

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

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