

Guidelines for Handling Involuntary Departures from Your Practice

By **Margie Satinsky, M.B.A.**



Margie Satinsky, MBA, is President of Satinsky Consulting, LLC, a Durham NC consulting company that specializes in medical practice management. Thanks to attorney Patti Bartis with Parker Poe for assistance on this article.

For additional information, go to www.satinskyconsulting.com or www.parkerpoe.com.

This is the second in a two-part series regarding disciplinary action and involuntary departures from your practice. Last month we covered disciplinary action. In some situations, disciplinary action is effective in addressing and resolving performance issues. In other situations, performance doesn't improve, and as a practice owner you wish to terminate an employee. This article provides important insights into the termination process.

Employment at Will in North Carolina

North Carolina is what is known as an "employment at will" state. Absent a contract for employment for a definite period of time, employment is terminable at the will of either the employer or employee. There's an important caveat here that many employers forget – that employment can be terminated at almost any time (although some times are better than other times) for any lawful reason.

Let's explore the application of the rule, starting with important proactive steps prior to employee termination. We'll then identify special situations related to size, health considerations, and employee activities and end with employee communication and security precautions.

Proactive Steps Prior to Employee Termination

Here are four proactive steps that employers can take to avoid legal problems:

- 1) Determine whether or not there is an agreement in place to employ an individual for a definite period of time. Such an agreement may take the form of a written contract, an email exchange or oral communications. If an agreement exists, read the fine print regarding required advance notice and severance payments.

- 2) Document all disciplinary action that may have preceded the decision to terminate.
- 3) Create and share policies and procedures with all employees before problems arise.
- 4) Apply personnel actions consistently.

Size Matters

Employers with 15-plus employees are subject to federal laws that prohibit making employment decisions based on race, color, gender, national origin, religion, age or disability. If you are thinking about terminating an individual in a protected category, verify that the basis for termination is not discriminatory.

Employers with 50-plus employees are subject to the requirements of the Family Medical Leave Act and smaller employers can face discrimination claims based on state law. Conduct an independent review to make sure that the action is supported by documentation, is compliant with business policies and procedures and is consistent with past personnel actions.

Health Considerations

If an employee has recently returned from medical leave or has requested future medical leave, think twice before proceeding with termination. Someone who has just returned from medical leave may interpret the termination as retaliation for having missed work. Similarly, someone who is planning to take leave may misinterpret the termination as punishment or interference with leave rights.

Furthermore, if the individual is covered by the employer's health insurance, losing a job prior to or during a health crisis is extremely stressful, notwithstanding health insurance continuation rights. In some cases it may make sense to postpone the termination. If you do proceed, make sure the termination is defensible.

Whistle Blowers

Employees who report violations of laws and regulations are protected from adverse employment actions under numerous statutes and in some circumstances, under the common law of North Carolina. Before deciding to terminate, consider whether or not the employee has complained about or reported a perceived or actual legal violation.

Employees Who Have Engaged in a Protected Concerted Activity

Non-management employees have the right to communicate with one another for the purpose of improving the terms and conditions of their employment. Protected activity of this sort can range from holding a meeting to discuss unionization to “liking” a negative comment about the workplace that a co-worker has posted on Facebook.

Don’t assume that making a negative comment about an employer is grounds for termination, even if it is a violation of your social media policy. Although employers can limit certain types of communications by its employees (e.g. disclosure of protected health information, harassing communications or false statements), many social media policies have overly broad restrictions. If a communication constitutes a protected activity, the termination based on the offensive communication could give rise to an unfair labor practice claim.

Communication with the Employee and the Entire Team

Because North Carolina does not have a law requiring employers to provide a reason for termination, some employers assume that termination without any reason at all is acceptable.

Regardless of the legalities, dismissal without reason is not advisable. Without a reason for termination, an employee is more likely to speculate that there is no



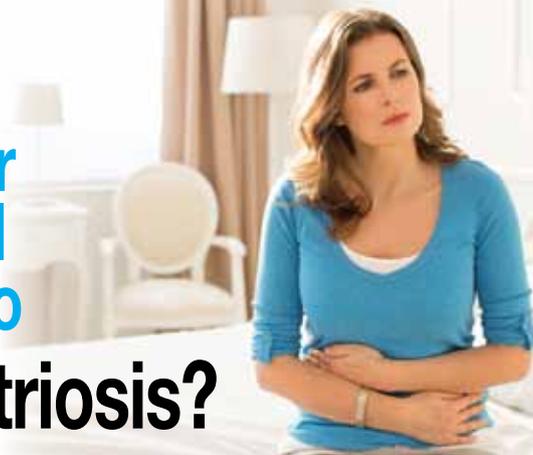
legitimate reason for dismissal. He/she may believe that unlawful motivation (e.g. race, age or repeated absences for medical reasons) was at play.

It’s prudent to provide a short and accurate statement of the reason for termination, even if the conversation is uncomfortable and awkward. Tell the truth rather than unintentionally leading an employee to believe that the motivation

is unlawful. Make sure to communicate the decision with other team members in a timely and consistent way.

Compliance with HIPAA Security Rule Requirements

Last but not least, comply with your own HIPAA Security Rule requirements for all employee departures, regardless of who made the decision to part ways.



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