

Voluntary Terminations

The employee decides to stop working for company



Voluntary Termination

- This generally cut-off rights to bring wrongful termination/discrimination suits but an employee can claim constructive discharge.

Constructive Discharge Standard

A constructive discharge is where an employee's voluntary termination qualifies as an involuntary discharge, but requires proof that the employer made the working conditions so intolerable that a reasonable person would feel compelled to resign.

Involuntary Terminations

The employee has zero control, i.e. no choice, over their termination



Involuntary Termination Reasons

- **Unsatisfactory Performance:**
 - Fails to perform essential functions
 - Excessive absenteeism
- **Organizational Change:**
 - Layoffs
 - Reductions in force
- **Misconduct:**
 - Violation of employee policies
 - Other conduct

Employment at Will

Employment at will pertains to the employer's right to terminate the employment relationship at any time, for any reason, with or without notice as long as the employer does not violate oral or written contracts or specific statutes.



Primary Laws that Pertain to Involuntary Terminations

- **Title VII of the Civil Rights Act of 1964:** Prohibits employers from terminating employment based on race, color, religion, gender and national origin.
- **Pregnancy Discrimination Act (PDA):** An amendment to Title VII, prohibits termination of employment based on pregnancy and childbirth.
- **Americans with Disabilities Act (ADA):** Prohibits employers from terminating employment based on disability.

Primary Laws that Pertain to Involuntary Terminations (cont.)

- **Age Discrimination in Employment Act (ADEA):** Prohibits employers from terminating employment based on being age 40 and older.
- **Workers' Compensation Retaliation:** Prohibits employer from terminating employee for filing a comp claim or in anticipation of filing a comp claim.
- **FFCRA Retaliation:** Prohibits employer from terminating employee for taking or asking to take FFCRA leave.

Primary Laws that Pertain to Involuntary Terminations (cont.)

- **Uniformed Services Employment and Reemployment Rights Act (USERRA):** Prohibits employers from terminating employment based on military service.
- **Family and Medical Leave Act (FMLA):** Prohibits employers from terminating employment based on requesting FMLA leave or use of FMLA leave.

Decision of Whether to Fire

- Assessment:
 - What happened?
 - Previous discipline/documentation?
 - Protected classification?
 - How did you previously handle similar incidents/similar circumstances?



Decision of Whether to Fire

- Is there a timing problem?
- Did employer discover anything near the time of termination?
 - Pregnancy
 - Disability
 - Comp claim
 - Report of Discrimination or safety issue
 - Leave
 - Other protected activity

Documentation

To establish credibility and to support your termination decision, you must objectively document incidents, poor performance and previous conversations with employees.

Documentation (cont.)

Be sure to include in your documentation:

- The **dates** of any incident or conversation between you and a problem employee. Documenting events shows that the decision to terminate an employee is supported by a record of prior incidents.
- A **record of violations** of policies or procedures, such as poor performance, absenteeism, insubordination, disruptive behaviors and unethical behavior. Whenever possible, include the language the employee used and how the incident affected your department or the company as a whole.

Documentation (cont.)

- **Details of conversations** you had with the employee and any **disciplinary actions** you took in response to the employee's performance deficiencies. Also note realistic guidelines you gave the employee and **deadlines** you set for improvement.
- **Employee appraisals** performed, details of meetings that took place to determine an employee's progress toward established goals and notes regarding the employee's level of participation throughout the process.
- A record of giving **verbal or written warnings** to the employee. The employee must sign a document that acknowledges receipt of each warning.

Releases

- Do you need one? – Yes if potentially high risk termination
- If releasing for an employee who is over 40 years old:
 - 21 day consideration period.
 - 7 day revocation period.
 - Specific language.



Unemployment Compensation

- Is the reason for termination misconduct?
 - Not being able to do the job is not misconduct.
 - Not doing the job is.
- TWC will likely want to see policy that was violated and a warning.



Reductions in Force

If you are doing a reduction in force, you should look at what work force looks like:

- Before and after reduction in force
- Is a protected class disproportionately impacted?

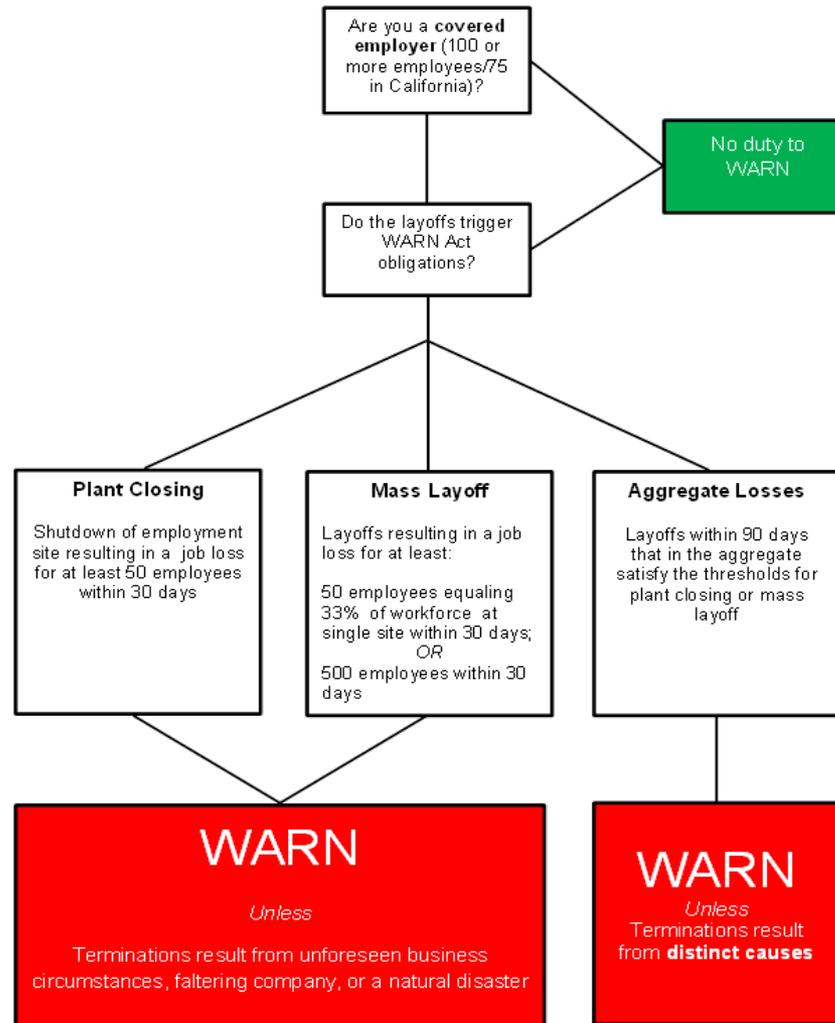
Does WARN Apply?

- **Employers** are covered by the WARN Act if, company-wide, they have:
 - 100 or more full-time employees (employees who work 20 or more hours per week and have worked for the employer for six months or more) [or]
 - 100 or more employees, including part-time employees, who work at least 4,000 hours per week, excluding overtime.

Is WARN Triggered?

- The WARN Act is triggered by:
 - **Plant closings.** The shutdown of a single employment site, facility or operating unit, that results in a loss of at least 50 full-time employees, during a 30 day period or
 - **Mass layoffs.**
 - A loss of at least 50 full-time employees during a 30-day period at a single employment site, affecting 33 percent or more of the employer's active employees; OR
 - a loss of at least 500 employees during a 30-day period.

When Is WARN Triggered?



Guidelines for the Termination Meeting

- Hold the discussion in private.
- Have Human Resources and/or another Manager in the room.



Communication to Other Employees About Termination

References

- Centralize references – All references come from human resources not an individual supervisor.
- Control information so that you limit exposure from:
 - Defamation cases.
 - Violation of release language.

Discussion

Presented by

Anthony G. (“Tony”) Stergio

Shareholder

Andrews Myers, P.C.

713.850.4214 astergio@andrewsmyers.com