

LET'S CALL THE WHOLE THING OFF

WHEN IT COMES TO EMPLOYEE TERMINATION, ONE SIZE DOES NOT FIT ALL. BY MATT STILES

A layoff is not a termination of employment and a firing is not a reduction in force. Confused? You should be. It's not as simple as "potato, po-tah-to" or "tomato, to-mah-to" but it's not as trivial either (or "eyether," as the case may be). Our need to feel better

TOOL KIT

about firing and being fired from our jobs has resulted in a messy vernacular. I may have added to the confusion myself last month by referring to the process leading up to a disciplinary separation from employment as a "de-hiring" process (March 2007).

In most states, including Florida, non-governmental employers can terminate an employee for a good reason, bad reason or no reason at all, so long as the real reason isn't prohibited by law. This is the at-will employment rule. It works to the employee's advantage, too, allowing an employee to leave a job at will.

The parties' will has a lot to do with it. There are two kinds of separation from employment: voluntary and involuntary (but both are at somebody's will). An employee voluntarily separates from your employment if, at her will, she resigns, retires, quits, or otherwise stops showing up (often referred to as job abandonment). An involuntary separation includes firings or terminations, RIFs or severance and layoffs, all at the employer's will.

VOLUNTARY SEPARATIONS FROM EMPLOYMENT

RESIGNATION

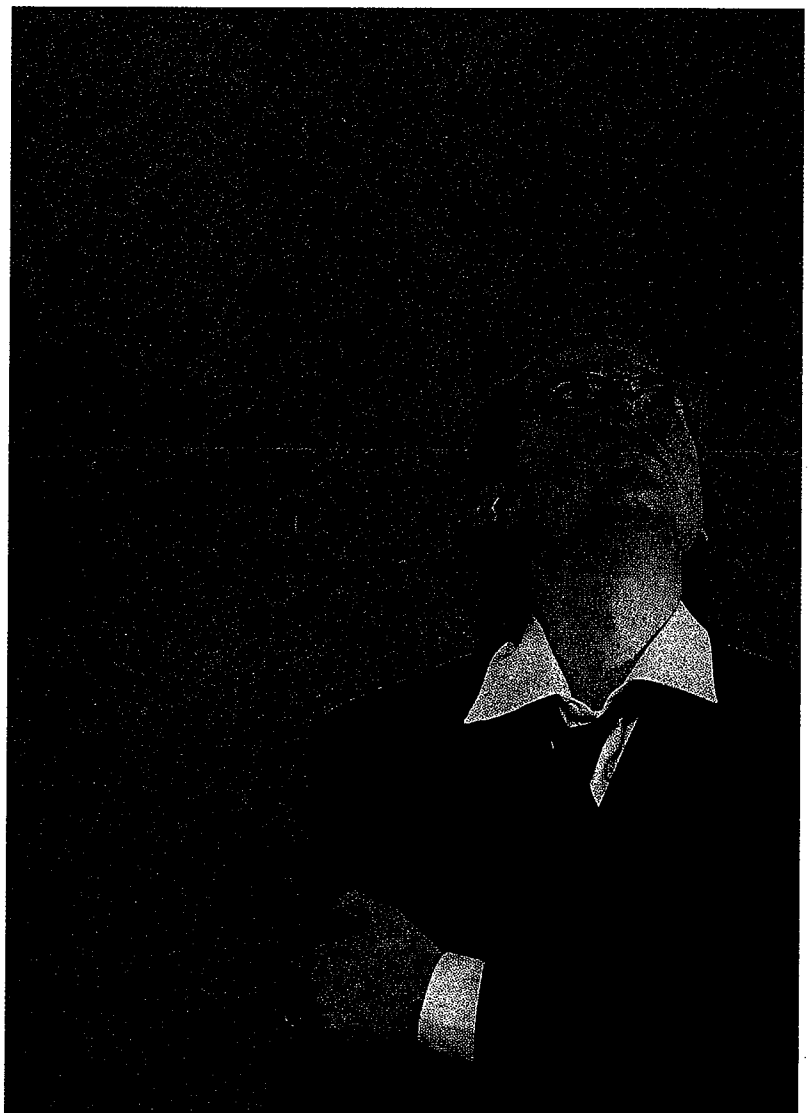
A resignation is the most polite and preferred kind of voluntary separation—the "po-tah-to," if you will. Smart employers encourage voluntarily departing employees to follow a formal resignation process. Because it's getting harder to find skilled replacements, these employers have written resignation policies

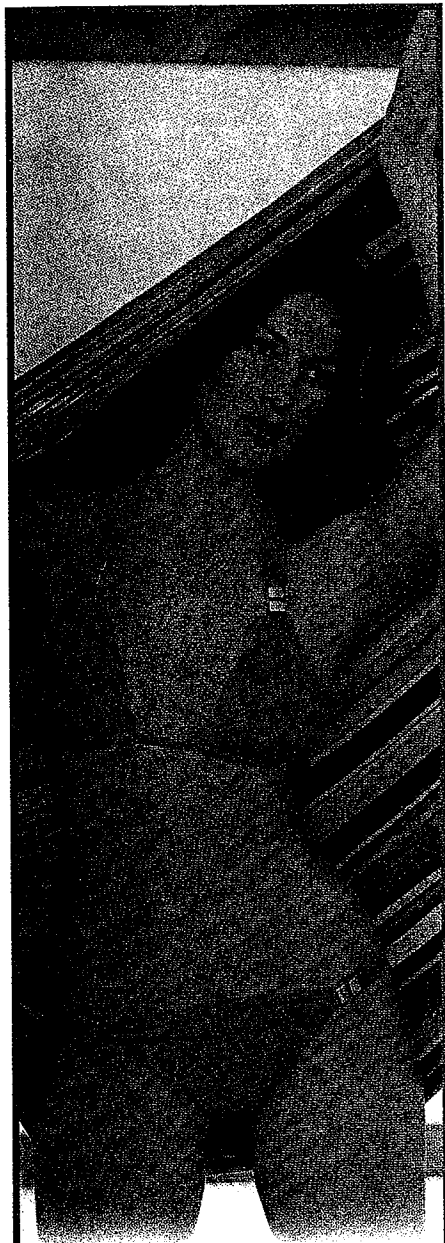
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requiring resignation letters and advance notice from departing employees. Standard resignation notice is two weeks, but how much notice you request from your employees should be based on the circumstances of your business.

For example, a client of mine that provides computer services to the Department of Defense must have a Level Two Security Clearance for each of its employees working for the department. It can take six months to one year for a new hire to obtain a clearance. This employer's written resignation policy asks employees to provide the earliest possible notice of their intent to resign and requests at least 30 days advance notice. Generally, your employees cannot be forced to comply with such policies, but you can use a carrot and stick approach to encourage compliance. Some employers will hold a former employee ineligible for rehire if she failed to follow the company's resignation policy. One of my clients provides a free, post-employment e-mail, mail and telephone >>





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forwarding service for former employees who comply with its resignation policy. That's a nice incentive in the information age.

Employers should know their rights when it comes to dealing with resigning employees. Although it may be to your advantage for the employee to provide advance notice of her intent to leave, sometimes you'll want to get that employee out the door right away. Take for example a sales employee who hands in her two weeks' notice and says she's leaving to work for a competitor. Do you really want to give that employee two more weeks to shore up her customer list and take those customers with her to your competitor? The law absolutely will allow you to reject the employee's notice and make her resignation effective immediately. Still, this approach can surprise employees unless you let them know in your resignation policy that the company retains the right to make any resignation "effective upon receipt." It's not a legal necessity, but to encourage compliance with resignation policies and still retain your right to make resignations effective on the spot, it may be best to pay the employee for those two weeks in lieu of letting the employee work out the notice period.

RETIREMENT

I've seen it happen a lot over the last few years: A senior executive retires from the company, the company throws him a huge retirement party, and two days later he's working for the competitor across the street. In other words: Don't be so quick to give that retiree his gold watch!

Most business retirement plans provide normal retirement at age 62, early retirement at 50 or 55. Healthy and vigorous seniors, advances in medicine, increasingly longer life spans, laws like the Age Discrimination in Employment Act and the need for supplementary income are making it more likely that older workers will remain active contributors to the work place. Combine this trend with some of the rich retirement incentives that companies offer, and the result is that some valuable senior employees are going to elect to retire pursuant to company policy, only to start actively working for somebody else. If this phenomenon concerns you, re-evaluate

your retirement plans, and make sure they're not the reason for your loss of senior talent. If you're happy with your retirement plan as is, don't feel defrauded by an employee who retires from your company and goes to work for somebody else.

QUITTING

Quitters in the employment context are employees who leave the job without prior notice. Although quitters can cause substantial disruption, employers should not try to penalize a quitter by withholding a paycheck, earned bonus or other earned benefit. In general, even an employee who quits is entitled to all compensation she earned, right up to the very minute she quits. Your resignation policy should clearly state that quitting employees are not eligible for rehire.

JOB ABANDONMENT

Most employers have a written no-call/no-show policy that any employee who fails to come to work three days in a row without valid excuse will be terminated from employment. This means that job abandonment is sort of a hybrid separation from employment because it has elements of both voluntary and involuntary separation. Usually, the employee voluntarily decides not to return to work, but fails to inform his employer that he's quit. After several days of unexcused absence, the company decides to involuntarily terminate his employment. It makes the most sense to group this circumstance with the voluntary separations, because really the employee who abandons his job is telling the employer—by his actions—that he's quit the job.

A good no-call/no-show policy makes sense, but it can't be applied with zero tolerance. What if your employee has been a no-call/no-show for three days in a row because she's severely ill or incapacitated? If you're an employer who's subject to the Family and Medical Leave Act (and if you have 50 employees or more, you probably are), it's a violation of law to terminate her employment when she would otherwise be entitled to FMLA-protected leave. The key is to be prepared to hear a good excuse for the unexcused absences and be willing to reinstate an employee when that excuse is legitimate.

INVOLUNTARY SEPARATIONS FROM EMPLOYMENT

TERMINATION/FIRING

A termination or firing is the result of an employer's decision to end the employment relationship. In most cases, the employer terminates the employee for cause, meaning that the employee has violated policy or procedure, failed to perform or engaged in misconduct. In other words, the cause is something the employee did wrong or failed to do right.

Don't fear firing employees with poor performance or misconduct, but you do need to understand the possible effects that such a firing may have on that employee's hope of future employment. A fired employee has a difficult record to overcome each time she applies for another job. Job applications will ask applicants to

list their prior employment experience and identify their reasons for leaving that employment. Because of the strong negative inferences associated with having been fired, many fired employees feel compelled to lie about their reason for leaving the prior employer. In some circumstances, the harsh reality is that a fired employee has the choice of lying or not being able to get a job. Additionally, when you fire an employee for cause, the employee is generally barred from obtaining some, if not all, unemployment compensation. Add these to the list of reasons why the process leading up to termination should be multi-step, thoughtful and deliberate.

Because a firing can inflict substantial career damage, many employers will offer an employee the option of resigning in lieu of termination. A good termination tool, the option of resigning in lieu of termination allows an employee who made a serious on-the-job mistake to exit with his dignity and, presumably, get a fresh start with the next employer. Generally, however, repeat offenders who show no remorse for their conduct should not be given this option. Having to tell a subsequent employer that you've been fired may be just the right kind of deterrent to make sure the repeat offender doesn't go on to create more trouble for somebody else.

REDUCTIONS IN FORCE (RIF)

A RIF is the result of a fundamental change in the business model, the quantity or quality of work being done or the number of staff needed to conduct the business for the foreseeable future. RIFs usually apply to groups of employees and are used to reduce staff for at least an indefinite period of time or at most, permanently. Which employees are RIFed and which are retained is usually based on objective criteria such as employee seniority, performance metrics or key sales figures.

Because poor performers are usually among the first to be let go as part of a RIF, some RIFs can be confused with a termination/firing. RIFs are not for-cause separations from employment because the reason for the separation is not the employee's misconduct or poor performance. Rather, the reason for the separation is the change in business

need. For this reason, most employees who are RIFed are entitled to recover unemployment compensation.

Many RIFs are also severance events. Severance is separation pay provided by an employer to an employee as a result of a business need to end the employment relationship. Severance is fairly common in RIF situations and has become a preferred way of helping employees transition into their next job. Severance pay may also be used in other separations from employment where the employer wants to obtain an employee's release of potential employment litigation claims. In nearly all cases where a severance is paid, the employer should request a formal release and waiver of the employee's legal claims in exchange for making the severance payment.

LAYOFF

Don't confuse a layoff with a RIF. Like a RIF, a layoff is a not-for-cause separation from employment, but it's usually for a short or temporary time only. The term layoff emerged from the manufacturing sector, and it usually refers to a short-term staff reduction caused by seasonal or cyclical business level fluctuations. Employees who are laid off are usually eligible for recall, a process by which the laid off employees are returned to work when business picks up pursuant to some objective system, frequently seniority. A laid-off employee is eligible for unemployment compensation until he is recalled to work. Unless you plan to recall an employee, don't tell her that she's being laid off.

When it's time to call the whole thing off, every employer must understand the termination vocabulary, because the words you use to describe a separation from employment will have consequences. Those words may send a signal to the former employee about how you view her work, whether you'd be willing to employ her again or if you'd give a positive employment reference. These words may be relied upon by the Florida Department of Labor when it decides if your former employee is entitled to unemployment compensation. And these words can also get you into trouble if that former employee sues you for wrongful termination. 