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White Paper

Avoiding Employee Claims For Wrongful Termination

Best Practices for Your Diocese, Parishes, Schools, and Other Ministries

**Prepared at the Request and in Collaboration with the
BPIC Risk Control Committee
Summer 2012**

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Summer 2012

Dear Friends:



On behalf of the Bishops' Plan Insurance Company (BPIC), I am pleased to announce an addition to the compendium of resources for the greater Church in America. As a national reinsurance company owned by member dioceses, BPIC invests in resources for its constituency as one of many ways to sustain our stable member-owned insurance company offering long term and to ultimately reclaim dollars for ministry.

We are delighted with this journey we took to explore the many aspects of the role of the supervisor at the local parish level, as well as through the entire enterprise of the diocese. Yes, there is the stark reality of the need to protect the Church from those who intend to hurt her, yet we also want to harness prudently the good will that is so important to mobilizing our servant leadership at the local level.

This White Paper, in particular, is meant to be an educational tool to navigating the complex world of employment. As the paper states in the opening paragraph "When employment ends, sometimes the real difficulties have just begun, depending on how this risk was handled from the beginning." Consistency and documentation are important to ensuring the best outcomes for all.

We actually started this initiative as a result of a frequency of emerging claims in this area of employment practice liability among our BPIC members. From there it was a remarkable collaboration among our members, led by the Archdiocese of St. Louis, along with our partners Arthur J. Gallagher & Co., Brit (Lloyd's Syndicate) and in2vate, a leading employment practices firm also involved with Virtus® over the years.

We hope you will embrace our efforts and be a part of the continuous improvement process we want to bring to this important temporal work of the Church.

His Blessings Always,

+Thomas John Paprocki

Most Reverend Thomas John Paprocki
Bishop, Diocese of Springfield in Illinois

Introduction

If you are a supervisor in the pastoral center, a parish, school or other ministry, you may be faced with many difficult employment decisions. The termination of an employee can be one of the most difficult decisions, potentially generating some of the largest risks an employer faces. When employment ends, the real difficulties may begin, depending on how this risk was handled from the beginning.

There are many reasons why supervisors do not manage employment terminations well. The thought of litigation looming, difficulties concerning interpersonal relationships or a lack of human resource training – to name but a few examples – can be challenging for some supervisors who find it difficult to manage their employees properly, with objectivity and appropriate action. Supervisors can easily fall into the trap of “letting things go” until it is no longer possible to retain the employee. The employee is then terminated without sufficient supporting documentation or without progressive discipline or other employer policies having been followed.

Once the employee is terminated, he or she may be driven by anger and feelings of unfair treatment or belief that his or her legal rights were violated, resulting in the employee filing a wrongful termination claim. Before termination takes place, a supervisor should follow the policies and procedures which have been outlined by the employer. If these policies and procedures suggest consultation with experienced Human Resource, Risk Management or legal personnel, the supervisor should work hand-in-hand with these important staffing resources before any action is taken. Their guidance may help avert a possible costly and highly stressful situation.

Overview of the Problem

Wrongful termination claims may be brought by employees who believe that the termination was because of an illegal act of discrimination or retaliation or some other non-compliance with statutory requirements. Supervisors should be familiar with federal and state laws that prohibit discrimination in employment, including termination, based on discrimination due to age, race, sex, disability, religion and/or national origin, marital status, whistleblowing/ retaliation claims, military leave, or family medical leave status. State and local laws may include additional categories, so you should be aware of the specifics of applicable law.

As an employer you should continually strive to provide equal employment opportunities for all persons without discrimination based on any of the above legally protected statuses. As a religious organization, however, your employer is not subject to anti-discrimination laws based on religion. For example, many positions require current and regular practice of the Catholic faith as an employment qualification. Your employer may reserve the right to make employment decisions based on religious belief or practice.

Protecting Your Diocese and Its Parishes, Schools, and Other Ministries from the Risk of Wrongful Termination

While there is no perfect formula to avoid a wrongful termination claim, the points below can provide guidance on managing the termination process. The use of these fundamental Human Resources practices and the importance of clear and concise policies, documentation, and reducing risk and exposure cannot be overestimated in the process.

Discussion will focus on the following best practices as they relate to employee termination:

1. Policy
2. Employee Files
3. Write-ups: Good and Bad
4. Documentation
5. Exit Interviews
6. Employee references

1. Policy

A clear and consistent policy should define the steps to be taken when an employee needs to be disciplined or terminated. In some organizations there are progressive discipline procedures that apply in some or all situations. If your employer has such a policy, these steps provide a path for the manager or supervisor to take in terms of progressive discipline. Following employer policy is crucial in protecting the parish, school, or other ministry, and ultimately the diocese, from liability.

Whatever the employer's policy, it should be clearly defined and communicated to all employees, either through training or one-on-one communication with the employee. The policy should be made available to the employee in a handbook or other written format or on an internet site, with an employee sign-off of understanding of the policy. An open door policy should be a standard practice to address employee questions or concerns. It is also important that these policies be enforced similarly and evenly and that no special treatment is given to any one group or individual. Think of the policy as your shield against liability.

2. Employee Files

The employee files should contain all employee documents, including the I-9 immigration form, job application, any employment agreements, and any and all documentation pertaining to the employee's performance. Documentation can include e-mails, written accounts of verbal conversations, and positive performance acknowledgements, as well as any formal written warnings that bear the signatures of both the manager and the employee.

Not only is this documentation important to ensure that proper steps were followed prior to a termination, it is also important to show that the employee was made aware of all steps within the process. An employee file should never be altered in any way after a claim has been brought. If possible, documentation should be created at the time of the incident. Creating or removing documents after the fact can look like the employer is trying to cover up bad acts.

3. Write-ups: Good and Bad

The term "write-up" carries a negative connotation. When other employees hear that a co-worker was "written up," they may envision a meeting between their co-worker and his or her supervisor, possibly with a witness present. They likely imagine there being tension in the room, defensiveness between the parties, and ultimately, hard feelings. But, not all write-ups are negative. Moreover, not all write-ups should be negative.

Often an employee will show a particular aptitude or leadership ability and successfully undertake a difficult task. In these instances, a supervisor should recognize the employee for his or her attributes or accomplishments. Human Resources is a people-focused business. It is important to remember that people have feelings and sometimes react according to those feelings rather than the facts of a situation. For this reason, it is important to recognize both favorable and unfavorable job performance. If this is not accomplished, the perception of your workplace may be that the only time an employee is acknowledged is when he or she has done something wrong.

While it is important to remember an employee's positive actions, disciplinary write-ups and meetings may also be warranted. These write-ups and meetings need not be unpleasant. A few simple reminders may make this process easier.

- **Stick to the facts. Do not deviate from the issues listed in the document. Remember that this information is likely discoverable should a lawsuit be filed.**

The facts should always be the focus in a disciplinary action. If an employee tries to divert the discussion away from the facts, it is important to redirect the conversation and keep it on course.

- **Prepare your supporting documentation and have it present during the discussion.**

Your supporting documentation is vital to keeping the meeting on task. Supporting documentation can include: documented times that the employee reported to work, e mails, witness statements, etc. For example, if an employee is receiving a warning for excessive tardiness, it is important to have the timecards or other substantiation of times and dates for the days in question. This proof will make your case stronger and a potentially difficult situation more objective.

- **Do not engage an angry employee who becomes belligerent.**

The employee being disciplined may quickly become argumentative. If this is the case, do not engage and/or respond. It is imperative that you remain professional and composed at all times.

- **Have a witness present, especially if the issue is significant or repeated.**

- » The witness should be another member of management. If a member of management is not available, the witness could be an employee who is in a more senior role and/or who does not work directly with the employee.
- » The policy of some employers is always to have a witness present, no matter how small the issue being addressed in the write-up. Again, following your employer's policy is key.

4. Documentation

Supporting documentation is the most important element. Remember this phrase: document, document, document! It is absolutely imperative to document issues as they happen. Proper and timely documentation, as well as addressing the issues with the employee in a timely manner, are key elements in successfully executing disciplinary action and/or a termination. Do not give only positive feedback on employee performance evaluations if the employee does not deserve it. Avoiding the truth does not help an employee recognize poor performance and denies the employee an opportunity to improve.

The importance of documentation lies in the presentation of the facts surrounding the issues. If the employee's shortcoming is one of poor performance, job descriptions and progressive discipline documents will comprise the bulk of the documentation. In cases of tardiness or absenteeism, time cards or other substantiation of the times at which the employee reported to work can clearly show the pattern in a clear and inarguable manner. In more severe cases, such as theft or misuse of resources, the documentation could include audit results, receipts, bank statements, etc.

The importance of maintaining formal job descriptions cannot be stressed enough. The diocese, its parishes, schools or other ministries should require employees to sign their job descriptions upon hire. The signature shows that the new hire understands the nature and duties of the position and also agrees that he or she is able to perform those tasks. It is also important to ensure that candidates hired to perform certain tasks are, in fact, capable of performing those tasks. If this is not the case, it then becomes necessary to implement a Performance Improvement Plan. When enacting a Performance Improvement Plan, the signed job description becomes a key reference in ensuing discussions. For example, if a 62 year-old candidate hired years ago as a custodian to maintain the grounds is no longer able to perform his or her duties; the job description will be a key element in releasing this person. Age is not a factor in the release, but rather that the employee could not perform the key tasks of the position and was no longer a proper fit for the position.

5. Exit Interview

Exit interviews, while not always appropriate, may provide significant information on why employees are leaving the diocese, a parish, school, or other ministry. Under some termination circumstances, the departing employee may decide not to take part in the exit interview.

If a terminated employee wants an exit interview, check first with your designated Human Resources, Risk Management legal or other advisor on how best to proceed. It is important that you do not deviate from the facts and keep in mind that anything you say may be discoverable should litigation arise.

Sometimes an exit interview can take place through the diocese's Human Resources department, thereby allowing feedback to someone other than the former employee's direct manager/supervisor. This approach may also ensure more objectivity and less chance of inaccurate statements.

6. Employee References

Every person hopes to leave employment with good references. However, that is not always possible.

Giving personal references is discouraged. Personal references can expose the diocese or its parishes, schools or other ministries to liability and the risk of a lawsuit claiming defamation. While someone in your organization may feel that he or she is just telling the truth, reasonable minds may differ.

The best practice used by many employers is to offer only dates of employment, salary, and the position held by the employee at the time of separation. No personal information is given, therefore no character comments can be implied or perceived and the employer has provided the requested information. Taking it one step further, providing only a written response may help the employer avoid getting talked into revealing more information.

Steps to Take Once You Receive a Legal Claim

In the event a legal claim is filed, it is important that you act quickly. Follow your organization's procedures and notify the person or department designated. E.g., you may be required to contact your diocese's risk management or legal department and/or your claims administrator to file a claim. Do not speak to anyone over the telephone or answer any questions that come to you by mail, e-mail or fax unless you have been given specific instructions by your employer to do so. Always refer inquiries to your attorney or other designated person in accordance with your organization's policies. Do not try to handle these matters on your own.

Legal claims filed against an employer by a current employee are especially challenging. The atmosphere in the workplace may become negative as staff members "take sides," the employee claimant and his or her attorney contact coworkers for information, etc. It is often important for the employer to communicate accurate information about the claim to staff that observes appropriate confidentiality. Among other purposes, this may help prevent additional claims against the employer for retaliation. Your attorney may advise on how best to handle the situation to minimize disruption in the workplace.

Conclusion

The role of an employer in addressing any termination can admittedly be difficult. Protecting your diocese and its parishes, schools and other ministries from wrongful termination claims may take some time and educational resources, but these efforts are worthwhile. Knowing and following employment laws applicable in your jurisdiction is fundamental. Further, following an appropriate pre-termination process can reduce the possibility of a legal claim, or at least allow the claim to be managed more efficiently. Most important, observing good employment practices and avoiding claims for wrongful termination help create a climate in the workplace that best fosters the ongoing mission of the diocese, parish school or other ministry.

Sample Exhibits

- Employee Performance Reviews – Exempt & Non-Exempt Employees
- Progressive Discipline Policy
- Request for Opinion-Prior to Separation/Termination
- Employment Verification Sample Form

Acknowledgements

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Bob Ryan – Archdiocese of St. Louis
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Peter Persuitti – Arthur J. Gallagher & Co.
Sheryl Anderson, Artex Risk Solutions, Inc.

References

www.stlouisarchdiocese.org
in2vate.com
Employment Law Alliance
www.bpicmembers.org
www.eeoc.gov

For additional information on wrongful termination please go to:
www.bpicmembers.org and www.gallagherpost.com

The following programs are available at www.bpic members.org for online training.

- **TERMINATIONS**

TARGET AUDIENCE: Managers/Supervisors
APPROXIMATE TRAINING TIME: 25 minutes

This training guides managers and supervisors through scenarios on topics related to employee terminations. A wide range of issues are covered, including employment-at-will, implied contracts, and wrongful termination for discriminatory or retaliatory reasons. Each scenario is accompanied by a brief tutorial on the basic employment principles involved and how the situations should best be managed.

- **PERSONNEL FILES**

TARGET AUDIENCE: Managers/Supervisors
APPROXIMATE TRAINING TIME: 25 minutes

Well-kept employee personnel records are perhaps the most important management tools available to an employer. This module discusses the types of documented information typically kept in personnel files, what information should be kept in a separate location, and who should have access to the information.

(NOTE: These programs are funded by Brit Insurance USA, Inc.)

[Sample Form]

EXEMPT EMPLOYEE ANNUAL PERFORMANCE REVIEW FORM For Directors, Managers, Supervisors and Professional Personnel

Describe the measurable goals of the ministry, department, office or agency. Then list accomplishments in support of those goals. You may do this exercise on a separate piece of paper but please follow the format.

List Goal #1:

List Accomplishments in support of Goal #1:

Rating (circle one): 5 Excellent, 4 Very Good, 3 Good, 2 Fair, 1 Poor

List Goal #2:

List Accomplishments in support of Goal #2:

Rating (circle one): 5 Excellent, 4 Very Good, 3 Good, 2 Fair, 1 Poor

List Goal #3:

List Accomplishments in support of Goal #3:

Rating (circle one): 5 Excellent, 4 Very Good, 3 Good, 2 Fair, 1 Poor

EXEMPT EMPLOYEE ANNUAL PERFORMANCE REVIEW FORM
For Directors, Managers, Supervisors and Professional Personnel

List Goal #4:

List Accomplishments in support of Goal #4:

Rating (circle one): 5 Excellent, 4 Very Good, 3 Good, 2 Fair, 1 Poor

List Goal #5:

List Accomplishments in support of Goal #5:

Rating (circle one): 5 Excellent, 4 Very Good, 3 Good, 2 Fair, 1 Poor

List Goal #6

List Accomplishments in support of Goal #6:

Rating (circle one): 5 Excellent, 4 Very Good, 3 Good, 2 Fair, 1 Poor

Overall Rating 1 2 3 4 5

Average Rating: Add ratings and divide by number of goals _____

Final Rating: Add Part A and Part B average and divide by two. _____

EXEMPT EMPLOYEE ANNUAL PERFORMANCE REVIEW FORM
For Directors, Managers, Supervisors and Professional Personnel

The signature of the employee does not necessarily mean agreement with the review. Rather, it is an acknowledgement the review was conducted and received by the employee. If the employee refuses to sign the performance review document, it will be so noted by the reviewer and placed in the employee's personnel file without signature.

Signature of employee and date

Signature of reviewer and date

Signature of reviewer's supervisor and date

Upon completion of the performance review with all signatures, the original form should be returned to the Office of Human Resources for placement in the employee's personnel file.

[Sample Form]

NON-EXEMPT EMPLOYEE ANNUAL PERFORMANCE EVALUATION FORM

Name: _____ Date: _____

Job Title: _____ Supervisor: _____

Time in current position: _____ Department: _____

Attach a copy of the current Job Description or write a brief description of the duties of the position, as you presently understand them.

INSTRUCTIONS:

The employee and supervisor should each do a performance review and rating separately. At the formal performance review session, a consensus should be achieved between the employee and the supervisor to determine the final rating by the supervisor.

How to do the ratings

Carefully evaluate each of the characteristics, separately, based on recurring day-to-day performance since the last review and not on recent or isolated, exceptional events. For each characteristic, rate the employee or yourself as excellent, very good, good, fair, or poor using the following definitions. Then circle the appropriate number on the form.

Some guidance

- (1) Avoid the tendency to rate nearly everyone as "average" on every characteristic instead of being more critical in judgment. The evaluator should use the ends of the rating scale as well as the middle.
- (2) Avoid the "halo effect," a tendency to rate the same individual "excellent" on every characteristic or "poor" on every characteristic based on the overall picture one has of the person being evaluated. However, each person has strong and weak points and these should be indicated on the rating scales.

EXCELLENT (5) Outstanding; unquestionably above acceptable standards; performance consistently exceeds job requirements.

VERY GOOD (4) Above acceptable standards; performance usually exceeds job requirements.

GOOD (3) Meets acceptable standards; performance meets job requirements.

FAIR (2) Improvement is needed to meet acceptable standards; performance frequently does not meet job requirements.

POOR (1) Definitely below acceptable standards; performance fails to meet job requirements.

NON-EXEMPT EMPLOYEE ANNUAL PERFORMANCE EVALUATION FORM

PERFORMANCE	1	2	3	4	5
--------------------	---	---	---	---	---

Knowledge: Understanding of basic job skills necessary to perform requirements of the job description.

Comments:

Planning: Development of methods and work organization to efficiently perform overall job.	1	2	3	4	5
---	---	---	---	---	---

Comments:

Application: Consistency of job performance.	1	2	3	4	5
---	---	---	---	---	---

Comments:

Accuracy: Minimal mistakes and errors in job performance.	1	2	3	4	5
--	---	---	---	---	---

Comments:

Quality: Overall quality of work.	1	2	3	4	5
--	---	---	---	---	---

Comments:

Quantity: Overall quantity of work.	1	2	3	4	5
--	---	---	---	---	---

Comments:

NON-EXEMPT EMPLOYEE ANNUAL PERFORMANCE EVALUATION FORM

FACTORS AFFECTING JOB PERFORMANCE

1	2	3	4	5
---	---	---	---	---

Flexibility: Alteration of activities, plans, etc. to work with new or changing situations.

Comments:

Attendance: Perfect attendance required for a five rating.

1	2	3	4	5
---	---	---	---	---

Comments:

Punctuality: Perfect record required for a five rating.

1	2	3	4	5
---	---	---	---	---

Comments:

Cooperation: Works well and effectively with others to achieve common goals.

1	2	3	4	5
---	---	---	---	---

Comments:

Creativity: Improves methods, procedures, introduces new ideas, etc.

1	2	3	4	5
---	---	---	---	---

Comments:

NON-EXEMPT EMPLOYEE ANNUAL PERFORMANCE EVALUATION FORM

Communication: Oral and written presentation of ideas.

1 2 3 4 5

Comments:

Initiative: Self-starter, requires a minimum of supervision, identifies needs and implements effective solutions.

1 2 3 4 5

Comments:

Judgment: Good decision making, uses available facts to form actions and responses.

1 2 3 4 5

Comments:

Dependability: Consistently reliable in completing work assignments and tasks consistent with quality and quantity standards and on time.

1 2 3 4 5

Comments:

OVERALL RATING:

1 2 3 4 5

AVERAGE RATING: Add ratings and divide by the number of areas rated (15).

Attach a summary of comments, if appropriate.

Signature of Employee and date

Signature of Supervisor and date

[Sample Form]

Request for Opinion Prior to Separation

Date	
Completed by: • (name & title)	
Parish	
Employee you wish to separate	
Employee's Date of Hire	
# of Hours Employee Works per Week	
Employee's Job Title • Please attach a copy of Employee's Job Description	
Age & Gender of Employee	
Please provide a <u>thorough</u> and <u>detailed</u> explanation of all reasons why you want to terminate this employee	
Please attach all employee performance reviews	

<p>Please list all documents addressing Employee's performance deficiencies</p> <p><i>For example:</i></p> <ol style="list-style-type: none"> 1. <i>June 5, 2002 memo from Pastor to Employee outlining 3 performance concerns & suggestions regarding how to correct</i> 2. <i>July 5, 2002 memo from Supervisor to Employee regarding excessive tardiness</i> 	
<p>Please list the names of other employees at your entity who have knowledge of this Employee's performance deficiencies and generally summarize the knowledge they have.</p> <p><i>For example:</i></p> <ul style="list-style-type: none"> • <i>Joe Smith is Fred's immediate supervisor and has observed Fred consistently arriving late to work</i> 	

Please forward this document and all requested supporting documentation to Diocesan Attorney.

[Sample Policy]

Progressive Discipline Policy

The Progressive Discipline process is a series of disciplinary actions taken when an employee has violated an organizational rule or when the employee's performance has deteriorated to the point where corrective action is needed. Examples are habitual absenteeism and excessive tardiness.

Benefits associated with following this recommended practice include:

- Improved employee performance helps you succeed with church ministries and objectives.
- (Parish's) ability to defend its employment practices against a wrongful discharge suit is enhanced.
- Thorough documentation of the steps leading up to employee termination saves you hours in court, if a suit is filed.

Employee behavior that requires you to take disciplinary action includes:

- **Performance issues** involve employee conduct that results in loss of productivity, such as:
 - attendance problems
 - unacceptable output levels or job tasks
 - failure to achieve other standard performance measurement criteria

Except in unusual or severe circumstances, a manager may release an employee for unsatisfactory performance only after the full sequence of warnings and reviews described in this section has taken place.

- **Misconduct** includes practices that violate policy or are illegal, unethical or against public policy, such as.
 - theft
 - sexual harassment
 - discrimination
 - violation of (Parish's) Electronic Communication Policy
 - misuse of (Parish) property

Some Diocese contend that misconduct may result in immediate termination. Contact the Diocese's Human Resources Department to initiate immediate termination.

Modes of Progressive Discipline

- **Counseling**
 - Counseling is a problem-solving process directed at issues affecting behavior or on-the-job performance.
 - Counseling brings performance issues to an employee's attention and assists the employee to correct them.
 - A Counseling attempt should be documented in the employee file.
 - When counseling does not resolve the problem, managers use verbal or written warnings to help the employee improve performance results.

- **Verbal Warning**

- Verbal warnings involve a discussion between you and an employee about a performance issue or other work-related problem.
- The objective is to correct the problem by communicating how actual performance falls short of desired performance.
- Verbal warnings are documented.
- If the problem persists, a written warning is appropriate.

- **Written Warning**

- Written warnings contain specific information about the nature of the problem, the necessary improvement, a timetable for future review and the consequences of continued unsatisfactory performance.
- Written warnings must be documented.

Although a written warning is generally issued to an employee after a verbal warning has been given, in some cases the nature of the performance issue and other circumstances justify giving the employee a written warning without providing a prior verbal warning.

[Sample Form]

Employment Verification Form

Diocese of _____

Office of Human Resources

Diocese Address

Phone:

Fax:

TO: Attention: _____

Company: _____

Address: _____

City, St, Zip: _____

Telephone: _____

We are in receipt your request to provide employment verification for a former employee of the Diocese of _____.

Our Employment Verification policy limits the information that we can release. In addition, the request for employment verification must be submitted in writing and be accompanied by a consent/ authorization signed by the employee authorizing the Diocese of _____ to release their employment information.

Following is the information we will release when the above requirements are met:

- Dates of Employment
- Salary
- Position Held

Due to the sensitive information we are disclosing, our employment verification form will be mailed and not faxed.

We are pleased to respond to your request as follows:

Former Employee's Name: _____

Dates of Employment: From _____ To _____

Position Held: _____

Salary at Separation: _____

Signature: _____

Title: _____

Date: _____



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