employees shall not rely on supervisory and management employee statements or representations that appear to alter the at-will employment relationship or imply that employees may only be terminated "for cause." Completion of the Introductory Period does not change an employee's status as an at-will employee, the Health Center's right to terminate an employee, or any other conditions of employment.

3. The personnel policies should also include a Code of Conduct for employees, disciplinary procedures (as discussed more fully below), procedures pertaining to termination (*e.g.,* exit interview), and employees' rights upon discharge (*e.g.,* payment for accrued leave, COBRA coverage, etc.).

4. Finally, as discussed above, in order to reduce exposure to potential implied contract claims, the health center should not include in the employee manual or applicable personnel policy handbook a welcome letter signed by the CEO/ Executive Director or any other health center manager.

Before commencing work, all employees should sign a statement that they have received, read and understand the health center's personnel policies. If a health center revises its personnel policies, employees should be given a new copy, with training regarding the contents of the new policies/procedures, and should be required to sign an acknowledgement that they have received and understand the revised version. Note that an employee is acknowledging that he or she received and *understands* the personnel policies, not necessarily that he or she agrees with those policies.

10 As mentioned above, if your health center is in Montana, consult legal counsel familiar with that state's employment laws.

If an employee does not sign the acknowledgement, a supervisor should document that the employee received the policies. This is particularly important if there are changes made to the procedures relating to disciplinary matters, including the manner in which employees are terminated. If, for example, a discharged employee can demonstrate that he or she did not receive the new policy, he or she may have a valid claim that the old policy applies. If such employee is subsequently terminated for reasons addressed in the new (but not the old) policies, he or she can claim that the health center is failing to follow its own policies by terminating the employee for reasons not specified in the personnel policies applicable to his or her situation.

Disciplinary Policies

It is strongly advised that all health centers include a disciplinary policy in their personnel policies, addressing employee misconduct and poor performance. The appropriate disciplinary action would, of course, depend upon the seriousness of the workplace infraction, but the personnel policies should outline various options, including termination, that the health center may exercise at its discretion. For example, oral warnings or written reprimands may be appropriate measures for certain instances of misconduct, but inadequate for others.

... instead of adopting a progressive discipline approach, health centers should consider adopting a discipline policy that, in practice, disciplines employees in proportion to their offenses ...

Progressive Discipline

Often, employers adopt a so-called "progressive discipline" system. Although there are various permutations of this approach to disciplining employees, generally, the consequences for offenses become progressively more serious if the employee's behavior does not improve. For example, minor offenses such as slight tardiness might be first addressed through oral reprimands and informal meetings with the employee. Repetition of minor offenses or more serious first offenses, such as unauthorized absences for a day or two or sleeping on the job, might merit a written warning that the employee reads and signs.

In theory, progressive discipline seems a logical and sound approach to addressing employee misconduct because it promotes a sense of fairness in the workplace – specifically, that the employer wants and has tried to help the employee keep their job by explaining the employer's expectations and providing an opportunity for the employee to improve. It can also prevent a "surprise" termination if the employee is later fired for actions or behavior that he or she had already been warned is unacceptable.

In practice, however, formally adopting, and legally committing to, a progressive discipline system can create problems for employers and lead to burdensome litigation. If a health center commits to a progressive discipline approach, but feels compelled in certain instances not to follow that policy and terminate an employee for a first-time infraction, the discharged employee may sue the health center for failure to adhere to its own policies and procedures (*i.e.,* starting with less severe disciplinary action).

Proportional Discipline

Therefore, instead of adopting a progressive discipline approach, health centers should consider adopting a discipline policy that, in practice, disciplines employees in proportion to their offenses but gives the health center

flexibility to discipline as it determines is appropriate to the particular facts and circumstances of each situation.

Suggested language in the personnel policies for "Disciplinary Action" includes:

> *All Health Center employees are expected to comply with Health Center job performance standards, standards of conduct, and other rules and requirements. At the Health Center's sole discretion and in order to assist employees in improving their performance and conduct, disciplinary actions short of termination may be taken in some circumstances. This policy does not describe a progressive system of discipline, but rather provides examples of the various types of disciplinary options that the Health Center may exercise.*

The Health Center maintains the right to terminate employees for any lawful reason without first using any of the disciplinary measures described or to discipline an employee in ways other than those described herein.

A Little Training Goes a Long Way

Once a health center has established sound personnel policies and procedures, the next step in protecting against wrongful termination claims is a good training program. This step is often neglected by employers, including health centers, that have numerous, time-consuming demands and/or limited resources. However, training may be extremely beneficial for a number of reasons.

1. Training employees on the health center's expectations lays the foundation for fairly disciplining employees when they fail to meet those expectations.

2. Training employees about the health center's anti-discrimination and non-harassment policies may prevent wrongful termination claims premised upon discrimination or harassment.

3. Training regarding the health center's grievance procedure, may, if effective, help reduce the escalation of employee complaints and lead to successful resolution of conflicts that otherwise may result in a contentious termination proceeding.[11]

4. Finally, because employees often bring wrongful termination claims when they believe they have been treated unfairly, training employees regarding the health center's at-will policy and non-progressive disciplinary procedures may lessen employees' surprise and, therefore, decrease their propensity to sue the health center.

Documentation, Documentation, Documentation

To properly defend itself against allegations of wrongful termination, it is of utmost importance for a health center to carefully document all workplace infractions, substandard performance, and the reason(s) for termination of any employee. Thorough documentation creates a written record of an employee's (mis)conduct and helps defend against allegations of discriminatory or arbitrary conduct on the health center's part.

Oral Reprimands

Documentation need not be a burdensome process. For minor offenses, where the employee received an oral reprimand, an employer should sign and date a note to the employee's personnel file detailing the workplace rule violated and the fact that the employee was orally warned.

11 The regulations governing Section 330 grants to most health centers, 42 C.F.R. §304(d)(3)(ii), require health centers to have in place Board of Directors' approved grievance procedures for employees. While a discussion of grievance procedures is beyond the scope of this issue brief, in general, the procedures should be clearly written and consistently implemented.

Written Reprimands

For more serious offenses, the employee should receive a formal written warning stating:

- The date, time and place of the infraction;
- Factual details of the incident;
- Specifically which rule or policy was violated;
- Remedial steps recommended (*i.e.,* specific steps the employee should take to ensure the offense does not occur a second time) and;
- Consequence language (*i.e.,* the repercussions if the employee commits the offense again).

It is advisable for written warnings to be signed by the supervisor (or the HR Director) and the employee (whether or not he or she agrees), and copied into the employee's personnel file. If the employee refuses to sign the warning, the supervisor should note the employee's refusal on the warning, date and sign the document, and include it in the employee's file.

Performance Appraisals

Honest performance appraisals are an added protection. Health centers should carefully document substandard performance in employees' performance reviews through the provision of low appraisal marks.

It is very important never to inflate an employee's performance review. In other words, if an employee is performing well, but not above standard, simply indicate on the performance review that the employee "meets expectations," rather than rating such employee as "excellent" or "outstanding." Over-rating an employee creates a written record that performance was more than acceptable. If that same employee is later terminated and there is no documentation in his or her personnel file of substandard performance or specific incidents of misconduct, the health center becomes more vulnerable to a wrongful termination suit.

Reasons for Termination

Finally, it is important to document specifically the reasons for terminating an employee.[12] Some employers feel sympathy for a terminated employee and, to facilitate eligibility for unemployment compensation or continued health benefits, they categorize the termination as something it was not. Never do this. Once you document the reasons for the termination, you have created a written record and any later inconsistencies with that record can lead to unwanted litigation.

Be Consistent in Enforcing Policies

Firing an employee for violating a policy that the employer does not consistently enforce with respect to other employees is a significant pitfall for many employers. Inconsistent application of workplace policies and procedures opens the door to allegations of wrongful termination, particularly claims of discrimination. For example, if a health center fires one employee for repeated tardiness but takes lesser disciplinary action against another employee who has a similar record of tardiness, the health center may be accused of discriminating in its enforcement of its policies. This is particularly problematic if the terminated employee is a member of a "protected

12 The advice to document the reasons behind an employee's termination is, in some respects, counter-intuitive given the fact that most employees are employed "at-will." However, it is important to document the reasons behind a termination in the event that the terminated employee sues the health center for wrongful termination. The contemporaneous documentation will allow the health center to demonstrate that the employee was not terminated for discriminatory or illegal reasons. The health center need only inform the employee that he or she was terminated in accordance with the health center's at-will policy.

class" (*e.g.,* a racial minority). Although the health center may be able to defend its actions based upon objective criteria (i.e., the terminated employee also had poor performance appraisals or violated other workplace conduct rules), the fact of inconsistent treatment will make defending against a legal claim more difficult.

Additionally, consistent enforcement of policies creates predictability in the workplace and sends a message to workers that violations will not be tolerated.

Reviewing the Final Decision to Terminate and Informing the Employee

Before making the decision to terminate an employee, one person at the health center (typically the HR Director[13]) should review the circumstances of the proposed termination and the relevant documentation. The HR Director should first determine whether the center followed its established policies, procedures, and practices.

Specifically, the HR Director should:

1. **Review whether the health center applied its disciplinary policies consistently as compared to other similar situations.** If it appears that the health center has deviated from the personnel policies or other applicable policies in any way, the HR Director or an appropriate supervisor should, before taking the termination action, document that such deviation was necessary in this particular employee's case. For example, if a health center has adopted a progressive discipline system, but proposes to make an exception and terminate (rather than first impose less harsh measures), it should document in writing in the personnel file why lesser measures are inappropriate under the facts and circumstances of this employee's case.

2. **Carefully review the employee's personnel file to ensure that the health center has sufficiently documented the reasons for the employee's termination** and that his or her personnel file does not contradict the documentation (i.e.,an exemplary performance appraisal.)

3. **Communicate the termination message to the employee** – often the most difficult aspect of firing an employee. There are a few practices that should be followed in communicating with the terminated employee.

    - **Conduct a formal "exit interview" with at least two health center managers present,** one of whom is typically the HR Director. The presence of two health center managers will help rebut allegations if the employee later disputes what was said or otherwise occurred during the exit interview. At the meeting, the HR Director should explain that the health center is terminating the employee and, under most circumstances, state the specific reasons for the termination.

      The quantity of information that a health center should communicate to a terminated employee varies significantly based upon the circumstances. For example, if the health center has clear, unequivocal reasons for terminating

13 Although the term "HR Director" is used throughout this Information Bulletin, it should be noted that this particular position may not exist at many health centers. While the CEO/Executive Director typically is responsible for all "hirings and firings," this responsibility can be delegated. Depending on the size and complexity of the health center and its particular circumstances, the CEO/Executive Director may appoint an HR Director, while others will have a Clinical Officer, Financial Officer, or other manager review employee disciplinary and termination decisions.

the employee, the center may choose to communicate this to the employee in hopes of preventing a wrongful discharge lawsuit. Conversely, if the grounds for termination are less clear or more intangible, the center may decide to inform the employee that it is simply exercising its at-will employment policy in terminating him or her.

- **Provide the employee an opportunity to speak** – At the exit meeting, the health center should also provide the terminated employee an opportunity to voice his or her disagreement and any other thoughts or concerns she or he has about the specific situation and about the health center as a whole.

  Allowing the employee to speak about the situation may elicit information that the HR Director was not aware of prior to the meeting. Obtaining information about the health center as a whole may provide the HR Director with valuable insight into the interpersonal relationships in the center, potential areas of improvement, and may, in extreme cases, alert the center to a potential claim of wrongful termination, harassment, or a "whistleblower" suit. In some cases these claims may be frivolous but, in others, the employee may have a legitimate claim that the health center can promptly correct, such as overturning an improper or inappropriate termination decision. Allowing the employee to speak freely and treating the employee with respect throughout the entire process may help avoid hard feelings, which, in turn, may help avoid a subsequent wrongful discharge claim.

In addition to the reasons for termination, the HR Director should:

4. **Provide the employee with all information related to post-termination benefits (*e.g.,* COBRA health care coverage).** The HR Director should document that this information was provided to the employee. Information should also be provided regarding the employee's final paycheck and/or other compensation (*e.g.,* accrued unpaid vacation). Health centers should follow their personnel policies' guidelines on compensation (*e.g.,* what day of the week a pay check is issued) and consult their state's "wage and hour" law to determine the exact compensation due upon termination.

5. **Require the terminated employee to return all health center property** (*e.g.,* keys, credit cards, computers, etc).

6. **Make sure that the employee signs a form stating that he or she has completed the exit interview.** That form should be included in the employee's personnel file.

7. **Assure that the terminated employee leaves the health center's premises immediately after the exit meeting.** This may help avoid any potential destruction to property, theft, disruption, violence, or other actions that unfortunately can result when a disgruntled ex-employee is terminated and allowed to stay on.

Releases/Waiver of Liability Forms and Separation Agreements.

Many employers require that discharged employees sign a "separation agreement," sometimes called a waiver of liability or release form, which is a legal document releasing the employer from any liability related to its decision to terminate the employee. In other words, a valid separation agreement prevents an employee from suing the employer for wrongful termination.

Though the content and enforceability of a separation agreement may vary from state to state, all separation agreements must contain four essential elements.[14]

1. **They must be in writing.** Oral separation agreements are unenforceable in a court.

2. **They must be signed by the employee.**

3. **They must be written in simple and clear language.** The employee must "knowingly" and "voluntarily" enter into the agreement. To ensure that the process is knowing and voluntary, health centers should ensure that the language of all separation agreements is simple and clear. The agreement should require that the employee carefully read and understand the document and recommend that the employee seek assistance from an attorney before signing it. Health centers should allow the employee to ask any questions and/or think about it for a few days before signing the agreement.[15]

4. **They must be supported with "consideration,"** a legal term that means the employer gives something of value to the employee above and beyond what the employer is already required to provide to the employee in exchange for the release.

The most common consideration for a separation agreement is a severance payment, such as two weeks' salary. Note that insofar as consideration must include *a benefit that the employer is not already legally required to provide,* if an employee's employment contract requires that he or she receive a severance package upon termination, the severance package alone is *not sufficient* consideration to support a separation agreement. In other words, in that circumstance, the health center would have to give some *additional* benefit (above and beyond the severance package) to the employee in order for the separation agreement to be valid. Conversely, if a health center's personnel policies state that employees are not entitled to severance, or are silent regarding severance (and the health center does not make a practice of offering severance packages), then a severance package (such as two weeks salary) would be sufficient consideration to support a separation agreement.

In this regard, it is advisable to adopt a personnel policy that does not entitle employees to severance upon termination. Here is suggested personnel policy language:

> *Employees of the Health Center are not entitled to severance. However, from time to time, and at the sole discretion of the Health Center, severance payments may be made. Any employee receiving severance must, as a condition of receiving severance, execute a separation agreement.*

14 Note that all four (4) elements must be satisfied for a separation agreement to be valid and binding.

15 The Older Worker Benefit Protection Act requires specific provisions be included in a separation agreement for an employee who is over the age of forty. For example, the employee must be given at least seven days to consider the agreement and have 21 days to revoke the agreement after it has been signed. Further, as with all separation agreements, the employee must be counseled to seek legal assistance in deciding whether or not to sign the agreement.

Separation agreements are appropriate on a case-by-case basis depending on the facts and circumstances of the termination. As stated above, if an employee is not otherwise entitled to a severance package, it is advisable to condition receipt of the severance on execution of a separation agreement. Further, if a termination is particularly contentious, it may be in the health center's best interest to secure a separation agreement if possible.

CONCLUSION

While terminating an employee is often an emotional and unpleasant experience, following the tips in this issue brief may lessen a health center's chance of becoming involved in litigation for such actions. Keep in mind, protection from wrongful termination liability is a process that begins long before the actual decision to terminate an employee takes place. That is, health centers must:

- Establish and describe in their personnel policies the relationship of the health center to its employees, a code of conduct for all employees, and disciplinary and termination procedures.
- Be sure to consult legal counsel familiar with state employment law for assistance in developing policies and procedures and follow them consistently.
- Evaluate employees fairly and accurately and document employee misconduct and/or poor performance. Consistent application of the health center's policies and thorough documentation are the keys to successfully defending a wrongful discharge suit.
- Once the decision has been made to terminate an employee, treat the employee respectfully and, if possible, attempt to secure a valid separation agreement.

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