

PETERS & LYONS, LTD.

ATTORNEYS AT LAW

SUITE 1000

25 EAST WASHINGTON STREET

CHICAGO, ILLINOIS 60602

DONALD F. PETERS JR.
CHRISTOPHER P. LYONS
MATTHEW L. ALDEN

TELEPHONE (312) 346-7300
FACSIMILE (312) 782-6690
E-MAIL laborlaw@peterslyons.com

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LABOR UPDATE

Recent Developments in Labor and Employment Law

“WE HAVE TO LET YOU GO”: TIPS ON CONDUCTING TERMINATION MEETINGS

How an employer conducts a meeting at which an employee is terminated is just as important as what is said to the employee. The manner in which the news is delivered can influence the employee's decision to sue, the employer's odds of winning such as suit, and the emotional and financial well-being of the employee over a period of months or years to come. To prevent problems resulting from a poorly conducted termination interview, the following guidelines may help:

- Tone and purpose of the meeting. The employer should set a formal, businesslike tone and start off by telling the employee unequivocally that he is no longer employed by the company. If possible, take steps to defuse the emotional impact the meeting will have on the employee. For example, holding the meeting at the end of the work day can help minimize embarrassment.
- Reasons for discharge. Although in most states an employer need not give an employee a reason for why the employment relationship is being terminated, an employer usually risks little by offering a brief and candid explanation of clear, well-documented reasons for the termination. Such a discussion might even lessen the chances that the employee will challenge the decision to terminate his employment.
- Restricting return to the work site. Depending on the reasons for the termination of the employment relationship, the employer needs to be firm that the employee must leave immediately. In such a situation, arrangements should be made for the employer to carefully gather, pack, and deliver the employee's personal items. In extreme cases, the employer may need to have someone accompany the employee from the premises.
- Emotional reactions. Employees' reactions to termination can run the gamut from anger, to tears, to being passive. Loss of employment often comes as a severe shock,

even when the employee had ample warning and should have expected it. The employer needs to remain calm, courteous, and respectful. Although the employer may feel sympathetic, the best response is to listen. Employers should generally avoid an extended discussion about the employee's feelings.

- Threats. Two types of threats are sometimes made by employees at the time of discharge: 1) threats of legal action; and 2) threats of violence or illegal activity. The response to each is different. If the employee threatens to sue an individual supervisor, the company, threatens to file a grievance, or to file a claim, the employer should calmly state that such a decision is the employee's own to make. Threats of violence or illegal activity may require immediate action by the employer depending on the circumstances.
- References. People want reassurance that, despite not performing well in one job, they can get a fresh start elsewhere. An employer may want to point out strengths that will help the fired employee find more suitable work, but this discussion also should note why those strengths did not help the employee in his or her present position.
- Return of company property. The employer should firmly but politely ask for the return of all company property, including keys, security badges, computer passwords, files, equipment, cell phones, pagers, and portable computers. Be sure to ask for the return of any company located at the employee's home.
- Termination letters. A formal, written communication to the employee stating the fact of the termination of the employment relationship is typically not required. However, some union contracts and written employment contracts may provide for a termination letter. Termination letters are the best way to let the employee know that the decision to terminate the employment relationship is final and to give the employee important information about the continuation of health insurance, if applicable, and any severance benefits that may be offered. The letter must be drafted with care, however, because in the event the employee files a legal action against the employer, the letter most likely will be used as evidence.
- Closing the interview. If the interview takes place in a room where the employee may be left alone, the employer may offer to leave the employee in privacy or, if the employee is distraught, to send in a co-worker with whom the employee is friendly. The employer also should arrange a time to cover any remaining termination details, such as insurance coverage continuation options.

While these tips are no guarantee that an employee may not choose to challenge the termination decision in court, they are practices that can help reduce the chances that an employee will file a claim of discrimination or a lawsuit.

FAMILY MEDICAL LEAVE GRANTED FOR THE FLU

A federal court of appeals has ruled that an employee may be entitled to a leave of absence under the Family Medical Leave Act (FMLA) when the employee misses work because of the flu, despite the fact that the flu ordinarily does not qualify as a serious medical condition for which FMLA leave can be taken. *Miller v. AT & T Corp.*, 2001 WL 475934 (4th Cir. 2001).

Kimberly Miller was an account representative for AT&T. Miller came down with the flu and sought medical treatment. Miller was given a blood test and fluids because she was severely dehydrated. Miller was also given a prescription, a work excuse to cover five work days, and told to return a few days later for reevaluation. Two days later, at Miller's second visit, she was given another blood test, showing that her condition had improved. Miller was also told to return for a third visit for a final blood test.

AT&T denied Miller's request for FMLA leave on the grounds that the flu is not generally a condition for which FMLA leave is granted and that the information submitted by Miller's doctor did not show that she received treatment on two or more occasions, i.e., that Miller's blood tests did not amount to continuing treatment. The FMLA defines a "serious health condition" as: 1) an illness that involves continuing medical treatment by a health care provider; or 2) a condition resulting in an inability to work for three or more consecutive days. Miller filed suit on the grounds that she should have been given FMLA leave for her five day absence in December.

The Court ruled that Miller's second doctor visit for a blood test and a physical examination qualified as "treatment" for FMLA purposes. Under the FMLA, "treatment" includes "examinations to determine if a serious health condition exists and evaluations of the condition," not merely treatment for the serious health condition itself. Although the Court noted that in most cases the flu is not a serious health condition, in Miller's case, the flu did amount to a serious health condition because Miller received continuing treatment for it and was incapacitated for more than three consecutive calendar days.

The FMLA can easily trap unwary employers who are not familiar with its complexity. For employers who are covered by the law's provisions (those generally having 50 or more employees for 20 or more calendar weeks in a year), two points should be kept in mind. First, if an employee is absent three or more consecutive days because of a medical condition, the employee may qualify for FMLA leave and the employer needs to investigate whether FMLA leave is available for the employee. Employers should remember, however, that they may require an employee to exhaust all forms of paid leave first before counting time off for an employee's own serious health condition as FMLA leave.

Second, the "continuing treatment" requirement can often result in eligibility for FMLA leave for conditions we might not normally think of as being serious standing alone. For instance, the federal court of appeals in Chicago has stated that the cumulative effect of a number of minor illnesses can qualify as a serious health condition if supported by medical documentation. *Price v. City of Fort Wayne*, 177 F.3d 1022, 1025 (7th Cir. 1997). In close cases, medical documentation from the employee's health provider may need to be supplemented with legal advice.

BITS & PIECES

The United States Supreme Court held in *Pollard v. E.I. du Pont de Nemours & Co.*, 121 S.Ct. 1946 (2001) that the limits on damages imposed by the Civil Rights Act of 1991 do not apply to claims for front pay, which is compensation awarded from the date of a judgment in favor of a victim of discrimination until the date the court orders the employee reinstated to his or her former position. In a June 11, 2001 article for the Society of Human Resource Management's "HR News" Peters & Lyons partner Chris Lyons commented that "the peculiar facts of each situation will determine the amount of 'front pay', if any, to be awarded" and that "employers cannot rely on that amount being capped." The article can be found at "www.shrm.org/hrnews/articles."

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Mickey Mouse is a Teamster! An Orlando Teamsters local recently concluded a new labor contract with Disney World, which won for their "cartoon workers" the right to launder their own uniforms, including their "tights." Previously, the employer performed the laundry duties for the theme characters. Not surprisingly, Minnie objected to wearing the drawers that Goofy wore yesterday. The new contract will remedy that.

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The San Francisco Board of Supervisors has voted to pay up to \$50,000 in benefits for sex changes for city employees. Employees must work for the City for at least one year and pay 15 percent out of pocket if they use a network doctor and 50 percent for a non-network doctor.

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QUOTABLE

"That golfers do not always hit their golf balls straight is a matter of common knowledge; it is a fact that needs no supporting evidence, a principle that needs no citation of authority." Justice Charles Freeman, Illinois Supreme Court, *Geddes v. Mill Creek Country Club*, May 23, 2001.

Since 1984, the LABOR UPDATE has been provided as a service to clients, fellow attorneys and other friends of our firm. Written entirely by Peters & Lyons attorneys, it is intended to provide useful information as to the matters covered, but should not be viewed as an exhaustive treatment of the subjects addressed nor as covering all significant developments in labor and employment law. The LABOR UPDATE is not intended to be a substitute for legal advice.

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