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The Unique Employment Law Specialists

Termination Checklist

Termination Checklist

This is a guide to minimising risk when terminating an employee's employment.
It is no substitute for legal advice.

<input type="checkbox"/>	Sources of obligations Review all relevant sources of obligations to the employee: e.g. relevant sections of legislation, enterprise agreement, modern award, employment contract, policies/ procedures, etc.
<input type="checkbox"/>	Serious misconduct If seeking to dismiss for serious misconduct, refer to Regulation 1.07 of the <i>Fair Work Regulations 2009</i> (Cth) – consider high threshold for conduct within the definition of "serious misconduct." No payment in lieu of notice is owed in cases of serious misconduct. Consider whether a negotiated exit may be preferable to minimise risk.
<input type="checkbox"/>	Unfair dismissal claim If seeking to dismiss for underperformance/misconduct, consider whether the employee is eligible to bring an unfair dismissal claim: i.e. have they completed the minimum qualifying employment period; is the sum of their annual rate of earnings and any other relevant guaranteed amounts less than the high-income threshold; is their employment covered by a modern award or enterprise agreement?
<input type="checkbox"/>	Valid reason & procedural fairness If the employee is eligible to bring an unfair dismissal claim, there must be a valid reason that is sound, defensible or well-founded for dismissal based on their underperformance or misconduct. The employee must also be afforded procedural fairness. At minimum, an employee must be notified of and have an opportunity to respond to the proposed reason for dismissal, before the dismissal is carried out. Generally, a clear prior warning that the employee's ongoing employment is at risk is required. Regard must be had to the context of the performance/conduct and the employee's employment history. A failure to afford procedural fairness can result in a finding of unfair dismissal even where there is a valid reason – consider getting an independent review of the procedure adopted to ascertain risk prior to dismissal.
<input type="checkbox"/>	General protections claim Consider the risk of claims of breaches of the employee's general protections under the <i>Fair Work Act 2009</i> (Cth). Avoid dismissing <i>because</i> the employee has a workplace right, or <i>because</i> the employee has or has not exercised a workplace right, or proposes to exercise a workplace right for example, exercising a right to leave, or raising OSH issues, or making complaints or enquiries in relation to their employment.

<input type="checkbox"/>	Discrimination Consider the risk of claims alleging discrimination under anti-discrimination legislation or the <i>Fair Work Act 2009</i> (Cth). Avoid dismissing because of a protected attribute, such as the employee's age, gender, family status, pregnancy, union membership or non-membership, sexual orientation or political views.
<input type="checkbox"/>	Consultation / policies & procedures Comply with any relevant consultation or other procedural obligations set out in any modern award, enterprise agreement or employment contract. Is there a risk that the organisation's policies/procedures will be interpreted as providing contractual entitlements to the employee? If so, have all relevant policies/ procedures been followed?
<input type="checkbox"/>	Implied terms Even if the organisation's policies/procedures are expressly ousted from creating contractual entitlements in the employee's employment contract, is there a risk of a breach of implied contractual terms – such as the implied duties of good faith/ cooperation?
<input type="checkbox"/>	Redundancy Is the proposed dismissal a redundancy – i.e. where the organisation no longer requires the employee's job to be performed by anyone? Ensure compliance with obligations under legislation, modern awards, enterprise agreements and/ or employment contracts regarding consultation, informing the union and/or Centrelink, considering redeployment and redundancy pay.
<input type="checkbox"/>	Negotiated exit Is a negotiated exit possible and preferable so as to minimise the risk of claims? If an employee enters a deed of release as part of a negotiated exit the risk of legal claims is minimal.

Disclaimer: This document is intended for use as a managerial tool only. It is not intended to address all the issues that may arise when terminating employment or be exhaustive in relation to a particular issue. It should not be relied on as legal advice. If you require legal advice about any specific employment law issues that arise, you should contact MDC Legal.

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