

HIGH-RISK SEPARATIONS · CHECKLIST COMPANION

Termination With a Complaint Trail

How to separate an employee connected to a complaint without converting a defensible situation into a retaliation or strict-liability claim.

RETALIATION

SEPARATIONS

AFFIRMATIVE DEFENSE

Checklist Companion

Termination With a Complaint Trail

Terminating someone who recently complained, participated in an investigation, or was accused is one of the highest-risk moves in employment. Done carelessly, it can create a new claim on top of the old one.

Two doctrines make timing dangerous. Title VII retaliation turns on causation, and courts often infer it from close timing alone. And under Faragher/Ellerth, the affirmative defense is unavailable when supervisor harassment culminates in a tangible employment action connected to it, so an action affecting a complainant has to be examined before it is taken. The answer is not to avoid acting; it is to act on a documented, independent basis, with counsel.

Pause and assess before anyone is told

Do not communicate a separation decision until it has been reviewed. Identify whether the employee recently engaged in protected activity, filing or participating in a complaint, or was named in one, and engage employment counsel first. The closer the separation is in time to the protected activity, the more the burden falls on you to show it was not retaliation.

Build a record that stands on its own

The strongest position is a legitimate, non-retaliatory business reason that predates or is independent of the complaint, supported by contemporaneous records: performance history, prior warnings, and progressive-discipline steps. Check consistency against comparators, because treating the complainant differently from others who did the same thing is classic evidence of pretext. Where the person is a complainant, confirm the action is not a tangible employment action connected to the alleged supervisor harassment, which would make the defense unavailable; where the person is a substantiated harasser, base the decision squarely on the written investigation findings.

Execute with care

Limit who knows and what is said, sharing findings only with those who have a legitimate need to know, to manage defamation risk. Prepare final pay and benefits continuation under state law and plan rules. If you use a separation agreement, follow the OWBPA rules for employees 40 and older, never bar the employee from filing an EEOC charge or cooperating with the agency, and do not use a pre-dispute nondisclosure clause for a sexual-harassment matter, which is void under the federal Speak Out Act; several state NDA laws reach further, so check them.

WHAT NOT TO DO

Do not fire a recent complainant on a reason invented after the complaint. Do not skip progressive-discipline steps you apply to others. Do not take an action against a complainant that could be characterized as a tangible employment action connected to the alleged supervisor harassment without counsel review, and do not over-share investigation details. When in doubt, slow down and involve counsel.

At a Glance

The checklist at a glance

The companion checkbox sheet walks through these 13 steps. Use the sheet in the moment; use this guide to understand the why behind each move.

PAUSE AND ASSESS

- ☐ **1** Do not act until the separation has been reviewed.
- ☐ **2** Identify whether the employee recently filed, participated in, or was named in a complaint.
- ☐ **3** Engage employment counsel before any decision is communicated.

BUILD THE RECORD

- ☐ **4** Document the legitimate, non-retaliatory business reason.
- ☐ **5** Assemble the supporting record.
- ☐ **6** Check consistency against comparators.
- ☐ **7** For a complainant, confirm the action is not a tangible employment action connected to the alleged supervisor harassment, which would make the defense unavailable.
- ☐ **8** For a substantiated harasser, base the decision on the written investigation findings.

EXECUTE CAREFULLY

- ☐ **9** Limit who knows and what is said.
- ☐ **10** Prepare final pay and benefits/COBRA per state law and plan rules.
- ☐ **11** If using a separation agreement, follow OWBPA rules for employees 40+.
- ☐ **12** Do not use a pre-dispute NDA for a sexual-harassment matter.

AFTER

- ☐ **13** Document the decision and rationale, and monitor for any retaliation claim.

Important

About this guide

Educational information, not legal advice. This guide is provided by empathiHR for general educational purposes. It is not legal advice and does not create an attorney–client or consultant–client relationship. Employment law changes frequently and varies by jurisdiction, industry, and the specific facts of each situation.

Separation requirements vary by jurisdiction, by collective–bargaining agreement, and by the facts of each matter, and state limits on nondisclosure and non–disparagement terms are often broader than the federal Speak Out Act. Before acting on anything in this guide, review your policies, programs, and specific circumstances with qualified employment counsel. empathiHR works alongside your legal counsel to build and maintain the operational program described here.

Case citations, statutes, and figures were current as of the update date on the cover and should be re–verified against primary sources before you rely on them. Where the law is unsettled or a figure is not fixed by statute, this guide says so.



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