

# Charleston Digital Corridor

## **EMPLOYMENT LAW ISSUES 102** **Tips For Employee Discipline, Termination, Severance And Releases**

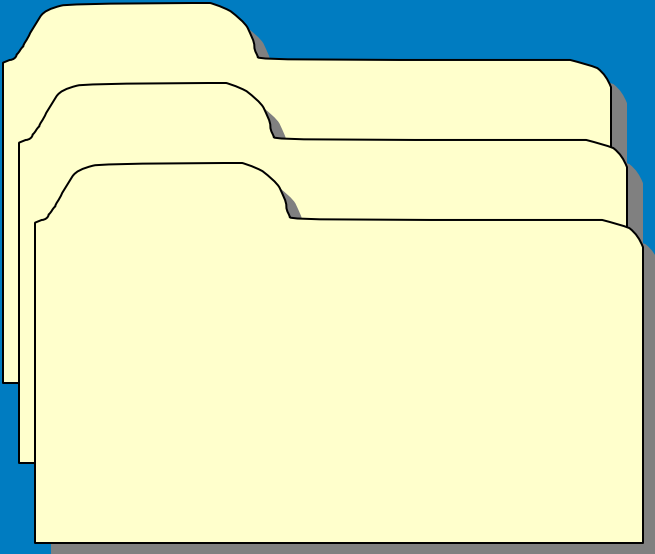
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# We will discuss today:



- Pre-termination documentation that helps, not hurts
- Preparing for the final meeting
- When to use a release and what terms to consider including
- Severance pay and related issues

# Pre-termination Documentation



- What is in your files?
- How confident are you that you have accurately documented the grounds for termination?
- Anything in the files may end up as an exhibit if the employee sues.
- E-mail means "Evidence-mail."

# Guidelines for Documentation



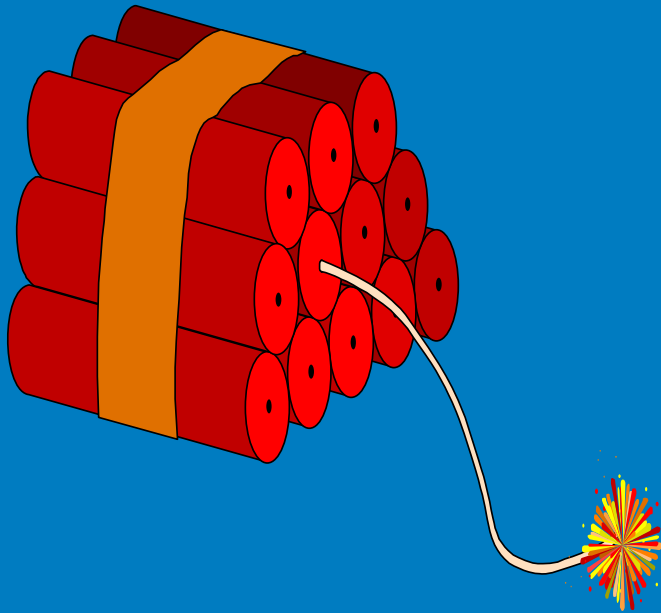
- Be accurate. Make sure all dates and facts are correct.
- Be fair. Do not exaggerate.
- Be kind; only include what is necessary to justify the decision.

# Guidelines for Documentation, continued



- Ask the employee to sign the documentation.
- Note if the employee refuses to sign.
- Put any documentation relating to the termination in the employee's file.
- **DON'T BACKDATE OR CREATE AFTER-THE-FACT DOCUMENTATION.**

# Documentation Dynamite



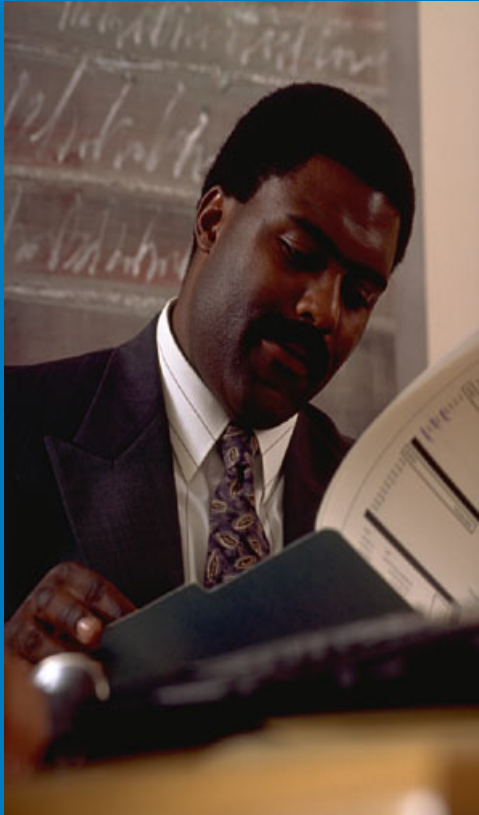
- If termination documentation is prepared significantly after the fact, you may be handing the terminated employee a factual basis for “pretext.”
- Giving varying reasons for termination also may create a question of fact as to pretext.

# Handbook Pitfalls in Termination

- Consult your handbook when considering termination.
- Follow to the letter any procedures stated in your handbook relative to termination.



# Preparing for the Termination Meeting



- Review the documentation in the employee's file.
- Consider who needs to be in the meeting.
- Outline what will be said.

# Preparing for the Termination, continued



- Consider the employee's reaction and be sensitive to potential "shock."
- Make sure the termination meeting is done as confidentially as possible.
- *Holnam* case establishes that defamation is always a real possibility with any termination.

# Preparing for the Termination, cont.



- Have any severance agreement, or release, that you intend to ask the employee to sign prepared and at the meeting, if possible.
- The severance agreement documents the separation—it may or may not include a release.

# When to Use A Release

Is the termination one that may result in litigation?

- Is the employee in a protected class?
- Is the employee likely to claim unfairness in the termination otherwise?
- Are you prepared to offer the employee something to which he/she would not otherwise be entitled?

# Terms of Release

## Must Haves for Enforceability:

- Reason for Termination and Effective Date
- Valuable consideration, getting something to which not otherwise entitled
- State What is Being Released
  - General Claims
  - Specific Statutes – ADEA, Title VII, ADA, etc.



# Terms of Release, continued



- If claim under ADEA is being included, the release must:
  - Specifically mention that ADEA claim is being released.
  - Advise employee to consult with counsel.
  - Allow employee 21 days to consider.
  - Allow employee 7 days to revoke.

# Release terms, continued



- If the employee has a pending charge of discrimination with SHAC/EEOC, including in the settlement agreement a clause that requires the discharged employee to dismiss the charge may be considered a separate act of retaliation.

# Release terms, continued

- The alternative is to settle the litigation separately from the SHAC/EEOC charge.



# If Termination is a Layoff. . . .

- “WARN” Act: Worker Adjustment and Retraining Notification Act

Rule: Employer shall not order plant closing or mass layoff until after 60 days written notice of such order.



# SOUTH CAROLINA LAW

- S.C. Code Ann. § 41-1-40 requires employers that demand notice from employees quitting work to post a note of impending shutdowns.
- Post notice in each room in building.
- Not required if shutdown is result of act of God
- \$5,000 + actual damages

# QUESTIONS ?



# Severance Pay Issues



- In order for a release to be enforceable, it must be supported by valuable consideration
- Severance pay, if not required by policy or contract, will provide valuable consideration.

# Severance Pay

- Comply with Employment Agreements
- Comply with Severance Pay Plans



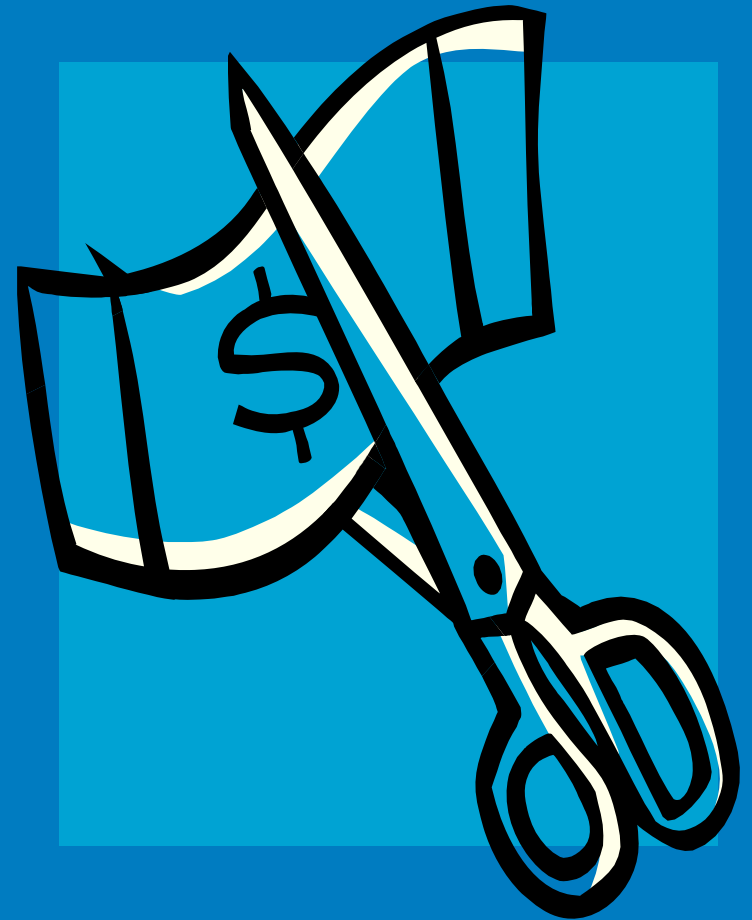
# Severance Pay

- Final Paychecks
  - State Law
  - Timing
- Vacation / PTO



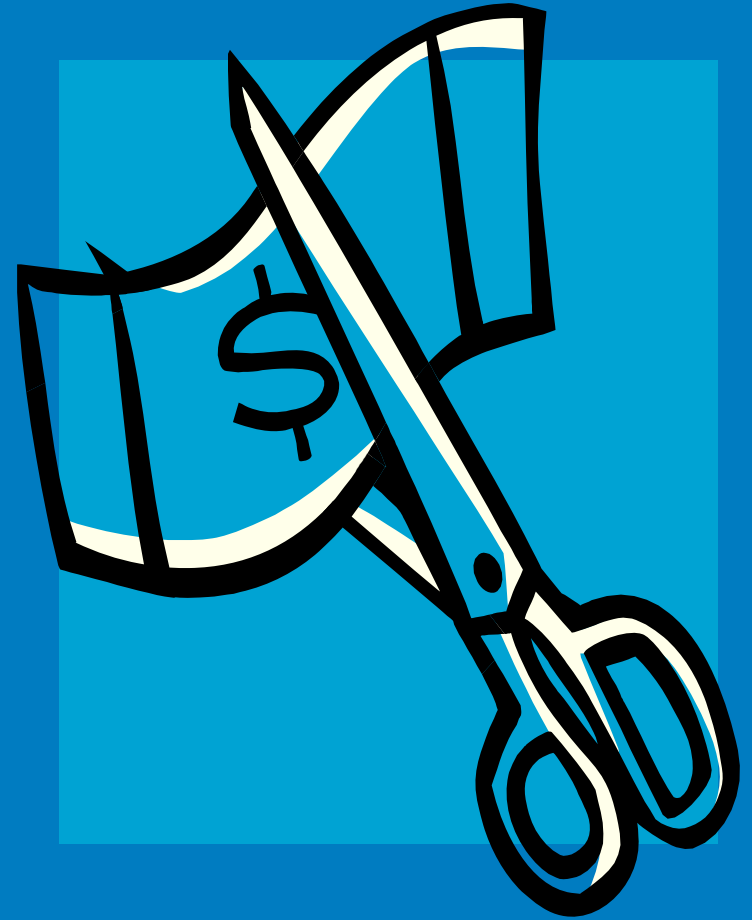
# Severance Pay

- Tax Reporting & Withholding Issues
  - Report as wages? (Form W-2)
  - Report as other taxable payment? (Form 1099)



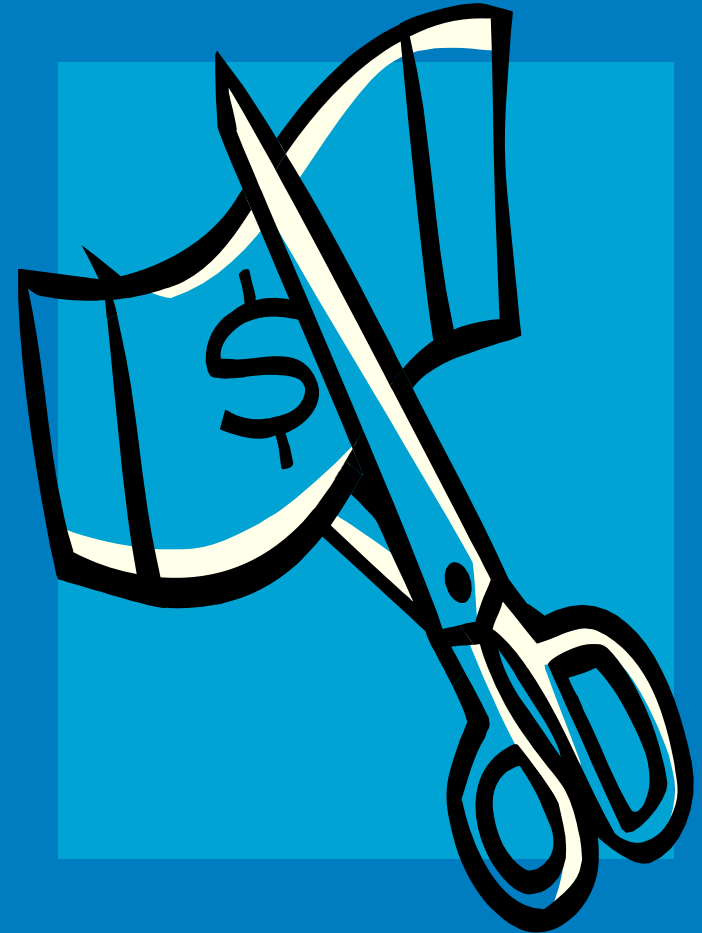
# Severance Pay

- Consider rules and restrictions of IRC §409A
  - Severance pay generally OK
  - Rules against acceleration of payments due



# Severance Pay

- Some payments not taxable
  - IRC §104(a)(2) – “the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness



# QUESTIONS?