

BEST PRACTICES GUIDE TO VALID DISMISSAL

Everything You Need to Know About Employee Termination Laws

9:00 am to 5:00 pm, Friday, October 26, 2018
Manila Marriott Hotel, Pasay City, Philippines

COURSE OUTLINE

- I. Basic Principle in Employee Dismissal**
- II. Different Types of Dismissal**
 - A. Actual
 - B. Constructive
 - 1. Unbearable treatment
 - 2. Elimination/Diminution of benefits
 - 3. Illegal transfer
 - 4. Failure to reinstate after preventive suspension
 - 5. Failure to reinstate after bonafide suspension of operation
- III. Other Forms of Separation from Employment**
 - A. Resignation
 - B. Termination due to disease
 - C. Retirement
 - D. End of season
 - E. Expiration of contract
 - F. Completion of project or phase thereof
- IV. Manner of Termination Depending on Forms of Employment**
 - A. Regular employee
 - B. Probationary employee
 - C. Casual employee
 - D. Project
 - E. Seasonal
 - F. Fixed-Term
- V. Constitutional Foundation**
 - A. Section 18, Article 2 – Promotion of Welfare
 - B. Section 12, Article 2 – Preferential use of Filipino labor
 - C. Section 3, Article 13 – Full protection to labor
 - D. Section 9, Article 2 – Promotion of Full Employment
 - E. Section 1, Article 13 – Promotion of Social Justice
- VI. Statutory provisions giving life to constitutional principles on labor**
 - A. Article 3, Labor Code
 - B. Article 211, Labor Code
 - C. Article 4, Labor Code
- VII. Kinds of Employees Under the Labor Code**
 - A. Managerial
 - B. Supervisory
 - C. Rank-and-File
- VIII. Concept of Employer-Employee Relationship**
 - A. Four-fold Test
 - B. Engagement or hiring
 - C. Control test
 - D. Payment of Wages
 - E. Power of Dismissal
- IX. Jurisdiction over labor cases**
 - A. Jurisdiction of Labor Arbiter
 - B. Commissioner
 - C. Concept of Single-Entry Approach (SENA)

- D. RA 11396 – An Act strengthening conciliation-mediation as voluntary mode of settlement of labor dispute

X. Overview on Dismissal involving Various Forms of Employment

- A. Regular
- B. Probationary
- C. Fixed Period
- D. Project
- E. Seasonal
- F. Casual

XI. Overview of Employee Dismissal & Termination

- A. Hazards of Terminating an Employee
 - 1. Backwages
 - 2. Separation pay
 - 3. Moral Damages
 - 4. Exemplary Damages
 - 5. Nominal Damages
 - 6. Attorney's Fees
- B. Rights of the Employer and Employee
 - 1. Legal Basis of Employee's Security of Tenure
 - 2. Management Prerogatives
 - Right to dismiss workers
 - Right to transfer
 - Right to re-assign workers
 - Right to promote and not to promote
 - Right to demote
 - Right to discipline erring employees
 - Right to abolish and create positions
 - Prescribe working methods, time, place, manner and other aspects of work

XII. Guideposts on Valid Dismissal of an Employee

- A. Substantive Due Process
 - Just Cause
 - Authorized Cause
 - 1. Determining the Proper Ground
 - 2. Applying the Procedural Due Process
- B. Procedural Due Process
 - Notice to Explain
 - Hearing / Conference
 - Final Notice of Dismissal

XIII. Just Cause for Dismissal

- A. Serious Misconduct
 - What is Serious Misconduct?
 - Specific Instances Constituting Serious Misconduct
 - Theft
- B. Sexual Harassment
 - Summary of Concept in Sexual Harassment
 - Liability of Employer for Failure to Take Action – the victim can institute separate action for damages
 - Penalties to be Imposed on the Offender
 - Prescription of Action
- C. Insubordination or Willful Disobedience
 - Meaning of "Reasonable" in Reasonable Order
 - Requisites of "Willful Disobedience"
 - Employee cannot refuse to comply with lawful order on the pretext that he is challenging validity
 - Rule on marriage policy
 - Disparate impact vs. disparate treatment
 - Prohibiting marriage with employee of competitor
 - Refusal to explain absence as directed is willful disobedience

- Mandatory drug testing is not violative of right to privacy
- The order to be obeyed must be sufficiently known to the employee

D. Gross and Habitual Neglect of Duties

- Concept; Definition
- Negligence is a factual issue that must be proved by the employer
- Determination of a Negligent Employee
- Habituality may be disregarded where loss is substantial
- Totality of evidence may be ground to dismiss first-time offender even if the offense is not habitual
- Actual loss or damage incurred is not essential
- Absences in Relation to Gross and Habitual Neglect
- To be a valid ground for dismissal, absences must be habitual
- Habitual tardiness or absenteeism may be sufficient ground to terminate employment
- Long tenure of employee is not a mitigating factor
- Where the dismissal is based on gross and habitual neglect of duty, separation pay cannot be awarded
- Awards received by the employee and his unblemished records negate gross and habitual neglect
- Rule as to Inefficiency, Incompetence or Poor Performance
- Poor performance as a ground for dismissal must be gross and habitual

E. Abandonment of Work

- Elements of Abandonment
- Claim of abandonment must be supported with evidence
- Absence with justifiable reason does not constitute abandonment
- There is no abandonment when an employee failed to report for work on a mistaken belief that he/she was dismissed
- The filing of complaint for illegal dismissal belies claim of abandonment
- Delay in the filing of complaint for illegal dismissal is not indicative of abandonment
- There is no abandonment in the enumerated cases
- Cases where absence of prayer for reinstatement does not constitute abandonment
- Seeking other employment after the filing of illegal dismissal is not abandonment
- Refusal to be reinstated does not negate claim of illegal dismissal
- Case when refusal is deemed lack of interest in resuming employment
- Offer to reinstate does not disprove illegal dismissal
- Abandonment requires notice
- Due Process Requirements in Abandonment
- If notice is sent by mail, the envelope and content must be offered in evidence
- Abandonment and AWOL are not the same
- Anticipated absence requires notice from employee
- Other Cases where the Supreme Court Ruled that there is Abandonment
- Abandonment in Overseas Employment

F. Fraud

- It is not required that employer should incur losses in cases of fraud
- Restitution of property taken by the errant employee does not erase the offense committed
- Commission of fraud may lead to loss of trust and confidence
- Misappropriation of the amount collected as officer-in-charge constitutes fraud

G. Willful Breach of Trust and Confidence

- Guidelines to be Observed in Loss of Trust and Confidence
- Breach of trust must be willful
- As a ground, loss of trust and confidence must be supported by well-established facts
- Effect if loss of trust is not supported by evidence
- Breach of trust and confidence must pertain to employee's work
- Employee charged must be holding a position reposed with trust and confidence
- Definition of "Position of Trust and Confidence"
- Classes of Position of Trust
- Breach of trust is a factual issue requiring substantial evidence
- Bare allegation of sabotage based on failure to report subpar work output cannot justify dismissal
- The application of the doctrine of loss of trust and confidence is not the same for

- managerial, supervisory and rank-and-file employees
- Employee gives up certain guaranties with his promotion to managerial position
- Security of tenure is not one of the guaranties given up by a managerial employee
- A manager may be dismissed on his command responsibility
- Instances where rank-and-file employees may be dismissed due to breach of trust and confidence
- Loss of trust and confidence is applicable to confidential employees
- Promotion of employee negates loss of trust and confidence
- Long years of service may aggravate the offense involving loss of trust
- Acquittal of an employee in a criminal case does not obliterate the loss of trust and confidence
- Return by employee of stolen property or amount subject of irregularity does not obliterate or mitigate administrative liability for loss of trust

H. Commission of a Crime or Offense

- I. Other causes of dismissal under Article 282 identified as “analogous”
 - Cases Where the Supreme Court Found the Causes for Dismissal as Analogous
 - Specific Provisions of the Labor Code Providing for Other Causes for Dismissal

XIV. Authorized Causes for Dismissal

- A. Termination Due to Closure of Establishment and Reduction of Personnel
- B. Specific Grounds under Article 283
- C. Employer must prove that termination is based on authorized cause
- D. Just causes are not relevant to prove authorized causes
- E. Installation of Labor-Saving Device
 - Losses are irrelevant in effecting termination due to labor-saving devices
- F. Redundancy
 - Requisites for Valid Redundancy to Exist
 - Employer’s right to earn from its investment is a recognized basis for redundancy
 - The employer exercises business judgment in determining who among employees should be retained or separated
 - Saving on labor costs is a valid reason for redundancy
 - Adoption of latest communication technology equipment, which can be operated by computers alone, is a valid basis for redundancy
 - Redundancy due to the hiring of independent contractors held valid
 - Example of Pieces of Evidence that would Substantiate Redundancy
 - Evidence of losses is not required
 - Reasonable criteria must be set in determining who shall be terminated
 - Rule Regarding “Last-In First-Out” (LIFO)
 - Employer is not bound by the LIFO method proposed by the labor union
 - When the choices given to employees all lead to termination, there is no choice at all
 - Burden of proof rests upon the employer
 - Accepted Criteria in Implementing Redundancy
 - Past transgressions may be part of the criteria
 - Redundancy exists even if there are no previous holders of redundant position
 - Hiring of contractual employee after effecting redundancy does not negate existence of redundancy
 - One-month notice may be disregarded if the worker consents to redundancy
 - Creation of new position after declaring another redundant may not indicate bad faith
- G. Retrenchment
 - Nature of Retrenchment
 - Meaning of “To Prevent Losses”
 - Retrenchment vs. Redundancy
 - Retrenchment is a duly recognized exercise of management prerogative
 - Limitations on the Exercise of Right of Management Prerogative to Retrench Employees
 - Retrenchment must be exercised only as a last resort
 - Retrenchment under Article 283 does not recognize temporary lay-off
 - Measures that may be Adopted Before Resorting to Retrenchment
 - Adoption of less drastic measures belies retrenchment in good faith
 - Basic Requisites for a Valid Retrenchment
 - Employer must prove serious business losses to justify retrenchment

- Security of tenure should not be denied on the basis of mere speculation brought by flimsy excuses for retrenchment
- Not all business losses would justify retrenchment
- Necessary conditions to justify retrenchment due to company losses
- Other Valid Justifications that may be Used
- Financial documents as proof of business losses must be signed by independent auditor
- The FS of the government-controlled corporations must be audited by COA
- Audited financial statements must be presented before the Labor Arbiter and not belatedly to the Court of Appeals or the Supreme Court
- Recognition of financial statements showing proof of losses is not a hard and fast rule
- The requirement on financial statements under the Tax Code is not the same as the Labor Code
- Business losses cannot be assessed by isolating branches or offices
- Neither self-serving affidavits, allegations of economic setback, decline of nickel prices nor volume of export, is sufficient proof to justify retrenchment
- Reasonable Criteria in Effecting Retrenchment
- Seniority must be taken into account in any retrenchment scheme
- Absence or disregard of any criteria or standard renders retrenchment invalid
- Rehiring of retrenched employee is an indication of bad faith
- Case where rehiring as project employees does not negate valid retrenchment
- Arbitrariness in the selection of employees to retrench is proof of bad faith and illegal retrenchment
- Requirement of One-Month Prior Notice
- Lack of 30-day notice to DOLE supports conclusion that retrenchment is illegal
- Thirty-day notice is still required although employees are on temporary lay-off prior to retrenchment
- Salary equivalent to 30 days cannot be made in lieu of 30-day prior notice
- Payment of salary for one month is sufficient indemnity for lack of required notice

H. Closure or cessation of business operations

- Nature of closure or cessation of business operations as ground for termination
- Closure or Cessation vs. Retrenchment
- Requisites for Cessation or Closure to be Valid
- Closure of business is management prerogative
- Employer has a right to close business operations even if there are no losses or serious financial reverses
- Closure of operation may be partial or only a section, branch or department
- Employer may close shop for any *bona fide* reason
- Non-renewal of employer's lease contract may be reason for closure
- If closure is due to economic reasons, the requirements for retrenchment must be followed
- Transfer or relocation of office or plant may amount to cessation of business
- Rule on change of ownership
 - Mere change in corporate name
 - Good faith and bad faith in change of ownership; Employer's liability
 - Sale or transfer of business
 - Asset sales vs. Stock sales
 - Rule on employer's liability in asset sales
 - Rule on employer's liability in stock sales
 - Manlimos Case
 - SME Bank Inc. Case
- Limitations on Management Prerogative to Close Business
- Employer has the burden to prove the validity of closure or cessation
- If the closure is in bad faith, dismissal is illegal
- Employer is still liable to pay separation if closure is not due to losses even if it acted in good faith
- If closure is due to economic losses employer may not be liable for separation pay
- Termination due to closure does not require hearing but notice to DOLE is necessary
- Employer must pay nominal damages if notice requirement is disregarded
- Rule on Separation Pay under Article 283
- Recent jurisprudence negates the award of separation pay if closure was due to losses

XV. Disease as ground for termination

- A. Rule if disease is curable within six months
- B. Rule if disease is not curable within six months
- C. Certification must be issued by Public Health authority
- D. Who is a public health authority? Can a company physician issue such certification?
- E. Competent public health authority
- F. Rule as to TB, HIV/AIDS, Hepatitis
- G. Employer has the burden to produce certificate
- H. Employer's remedy if employee refuses to undergo examination
- I. Notice of termination
- J. Payment of separation pay

XVI. Preventive Suspension

- A. Nature of preventive suspension
- B. Preventive suspension is not a penalty
- C. Serious and imminent threat
- D. Effect if preventive suspension has no basis
- E. Preventive suspension is not equivalent to dismissal
- F. Scientific finding is not a requisite to determine basis of preventive suspension
- G. Period of preventive suspension
- H. Effect if preventive suspension lasts beyond 30 days
- I. Extension of preventive suspension
- J. Preventive suspension and constructive dismissal
- K. Preventive suspension in construction industry

XVII. Resignation

- A. Meaning of resignation
- B. Termination by employee for cause
- C. Termination by employee without cause
- D. Rule on 30-day prior notice
 - 1. Concept of involuntary servitude
- E. Damages in resignation
- F. Acceptance of resignation
- G. Mere receipt of resignation letter is not equivalent to approval
- H. Effect of acceptance
- I. Forced resignation
- J. Withdrawal by employee of his resignation
- K. Non-acceptance of withdrawal; Effect
- L. Burden to prove involuntariness in resignation
- M. Resignation vs. dismissal
- N. Coercion in resignation; meaning of coercion
- O. Requisites for intimidation to exist; case of *Gan vs. Galderma Philippines, Inc.*, G.R. No. 177167, January 17, 2013
- P. Construction dismissal in resignation

XVIII. Retirement in relation to Dismissal

- A. Article 287 of the Labor Code
- B. Optional Retirement
- C. Compulsory Retirement
- D. Retirement Plan
- E. When retirement amounts to dismissal
- F. Retirement plan, CBA and dismissal
- G. Rule on shortening of effective date of retirement
- H. Redundancy in the guise of retirement application
- I. Case involving award of retirement benefit to a validly dismissed employee
- J. Continuation of service of retired employee

XIX. Consequences of Dismissal

- A. Consequences when dismissal is valid
 - 1. Separation pay
 - 2. Exceptions
 - 3. PLDT Doctrine
 - 4. Toyota Doctrine
 - 5. Forfeiture of benefits

- B. Consequences when dismissal is illegal
 - 1. Reinstatement
 - a. Reinstatement pending appeal (Art. 223)
 - b. Reinstatement by final and executory judgment (Art. 279)
 - c. Concept of strained relations
 - 2. Backwages
 - a. Mercury Drug rule (maximum 3 years backwages)
 - b. Ferrer doctrine (Deduction for earnings made elsewhere)
 - c. Bustamante rule (Full backwages)
 - 3. Separation pay
 - 4. Damages
 - 5. Attorney's fees
- C. Termination under DO 18-A
- D. Execution of waiver and quitclaim
- E. Requisites for validity of quitclaim
- F. Labor case filed after execution of quitclaim; effect

Center for Global Best Practices

Please Contact: **Mary Grace Dominguez**

Manila Lines (+63 2) **556-8968 or 69** * Manila Telefax (+63 2) **842-7148 or 59**

Cebu Lines (+63 32) **512-3106 or 07** * Baguio Line: (+63 74) **423-2914**

Email: **marae.cgbp@yahoo.com** * Website: **www.cgbp.org**