2017 LEGAL UPDATE

WISCONSIN COUNTIES ASSOCIATION

Discipline and Discharge of Sheriff's Department Deputies: The Grievance and Statutory Process

Presented By:

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I. BACKGROUND

Effective management and supervision of employees can be one of the most rewarding as well as most challenging duties for a front line supervisor. It can provide an opportunity for management to reinforce the need for employees to refocus their performance and conduct in a direction that is intended to meet organizational expectations. It can also serve as a catalyst for employees to change behaviors that are not in keeping with these expectations. Ultimately it is about maximizing the potential of the workforce by recognizing the good performers and working to improve substandard performances.

Furthermore, doing nothing to address substandard performance creates an environment where that behavior is accepted. This has a negative impact on employee moral because the top performers see others are not being held to the same standard. A proactive environment of effective management and discipline can help to address this issue. Supervisors must be attentive to what is occurring in the workplace. An emphasis is placed on having ongoing discussions with employees regarding performance issues. It is an environment in which there should be no surprises for employees if discipline, including termination, is required.

Counseling, evaluating, disciplining, or terminating a marginal employee without proper preparation and knowledge is fraught with its own pitfalls and can lead to considerable and unnecessary expenses.

What follows is practical advice concerning how to deal with problems involving reviewing and/or disciplining employee, particularly borderline employees, including:

A. Screening in the Hiring Process

B. Documentation

C. Counseling

D. Discipline and Termination

II. UNIQUE ASPECTS OF LAW ENFORCEMENT DISCIPLINE

A. Sec. 59.26(8) The County Board Grievance Committee Hears Discipline

1. Appointed as Standing Committee
2. Committee Notifies Accused of Charges
3. If Deputy requests a hearing, hearing within 3 weeks of request for hearing.
4. Committee may take testimony, and if so, it is transcribed.
5. Chair issues subpoenas.
6. Disorderly persons can be removed.
7. Committee issues written decision based on statutory "cause".
8. Committee files decision with Secretary of committee.

B. Application of the Grievance Procedure

1. Bargaining Agreement can Impact Procedure
2. Options between Circuit Court or Greivance Arbitration
3. Know your respective procedure – If differs from County to County.

C. Statutory Cause Applied to Deputies

D. Lsw Enforcement Officer Bill of Rights Section 164

1. Internal investigatory interviews that could lead to discipline

    a. Informed of nature of the investigation
    b. right to representation of their choice who may be present

2. Otherwise evidence gained not allowed in disciplinary proceeding.

E. The Garrity Warning and 5th Amendment Issues

F. Brady v Maryland (1963) and Giglio v. US (1972) Issues

III. PROSPECTIVE EMPLOYEES

As with all other areas of supervision, taking preventative measures is well worth your time. While some employees begin their careers and later develop problems, others should simply never have been hired in the first place.

Points to consider during the hiring and orientation process include:

A. Has the prospective employee changed jobs frequently? If so, does the employee have a good explanation?

B. Are there significant gaps in the employee's employment history? Is there a good explanation for that?

C. Do the prospective employee and the employer clearly understand the duties, time requirements, etc. of the job?

D. Does the interviewer and/or supervisor perceive that the employee may have difficulty getting along with current employees? How can that be verified?

E. Have you trained those who will interview and have you standardized your questions to avoid discriminatory content?

F. Is your application in accordance with current law, and does it include a provision whereby the employee acknowledges that if any information is falsified that can be grounds for termination?

G. Use background checks carefully. To what degree have we protected the company from discrimination on the basis of arrest and/or conviction?

H. Use credit checks only where clearly appropriate.

I. Have you developed an appropriate nondiscriminatory reason for the hire decision that you made?

J. Do you have a system for maintaining the documents supporting your hiring decision?

IV. ESTABLISH GOALS AND EXPECTATIONS

Establishing reasonable goals and expectations is paramount to developing a positive and productive workforce. In doing this, consider the following:

A. Is the goal job-related?

B. Is the goal fair?

C. Can achievement of the goal be evaluated?

The role of **job descriptions** in establishing expectations has gained added value in setting a proper foundation for avoiding discrimination cases, particularly under the Americans with Disabilities Act (ADA). An effective job description should:

A. Define skills and qualifications necessary for the job.

B. Define the essential and non-essential elements of the job.

C. Establish accountability factors.

D. Provide an objective tool for measuring employee performance.

Depending on the organization, **employee training** could be a worthwhile exercise to help employees understand performance expectations and ask questions during an introductory phase. It is important to select the right person to conduct the employee training. In doing this, consider the following:

A. Is the person knowledgeable when it comes to the organization's culture, work rules, and expectations?

B. Is the person friendly and a good communicator?

C. Is the person a good employee and one who can lead by example?

A clear set of **written work rules** is essential to managing any group of employees. The written rules put employees on notice of performance expectations and provide supervisors with a legitimate nondiscriminatory reason for discipline. The form of written rules may vary from organization to organization, a few examples include:

A. Employee handbook

B. Offer letter.

C. Employment contract.

D. Work rules.

E. Collective bargaining agreement.

F. Notes and memos

A supervisor can also provide appropriate feedback and clarify expectations through **performance evaluations**. When done correctly, this tool can be extremely valuable. When done poorly, it can create more problems than if not done at all. Consider the following:

A. How often do you conduct reviews?

B. Do you have a standard evaluation process?

C. Who is involved in the review process?

D. Prepare carefully.

1. Review job description and previous goals.

2. Review previous evaluations. Look for changes and/or trends.

3. Review relevant documentation.

4. Speak with appropriate managers and supervisors.

5. Prepare written evaluation in advance of meeting with employee.

6. Solicit employee input where appropriate.

E. Avoid using evaluations for discipline.

F. Allow employees to prepare for evaluations; consider using employee self appraisals.

G. Develop and use a practical evaluation form.

1. Include objective standards, goals.

2. Record observations.

3. Leave out unsubstantiated opinions and useless generalities.

4. Be consistent in using numerical ratings.

5. Allow employees to comment.

H. Avoid common evaluation problems.

1. Absence of specific comments.

2. Inconsistent comments.

3. Inflated comments or rankings.

4. Comments inconsistent with rankings.

5. Indirect comments.

6. Comments that supply excuses.

7. Insulting or vindictive remarks.

I. Conduct an effective evaluation meeting.

1. Be on time and prepared.

2. Stay on track.

3. Don't get mired in details.

4. Don't make it personal.

5. Be prepared to provide specific examples.

6. Tell the truth. But gently.

7. Allow for response or questions. Listen. Don't argue.

8. Clearly communicate expectations and goals.

9. Be sure employee understands potential consequences.

10. Avoid promises or assurances.

J. Allow employees an opportunity to respond in writing (Wis. Stat. § 103.13).

K. Follow up when required.

1. Be sure to set new goals for the next evaluation period.

2. Establish conditions of "probation" if appropriate.

3. Take advantage of opportunity to offer coaching, training, or other assistance.

4. Consider need for accommodations.

5. Follow through on promises to have meetings or perform interim evaluations.

V. WHEN DOES DISCIPLINE BECOME APPROPRIATE?

A. General Causes for Discipline.

1. Violations of work rules, policies, procedures. Examples:

   a. Excessive absenteeism, tardiness.

   b. Harassment.

   c. Violations of social media policy.

   d. Violations of drug policy.

2. Unprofessional conduct. Examples:

   a. Theft.

   b. Vandalism or property damage.

   c. Inappropriate language.

3. Insubordination.

4. Dishonesty.

5. Poor performance.

6. Violence.

VI. STEPS TO CONSIDER WHEN TAKING DISCIPLINARY ACTION

A supervisor should consider a number of steps in the consideration of discipline. This process starts with an effective investigation. In conducting investigations, supervisors **should**:

A. Investigate promptly.

B. Review allegations, interview witnesses, and review relevant documentation.

C. Immediately tell the employee the nature of the investigation.

D. Allow non-management employees to attend an investigative meeting with a union

representative, if requested.

E. Request the employee give his/her side of the story.

F. Be positive, direct, and fair.

G. Remain objective, stick to the facts, give the employee objective information, and ask for his/her response.

H. Listen to the employee's reaction, if any.

I. Allow the employee to ask questions as long as they relate to his/her particular case.

J. Keep the tone of the proceedings formal.

K. Step back and consider the facts before making a decision.

L. Protect employee confidentiality to the extent consistent with legal obligations.

During the investigation process, supervisors **should not**:

A. Sympathize with or become an ally of the employee.

B. Interrupt or "talk over" the employee.

C. Confront the employee's anger or become defensive.

D. Become involved in "bargaining" with the employee.

E. Discuss side issues, hidden agendas, or "political" motivations.

After investigating the matter and assuming discipline is warranted, the supervisor must then consider what discipline is appropriate. Various factors to consider include:

A. Severity of the infraction.

B. Past disciplinary record.

C. Mitigating factors.

D. Aggravating factors.

E. Length of service.

F. Legitimate performance obstacles.

G. Disciplines administered in similar cases.

H. Amount of warning/notice.

I. Opportunity to correct problems.

J. Reasonableness of policy/rule.

Typical levels of discipline include:

A. Verbal reprimand/warning.

B. Written reprimand/warning.

C. Suspension.

D. Demotion.

E. Probation.

F. Termination.

When meeting with an employee to impose discipline, supervisors **should**:

A. Be positive, direct, and fair.

B. Briefly explain the reason for the discipline. Be careful not to modify or add reasons that are not included in the discipline notice/letter.

C. Emphasize the decision is final and irrevocable, that all levels of supervision concurred in the decision, and that all relevant factors (e.g., performance, workload, experience, prior discipline, etc.) were carefully reviewed.

D. Send the employee a confirming letter citing the reasons for the discipline or discharge, including a summary of previous violations, oral and written warnings, or other prior discipline.

E. Send a copy of the discipline letter to the union (if necessary) and to the human resources director (for inclusion in the employee's personnel file).

F. Have the employee sign an acknowledgment of receipt of the discipline.

When meeting with the employee to impose discipline, the supervisor **should not**:

A. Become involved in bargaining or negotiations over the decision.

B. Discuss side issues or "political" motivations.

C. Discuss the discipline of another employee.

D. Take more than 10 or 15 minutes for the discipline session.

VII. WHAT IS THE PROPER WAY TO DOCUMENT DISCIPLINE?

A. The most important part of any disciplinary decision is **proper documentation**. Under the concept of progressive discipline, further discipline if necessary will build upon the past discipline. In that respect, the history becomes very important.

B. Failure to leave the appropriate "paper trail" creates an implication that no problems actually existed but were fabricated post hoc.

C. Proper "contemporaneous" documentation protects against memory loss over time and unavailable witnesses, supports your position as to what happened, and provides verification of what the employee actually knew.

D. Employees should be given copies of all disciplinary notices and warnings and should sign a receipt indicating that they have received the documentation.

E. May allow the employee to disclaim agreement with the discipline.

F. If employee refuses to sign, document the refusal.

G. Employee has legal right (under Wis. Stat. § 103.13) to make a written response to any "personnel document."

H. Information to include in documentation.

1. Background and identifying information.

2. Relevant dates.

3. Factual details (stick to facts; do not speculate).

4. Names of witnesses and statements where available.

5. Identification of the rule, policy, or procedure that was violated (and a current copy).

6. Information about previous employee infractions.

7. The employee's explanation, if any.

8. Documentation that supports discipline.

9. Conclusions, if any, drawn from investigation.

10. Clear statement of disciplinary action taken.

11. Future consequences.

12. Name of supervisor.

13. Employee's response, if any, to discipline (Wis. Stat. § 103.13).

14. Employee's acknowledgment of receipt.

VIII. DISCIPLINE OF EMPLOYEES DURING AND SUBSEQUENT TO LEAVE UNDER THE FAMILY AND MEDICAL LEAVE ACT.

A. FMLA Does Not Exempt Employees From Discipline.

1. The circumstance that an employee may have qualified for and taken medical leave under the Family and Medical Leave Act does not render the employee immune from the consequences of unsatisfactory work performance.

2. The United States Federal Courts have consistently construed the Family and Medical Leave Act as holding employees accountable for their work

performance in the same manner as if they had not taken leave.

B. FMLA Principles.

1. An employer can avoid liability under the FMLA if it can prove that it would not have retained an employee had the employee not been on FMLA leave.

2. An employee may be terminated for poor performance when he/she would have been terminated for such performance even absent his/her leave.

3. An employer need not reinstate an employee if application of "a uniformly-applied policy governing outside or supplemental employment" - i.e., a rule against working while on leave - results in the employee's discharge.

4. An employer may request an employee to provide recertification of his/her need for continuing FMLA medical leave if:

   a. The employee requests an extension of leave.

   b. Circumstances described by the previous certification have changed significantly.

   c. The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification.

5. An employee has an obligation to respond to his/her employer's questions designed to determine whether an absence is potentially FMLA- qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection.

C. Note on Wisconsin FMLA.

1. The Wisconsin Family and Medical Leave Act incorporates provisions on reinstatement rights almost identical to those of the Federal FMLA, Wis. Stat.§ 103.10(8)(a) and (9)(d).

> (8) POSITION UPON RETURN FROM LEAVE. (a) Subject to par. (c), when an employee returns from family leave or medical leave, his or her employer shall immediately place the employee in an employment position as follows:

1. If the employment position which the employee held immediately before the family leave or medical leave began is vacant when the employee returns, in that position.

2. If the employment position which the employee held immediately before the family leave or medical leave began is not vacant when the employee returns, in an equivalent employment position having equivalent compensation, benefits, working shift, hours of employment and other terms and conditions or employment.

* * *

(9) EMPLOYMENT RIGHT, BENEFIT OR POSITION. (a) *Except as provided in par. (b), nothing in this section entitles a returning employee to a right, employment benefit or employment position to which the employee would not have been entitled had he or she not taken family leave or medical leave or to the accrual of any seniority or employment benefit during a period of family leave or medical leave.*

(b) Subject to par. (c), during a period an employee takes family leave or medical leave, his or her employer shall maintain group health insurance coverage under the conditions that applied immediately before the family leave or medical leave began. If the employee continues making any contribution required for participation in the group health insurance plan, the employer shall continue making group health insurance premium contributions as if the employee had not taken the family leave or medical leave. (Emphasis added.)

2. There is no absolute right to reinstatement following a medical leave under the FMLA. An employee may be discharged for poor performance when the employee would have been dismissed for such performance irrespective of medical leave.

3. An employee may not be discharged for reasons related to a request to take medical leave.

4. An employee may be discharged during the period of his/her FMLA leave for significant deficiencies that occurred prior to the employee's FMLA leave, but were discovered during the period of the employee's FMLA leave, and would

have been grounds for termination if the employee were not on FMLA leave.

IX. DISABILITIES AND DISCIPLINE.

A. Discipline and Accommodation.

1. ADA.

a. The Americans with Disabilities Act (ADA) prohibits discrimination against people with disabilities and guarantees opportunities for individuals with disabilities.

b. Employers do not have to excuse a violation of a uniformly applied conduct rule that is job-related and consistent with business necessity. This means that an employer never has to tolerate or excuse violence, threats of violence, stealing, or destruction of property. EEOC

c. Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, October 17, 2002.

d. An employer may discipline an employee with a disability for engaging in misconduct if it would impose the same discipline on an employee without a disability. *Id*.

e. An employer who disciplines an employee for disability-related conduct will still be required to provide a reasonable accommodation prospectively. *Id.* EEOC guidance makes clear that while the Americans with Disabilities Act may require employers to modify their time and attendance requirements as a reasonable accommodation in some circumstances, employers aren't required to completely exempt a disabled employee from such requirements.

2. WFEA.

"Clemency and forbearance" from discipline may constitute a reasonable accommodation. *Target Stores v. LIRC*, 217 Wis.2d 1, 576 N.W.2d 545 (Ct. App. 1998) (clemency and forbearance were reasonable where employer knew that employee with sleep disorder was undergoing treatment and had other medication options available; the employer should have refrained from firing the employee for "loafing" the next time she was spotted dozing off).

X. SOCIAL MEDIA AND DISCIPLINE

A. NLRA

1. The National Labor Relations Act (NLRA) gives employees, including those working for non-unionized employers, the right to engage in "protected concerted activity."

2. Protected activity includes not only union activity but also discussions among employees relating to terms and conditions of employment. An employer's social media policy may violate the NLRA if it would tend to "chill" an employee's ability to discuss workplace issues.

3. Employers that discipline employees for violating overly broad social media policies may find themselves facing an unfair labor practice charge.

B. The Wisconsin Social Media Act

The law does not prohibit an employer from taking any of the following actions concerning current or prospective employees:

1. Requesting or requiring an employee to disclose access information to the employer in order for the employer to gain access to or operate an electronic communications device supplied or paid for in whole or in part by the employer or in order for the employer to gain access to an account or service provided by the employer, obtained by virtue of the employee's employment relationship with the employer, or used for the employer's business purposes.

2. Discharging or disciplining an employee for transferring the employer's proprietary or confidential information or financial data to the employee's personal Internet account without the employer's authorization.

3. Conducting an investigation or requiring an employee to cooperate in an investigation of any alleged unauthorized transfer of the employer's proprietary or confidential information or financial data to the employee's personal Internet account, if the employer has reasonable cause to believe that such a transfer has occurred, or of any other alleged employment- related misconduct, violation of the law, or violation of the employer's work rules as specified in an employee handbook, if the employer has reasonable cause to believe that activity on the employee's personal Internet account relating to that misconduct or violation has occurred.

4. Restricting or prohibiting an employee's access to certain Internet sites while using an electronic communications device supplied or paid for in whole or in part by the employer or while using the employer's network or other resource.

5. Complying with a duty to screen applicants for employment prior to hiring or a duty to monitor or retain employee communications that is established under state or federal laws, rules, or regulations.

6. Viewing, accessing, or using information about an employee or applicant for employment that can be obtained without access information or that is available in the public domain.

7. Requesting or requiring an employee to disclose the employee's personal electronic mail address.

XI. PROFESSIONAL IMPROVEMENT PLAN

Before developing and drafting a professional improvement plan (PIP), be sure that you have documented the employee's performance issues. **Documentation** should include:

A. Relevant dates.

B. Description of actual performance discrepancy/issue.

C. Description of expected performance.

D. Description of consequences.

E. Description of any disciplinary action taken.

F. Signatures of the manager and employee. If the employee will not sign, then obtain the signature of a witness.

Professional improvement plans **should** address the following:

A. Be designed to correct deficiencies.

B. Be specific to the areas of performance deficiencies.

C. Contain measurable objectives.

D. Identify an individual to oversee the plan implementation.

E. Provide a timeframe for improvement.

A plan of performance improvement may begin as a monodisciplinary plan, but it may blur into a disciplinary process and lead to discipline, nonrenewal or termination.

XII. LAST CHANCE AGREEMENTS

A. What Does It Cover

B. What Is The Review Process

C. Who Is Involved in the Review Process

XIII. CONSIDER A RESIGNATION AND RELEASE AGREEMENT IN LIEU OF TERMINATION

Employers should not jump to a termination decision without first considering the possibility of securing a resignation and release agreement. By properly counseling and discussing the options with the affected employee, the employer may be able to peacefully resolve the employment issue to all parties' satisfaction. A mutually agreed upon resignation and release may be a less emotional, more understanding way to terminate the employment relationship.

There is no "one size fits all" resignation and release agreement. However, the key components of a resignation and release agreement could include:

1. Statement of resignation by the employee and acceptance by the employer.

2. Consideration which could include severance pay, accrued vacation payout, continued paid health insurance, non-contesting of unemployment compensation and a letter of reference.

3. Release of claims by the employee.

4. Forfeiture of any future employment.

5. Confidentiality.

6. Non-admission of liability or wrongdoing by either party.

XIV. CONSIDERATIONS IN IMPLEMENTING THE TERMINATION

A variety of considerations come into play once a decision to terminate has been made and you are to implement that decision. Such considerations include:

A. Will the employee be released immediately?

B. What day will you implement the decision?

C. How will you handle computer access and email?

D. What arrangements are necessary to regain keys and equipment?

E. What arrangements will be made for the employee to gather their things?

F. What about a reference letter?

G. What payouts exist in pay and benefits?

H. Does the employee have an employment agreement which contains a non-compete or other restrictive covenant?

I. "Fundamental Fairness" and "Just Cause" Considerations.

1. Consider Your Burden of Proof.

2. When entering into the discipline mode, it is necessary to know what standard or burden of proof exists for upholding the discipline taken. In Wisconsin, we start with the proposition that employment is **at-will**, and the employee can be discipline or terminated for any reason, or no reason, as long as the decision did not involve an illegal decision. Yet, the at-will status can be modified by a variety of situations such as:

    a. Employment discrimination laws.

    b. Employment Contract - set term or probationary period.

        i. Specific term of employment.

        ii. Limitations on reasons for termination.

c. Collective bargaining agreements. For example:

i. "Probationary" period.

ii. "Just cause" provisions for discipline and/or termination.

d. Wrongful discharge law.

i. Public policy discharges in Wisconsin are limited to certain situations.

ii. Employee is terminated for refusing to violate the law or violate clear public policy.

iii. Employee is terminated for performing legally mandated task (e.g., reporting nursing home abuse).

iv. Public policy discharge does not include termination for reporting illegal conduct unless employee is legally required to report.

v. Terminating the spouse of a police officer in retaliation for the arrest of your spouse for drunk driving.

vi. Constitutional protections. For example:

a. Substantive Due Process.

b. Property Interest.

c. Liberty Interest.

d. Procedural Due Process.

3. To the extent possible, employers should ensure that all discipline and/or termination decisions are fair and rationally based. (Keep in mind that jurors may make the ultimate decision as to whether a discharge was "wrongful" or discriminatory.)

4. Except where limited by contract or collective bargaining agreement, employers should reserve wide discretion to administer discipline and discharge as may be warranted by individual circumstances.

5. "Just cause" is not automatically required for discipline/termination.

    a. The right to be disciplined only for “just cause” is generally created by contract, statute or ordinance, or employer policy.

    b. Just cause can be defined by rule or contract.

6. Even where "just cause" is not required for discipline or termination, employers should consider applying the same general principles to assure "fundamental fairness" in the discipline/termination process.

7. Separate from at-will, a common consideration is the concept of **just cause**. For example, most collective bargaining agreements indicate that the employer can discipline and discharge as long as such decision is for just cause. Just cause is a term of art in labor relations. While there are varying legal definitions, a common test for establishing just cause includes the following:

    a. Was the employee on notice of the work rule or performance expectation and the probable disciplinary consequences of the employee's conduct?

    b. Was the employer's rule or managerial order reasonably related to?

        i. The orderly, efficient, and safe operation of the employer's business; and

        ii. The performance that the employer might properly expect of the employee?

    c. Did the employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

    d. Was the employer's investigation conducted fairly and objectively?

e. At the investigation, did the investigator obtain substantial evidence or proof that the employee was guilty as charged?

f. Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

g. Was the degree of discipline administered by the employer in a particular case reasonably related to?

i. The seriousness of the employee's proven offense; and

ii. The record of the employee in his/her service with the employer?

XV. HOW SHOULD TERMINATIONS BE HANDLED?

A. General Termination Guidelines.

1. Do not act in haste or anger. Always take time to consider the issue carefully. If possible, do not terminate during an investigative meeting.

2. Check with human resources and/or legal counsel before the termination is affected. Afterwards is too late.

3. Be sure the supporting documentation is in order before the termination takes place.

4. Consider the "just cause" factors, even if it isn't required.

5. If "due process" is required, be sure it has been provided.

6. Double check for consistency with prior actions.

7. Plan the termination meeting carefully and conduct it efficiently.

8. Identify security issues and concerns (e.g., return of property or computer security).

9. Be prepared to provide a reason (or reasons) for the termination.

10. Prior to the termination meeting, determine a strategy for employment references.

B. The Termination Meeting.

1. Arrange to have at least two employer representatives present as witnesses. Determine in advance the role that each person will play in the meeting.

2. The employee does not have a (*Weingarten*) right to representation in a meeting where the employer will merely inform the employee of discipline it has already decided to take.

3. Where appropriate, alert security in advance. But don't necessarily have the police positioned outside the conference room door.

4. Prepare an outline or script for the meeting in advance. You don't have to read from it, but you should at least follow it.

5. Tell the employee as honestly as possible the reasons for the discharge. Prepare a written memorandum setting forth the basis for dismissal and be prepared to give it to the employee.

6. Allow the employee to comment on the reasons (and be sure to document what the employee says).

7. Do not argue or negotiate. If you believe you may change your mind based on what the employee says, then you are not ready to terminate.

8. Be prepared to discuss severance and /or benefits issues.

9. Make arrangements for return of employer property, especially files, computers, proprietary information, and keys.

10. Have a plan for the employee's orderly departure.

11. All employer representatives should document the meeting immediately thereafter.

XVI. WHAT STEPS SHOULD BE TAKEN FOLLOWING TERMINATION?

A. Procedures for Responding to Reference Requests.

1. What information will be given?

   a. In order for the employer to be protected by statutory reference immunity (Wis. Stat. § 895.487), information given should be limited to qualifications and job performance.

   b. Employers should not answer questions that are illegal, should not speculate, and should not pass on unsubstantiated rumors. The reference should not say anything to which he/she would not be prepared to testify.

   c. No confidential personal (e.g., medical) information should be given out.

2. Who will be authorized to give out references?

   a. If possible, limit the number of persons who are authorized to give references.

   b. Train all supervisors not to answer reference requests unless they have checked with human resources.

   c. Coordinate stories among departments and among supervisors within departments.

3. How will reference requests be verified?

4. Will references be limited to writing?

5. Will a written release from the employee be required in advance of any reference?

6. How will the employer document reference requests and responses?

7. Should the employer consult with counsel prior to giving out a reference?

B. Documenting "After-Acquired" Information.

1. After termination, employers often receive additional information about employee conduct that provides additional support (or would independently support) the termination decision.

2. This "after-acquired" evidence may be used as a defense in a post-termination lawsuit in order to limit the employee's potential damages.

3. To use this defense, the employer must be prepared to show that, acting in a neutral manner, the employer would have terminated the employee if it had known of the after-acquired evidence.

4. Any "after-acquired" information should be preserved with the employee's personnel file.

C. Answering Unemployment Inquiries.

1. Decide in advance whether you will contest unemployment and on what basis (e.g., misconduct or voluntary quit).

2. Be sure that documentation supports your position.

3. Respond promptly and honestly to U/I inquiry.

D. Maintaining Documentation.

1. Employers are legally required to keep personnel documentation for time periods established by various laws.

2. If an employee files discrimination claim, all documentation relating to that claim must be preserved until the claim is resolved. This requirement is broader than the employee's personnel file.

3. Consider the statute of limitations for various potential claims. For example, contract claims remain alive for 6 years.

E. Former Employee Requests for Personnel Files.

1. Former employees are covered under Wisconsin's access to personnel document statute (Wis. Stat. § 103.13).

2. Under this statute, a former employee has the right to request his/her personnel file ("personnel documents").

3. There are certain exceptions to what has to be provided under the statute (e.g., test documents and employment references). When in doubt, consult with legal counsel.

4. Whenever there is a possibility that the employee will file a legal claim, a request for a personnel file should be reviewed by an attorney prior to handing over the documents.