

# WHAT THE ADMINISTRATOR AND HUMAN RESOURCE DIRECTOR NEED TO KNOW ABOUT THE TERMINATION PROCESS AND SEPARATION AGREEMENTS

**7th Annual WCMA Women's  
Leadership Seminar  
December 5, 2024**

**Kyle J. Gulya, Esq.**  
von Briesen & Roper, s.c.

**Jill Pedigo Hall, Esq.**  
von Briesen & Roper, s.c.

## Disclaimer

Jill, Kyle, and their firm, von Briesen & Roper, s.c., generally represent the employer as the entity and not individuals. While they like all of you and think you are great people, this presentation should not be treated as legal advice or as a position their firm's clients will take in personnel issues or negotiations with any of you. You are, unfortunately, not the personal client of von Briesen & Roper. The municipal client of von Briesen & Roper ultimately makes their own decisions and may be more generous or more stingy, but in all likelihood will handle the matter just right. Many of the provisions identified herein are from agreements that are provided merely as an example.

# Arriving at Termination

# Considerations Before Discharge

- “HOW” is all about LEVERAGE and CULTURE!
- Job security standard
- Evidence - what does the employer have? What should they have? Consider the strength of documentation
- Witnesses - strength and credibility of witnesses and the supervisor. What about witness cooperation?

# Considerations Before Discharge

- Organizational Messaging
- Claims employee may have against the employer
- Claims employer may have against the employee
- Cost of the process
- Publicity
  - Public hearing or closed session - 19.85(1)(b)
  - Media inquiries
  - Records Requests

# Considerations Before Discharge

- **Goal**: Is the action being taken by the employer restoring or helping return the workplace to being a normal, safe, and productive professional work environment?

# During the Investigation

- Make sure these were not present:
  - Bad faith (doesn't apply in at-will situations)
  - Biased investigator
  - Fundamentally coercive investigative process. *Oddsens v. Board of Fire & Police Commissioners*, 108 Wis.2d 143, 321 N.W.2d 161 (1982).

# Before you terminate

- Have you met all required steps, either under policy or law?
  - At will, for cause, just cause, recent work comp user, returning military service member?
  - What process is owed to the employee? What is due process?
  - What is a *Loudermill* hearing before termination and when does it apply?

# Statutes Creating Job Security Rights

- Ch. 17 Statutory Officers - *at pleasure* and *for cause* removal.
- Wis. Stat. § 66.0509 Act 10 Grievance Procedures. If an employee is dismissed without the opportunity to grieve, per an exception in the procedure, that procedure may violate the statute's mandate that the grievance procedure address terminations and allow for employees to grieve terminations. *Dodge Cnty. Pro. Emps. Loc. 1323-A, AFSCME, AFL-CIO v. Dodge Cnty.*, 2014 WI App 8, 352 Wis. 2d 400, 842 N.W.2d 500.
- Wis. Stat. § 62.13(5) Disciplinary Actions Against Subordinates (Police and Fire)
- Wis. Stat. §59.26(8)(b) Appointed Deputy Sheriff

## “Property Interest” in Public Jobs

- Public employees’ property rights are based in state law, ordinances, contracts, policies, or other external sources.
- The question is whether those statutes, contracts, rules, or understandings create a legitimate expectation of continued employment.
- *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985) - seminal case recognizing property interest and process.

## Non-disciplinary Separations: Do Due Process Rights Exist?

- Examples of nondisciplinary separations: medical reasons, inability to lawfully perform a job duty (loss of license, firearm disqualification under the Lautenberg Amendment), disqualifying criminal convictions
- If a property interest exists, then Courts require some minimal form of due process before depriving the employee of the protectable property interest.
- For medical situations, this can be an added step following completion of the cooperative interactive process under the ADA

# “Liberty Interest” in Public Jobs

- A public employee’s “liberty” interest is the employee’s right to their good name and reputation
- If there has been (1) separation from employment, and (2) recent publication by the employer following the separation of arguably adverse and stigmatizing information about the employee, the employee is entitled to a due process “name clearing” hearing, which provides the opportunity for the employee to clear their name on the record, but not the right to get their job back

# What is a stigmatizing charge?

- Termination of employment alone is not a deprivation of liberty
- A stigmatizing charge giving rise to “a ‘badge of infamy,’ public scorn, or the like.” Examples: charges of theft, dishonesty, immorality, drug use or alcoholism, disloyalty, mental disorder, criminal acts, prone to suicide prone, lack of intellectual ability, abusers, sexual harassment, and racism
- Stigma must take place around the time of employment deprivation—statements made many months before or after termination of employment do not infringe liberty interests

## “Liberty Interest” Process

- What process is owed? Name clearing hearing, which means notice and an opportunity to be heard, but the employee doesn't get their job back.
- Public Records Requests and rights to challenge: Do they negate the need for process?

# The At-Will Termination

- Hire slow, fire fast. This is a business decision.
- Letter, in person or by phone or videoconference?  
*Up in the Air.*
- What do you say? Do you need to provide a reason?
- There is no debate
- Do you offer the opportunity to resign?

# The Job Security Termination

- Basic Due Process (post-deprivation process available):
  - Notice of the charges against the employee;
  - An explanation of the evidence;
  - An opportunity to present his/her side of story
  - Unbiased decisionmaker
- Additional Due Process (post-deprivation process not available):
  - Right to present evidence and challenge evidence
  - Right to examine witnesses and cross examine witnesses

## Hearing Due Process: The Unbiased Decisionmaker

- Bias—the Quintessential Attack—the boss is out to get me!
- While the employee is entitled to an impartial tribunal, a decision maker does not violate the requirement of impartiality by performing a combination of investigative and adjudicative functions.
- Fundamental Principle: There is a strong “presumption of honesty and integrity in those serving as adjudicators.”

## High Probability of Bias

- In the absence of actual bias, there must exist “[c]ircumstances which lead to a high probability of bias.” The US Supreme Court has identified only two such situations that meet this high standard:
  - Where the adjudicator has a pecuniary interest in the outcome; or
  - Where the adjudicator has been the target of personal abuse or criticism from the party before him. The abuse and criticism of the objecting party must be so **egregious as to absolutely cloud the ability of the decision-maker from making any rational decision.**

# Examples Where High Probability of Bias Was Not Found

- A school board member who encouraged a member of the community to testify against a principal in a nonrenewal proceeding did not present sufficient evidence of bias to constitute a denial of due process. *Norbeck v. Davenport Comm. Sch. Dist.*, 545 F.2d 63, 68-69 (8th Cir. 1976).
- A school board member's campaigning on a platform to "get rid" of a teacher was insufficient evidence of a financial or personal stake that would have required removal of that Board member from that teacher's nonrenewal hearing. *Jones v. Sulley Buttes Schs.*, 340 N.W.2d 697, 700 (1983).

## Decisionmakers Must Stay “Pure” to Ensure Due Process

- Members of the government body hearing the matter cannot also have been witnesses or have participated in the investigation
- Only those matters noticed for hearing may be considered by decisionmakers at the removal hearing
- In *State ex rel. Alba v. City of Waukesha Police & Fire Commission*, 365 Wis. 2d 195 (Ct. App. 2015), the decision maker could not consider evidence unrelated to a specific charge and then issue a finding on that “new” charge based in part on evidence that members of that governmental body were witnesses to the evidence for that new charge. The Court stated: “One of the findings of fact from the disciplinary hearing stated that the PFC considered as evidence the responses Alba gave to [PFC Chairperson’s] questioning. We agree with Alba that this constituted a due process violation. PFC members essentially were witnesses at the interview, then used their recollections when they sat as adjudicators at his disciplinary hearing. The PFC undisputedly made a finding based on personal knowledge and perception rather than on evidence presented at the hearing and available to the public. A judge ‘cannot be a witness and the finder of fact, too.’”

# Avoiding Appearance of Bias When Using Legal Counsel

- If the lawyer is advising the employer during the investigation, then that lawyer should not advise the decision maker if that decision maker is a governmental body conducting an impartial hearing.
- Separate legal counsel should be brought in.

# The Three Ring Circus

- Who is on trial? (Just cause measures what?)
- The show for the union faithful
- Some employees just want to see the world burn:  
The scorching of earth - why does this happen?
- Elected official interference
- Litigation Prep Session?

# SEPARATION AGREEMENTS

# Why Use a Separation Agreement?

- Alternative to public hearing with attendant costs in public scrutiny, dollars, time, morale, and distraction
- Secure a release of claims and closure
- Reduced risk of public involvement in personnel matters

## A separation agreement should include...

- Outline of consideration including money to be paid, payment schedule and standard deductions
- Non-admissions of liability clause
- Detailed broad waiver and release of claims
- Indemnification for the employer
- Older Worker Benefit Protection Act provisions for age claims for former employee aged 40+
- No rehire/no reinstatement clause
- Union must be signatory if they represent the employee

# What Should Not Be Included?

- Promises of Confidentiality by the Employer
  - there are public records issues
- A promise to destroy disciplinary records - they are public records
- A mutual release
- Non-disparagement clauses

# CONSIDERATION

In consideration for Employee's commitments under this Agreement, Employee and Employer agree Employee's voluntary and irrevocable resignation from employment and appointment is effective on the end of the business day on \_\_\_\_\_, 2024 (the "Resignation Date"). The Employer relies upon and accepts Employee's irrevocable resignation and the parties agree the Employer's reliance is genuine and binding on the parties. The Employer shall provide Employee, as severance pay, payment of his normal weekly salary including deductions until \_\_\_\_\_, 2025 (the "Severance Period") beginning on a subsequent regular payroll following the Resignation Date.

# RELEASE

In consideration of the Employer's obligations and promises under this Agreement, Employee does hereby fully and forever discharge and release the Employer, which includes all departments and agencies, and all of the foregoing's past and present employees, officers, agents, representatives, insurers, and attorneys (collectively, the "Released Parties"), from any and all actions, causes of action, claims, demands, damages (including but not limited to punitive damages), costs, expenses, attorneys' fees, and compensation on account of, or in any way growing out of any and all known and unknown damage resulting to or from any action or omission by the Released Parties which arose on or before the Effective Date of this Agreement.

# INDEMNIFICATION

The parties understand and agree Employee waives any right to and shall not accept or recover any monetary damages or any other damages or anything of value from the Released Parties as a result of filing a lawsuit, charge, claim, or action or for participating in any investigation or proceeding, or for any related claim, action or judgment against the Released Parties. Employee agrees that in the event Employee, or another person on Employee's behalf, files for or receives any money or benefit as a result of such lawsuit, charge, claim, action, investigation, charge or proceeding or related claim, action or judgment, that is paid by the Released Parties, then Employee shall indemnify and fully reimburse the Released Parties for its costs and attorneys' fees in defending the action, regardless of the outcome of any case, and Employee shall indemnify and fully reimburse the Released Parties for any amounts paid to Employee, to Employee's attorneys, or on Employee's behalf within ten days of the receipt of such payment.

# Older Worker Benefits Protection Act

This Agreement is governed by the Older Workers Benefit Protection Act. Under this Act, Employee has been offered at least twenty-one (21) days after being given this Agreement during which s/he may consider whether or not to sign this Agreement. Employee further represents and agrees that s/he has been advised that, as to the release of claims under the OWBPA and ADEA ONLY, for a period of seven (7) days following the execution of this Agreement, s/he may revoke his/her decision to enter into the release of OWBPA and ADEA claims, and the Agreement shall not become effective or enforceable until expiration of the seven (7) day revocation period. To be effective, the revocation must be in writing and delivered in person or post-marked to Employer within seven (7) days of Employee's execution of this Agreement. If Employee exercises his/her right to revoke his/her waiver and release under the OWBPA and ADEA, then the remainder of this Agreement shall continue in full force and effect, except that the amount of severance pay in paragraph \_\_\_ shall be reduced to \$\_\_\_\_\_, which Employee agrees shall constitute adequate and sufficient consideration to continue to bind Employee to all other provisions of this Agreement and his/her obligations hereunder.

# NO ADMISSIONS OF LIABILITY

The parties' participation in this Agreement is not to be construed as an admission of any wrongdoing or liability whatsoever by or on behalf of Employee, the Employer, or the Released Parties.

# LEGALESE - ADVICE TO CONSULT

Because this Agreement includes a waiver of Employee's rights under Title VII of the Civil Rights Act of 1964, the Wisconsin Fair Employment Act, and the other statutes and claims referred to in Sections \_\_\_ and \_\_\_, Employee is advised to consult an attorney before Employee signs this Agreement.

## LEGALESE - ACKNOWLEDGEMENT

Employee further states and agrees that Employee has read this Agreement, that Employee has had the opportunity to have it fully explained to Employee by an attorney or other representative or advisor, that Employee fully understands its final and binding effect, and that the only promises made to Employee to sign this agreement are those stated in this Agreement, and that Employee is signing this Agreement freely and voluntarily.

## LEGALESE - Other

- Choice of Law and Forum
- Severability
- Mutual Negotiations: This Agreement is the product of mutual negotiations, and no rules of strict construction shall be applicable against either party.
- Counterparts and Electronic Signatures

# Post-Termination Issues

- Returning an employee's property—to box or not to box?
- Obtaining property from an employee
- Payout of accrued, unused vested leave benefits
- Classification of any payouts issued under a settlement agreement within the Wisconsin Retirement System
- Employment reference checks
- Unemployment insurance
- Benefit continuation paperwork

Sign up to  
receive  
von Briesen's  
Law Updates by  
visiting:  
[vonbriesen.com/  
email-sign-up](http://vonbriesen.com/email-sign-up)



# THANK YOU!

Any questions, please contact:

Kyle Gulya

[Kyle.Gulya@vonbriesen.com](mailto:Kyle.Gulya@vonbriesen.com)



Jill Pedigo Hall

[Jill.Hall@vonbriesen.com](mailto:Jill.Hall@vonbriesen.com)

