

Compliance Strategies for Departing Employees

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Departing Employee Checklist

- Transition planning
 - ◆ Document and periodically review documentation describing job responsibilities and duties
 - Avoid excessive reliance on undocumented knowledge
- Transition responsibilities and duties
 - ◆ Clearly delineate re-assignment of responsibilities and duties
 - Ensure compliance-related duties are identified and effectively transferred
- File and document transfer
 - ◆ Compliance with records management policy
 - ◆ Assess litigation retention requirements
 - Consult with counsel before destroying any documents
 - ◆ Ensure documents and files are available and identifiable for future needs and use

Departing Employee Checklist (cont)

- Computer Resources
 - ◆ Electronic document management
 - Retention or destruction
 - Remember litigation needs
 - ◆ Computer re-imaging prior to re-deployment
 - Avoid inappropriate disclosure to subsequent users
- Building and system access
 - ◆ Collect access cards
 - ◆ Cancel system access
- Separation and Severance Agreements
- Exit Interviews

Separation and Severance Agreements

- Provision requiring signer to report misconduct and cooperate with investigations

Sample Language: I represent that I have notified Employer of any information or knowledge I have regarding known or possible violations of the Employer's legal or contractual obligations or of Employer's policies. In further consideration of Employer's agreement to the terms contained herein, I agree to cooperate and provide information within my knowledge in response to Employer's reasonable requests concerning any investigation, litigation, or any other matter which relates to any fact or circumstance known to me during my employment with Employer. I agree to respond to Employer's request for cooperation and assistance within two business days of each such request. I acknowledge that I am not entitled to further compensation or consideration from Employer for such cooperation or assistance, except to the extent any witness fees are mandated under federal or state law.

I further agree to inform Employer of all subpoenas, correspondence, telephone calls, requests for information, inquiries or other contacts I may receive from third parties, including governmental agencies, concerning any facts or circumstances known to me during my employment at Employer. I agree to inform Employer within two business days of each such contact. I agree that I will not represent or make states on behalf of Employer during this period without approval of the General Counsel.

Separation and Severance Agreements (cont)

■ Whistleblower Provisions

- ◆ Prohibitions against disclosing misconduct to the government may be ruled void as contrary to public policy.
- ◆ Consider clause that prohibits collecting any qui tam recoveries

Sample Language: In exchange for the consideration outlines above, I agree to release Employer from all claims, demands, actions or liabilities I may have or may claim to have, known or unknown, against Employer of whatever kind, including but not limited to, those which are related to my employment with Employer or the termination of that employment, up to and including the effective date of this Release. ...

I agree that this release covers claims under the Civil False Claims Act (including any entitlement to share in any recovery by the United States)....

Exit Interviews

- Purpose
- Compliance Related Question(s)
- Type of Termination
- HR or Compliance Interviewer
- Investigations, Follow-up and Resolution

Exit Interviews -- Purpose

- Primarily an HR and management tool
- Tool to assess turnover and possible management or manager issues
- Give people an opportunity to “blow off steam”
- Get information that can be used to improve the company and its employment practices
- Find out if there are compliance issues

Exit Interviews -- Compliance Related Question(s)

- Even if exit interview is primarily an HR task, it should include relevant compliance related questions
 - ◆ Lack of a question is a lost opportunity and the possible making of a whistleblower
 - If you don't give them the opportunity to tell you -- they may feel compelled to tell someone else, i.e., the government.
 - ◆ If you asked the question and the person said no, they may have difficulty convincing the government to pursue a qui tam action.

Exit Interviews -- Compliance Related Question(s) (cont)

- Nature and type of question(s) depends on type of business and compliance program structure.
 - ◆ Include question regarding HR-related issues before the compliance question to avoid primarily HR issues being raised in response to the compliance question.

Sample Question: Other than any issues you've identified for Question 21 above, are you aware of any conduct or activities that violates the company's legal or contractual obligations or policies -- such as submitting false reports to the government, paying less than what was owed under a contract, accepting or giving inappropriate gifts, working for a competitor, inappropriately disclosing customer medical information, giving the company's proprietary information to a competitor, buying or selling stock with inside information, etc.

Exit Interviews -- Type of Termination

- Involuntarily terminated employees
 - ◆ Resource and timing issues may prohibit comprehensive exit interviews of all involuntarily terminated employees
 - ◆ Are allegations by terminated employees reliable?
 - Con Considerations
 - Using exit interview to try and harm management
 - Specious allegations and complaints
 - Disruptive
 - Limited resources
 - Pro Considerations
 - Nothing to lose -- no fear of retaliation for disclosing problems
 - Termination may be the result of management cover-up of problems
 - ◆ Focus on involuntarily terminated employees most likely to have reliable and relevant information, i.e. senior managers, compliance officers, employees in sensitive positions.

Exit Interviews -- Type of Termination (cont)

- Voluntarily terminated employees
 - ◆ Good source of information regarding perceptions of the company, including its compliance
 - Level and degree of dissatisfaction may be surprising
 - Many issues will be HR in nature, i.e., boss mean, unfairness, discrimination, bonus structure and payment, etc.

Exit Interviews -- HR or Compliance?

- Is the exit interview primarily HR or Compliance in content
 - ◆ Compliance should be interviewer only if exit interview is primarily compliance in nature or as a follow-up to compliance issues identified in an HR exit interview
 - If Compliance conducts interview, have process in place to triage HR issues
 - ◆ Interviewer should be knowledgeable and trained on interviewing techniques and issues
- Include compliance related question(s) in the exit interview
 - ◆ Train HR on type of information necessary if compliance issues identified
 - ◆ Establish process for HR to notify Compliance of any positive responses
 - Audit HR's compliance with the process.

Exit Interviews -- Investigations, Follow-up and Resolution

- If you receive any information about possible misconduct, make sure you follow-up on it.
 - ◆ Don't ask the question if you are not going to do anything with the information.
 - Recognize that many of the allegations will be bogus or inaccurate, but there will be some gems
 - ➔ Frequently, people will report what they "heard" was wrong -- and often they "hear" wrong
- Consider establishing single source for triage and oversight to ensure all identified issues are investigated, resolved and corrected.
 - ◆ Minimizes the likelihood of things falling through the cracks and allows for a comprehensive approach to issue identification

Exit Interviews -- Investigations, Follow-up and Resolution (cont)

- If you find a problem fix it, and try to stop it from happening again.
 - ◆ Management needs to understand this is part of the compliance program and their management responsibilities.