

# Don't Let the Door Hit You on the Blank on the Way Out: Skipping the Notice Period

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Every HR manager has had that moment where they're trying to decide whether or not to waive a notice period for an employee who is terminating. Many also have a trickle of doubt about the repercussions waiving the notice period may create.

Frequently we see three common circumstances:

- **The difficult employee.** Essentially an employee that you have been hoping to terminate for ages because they are a poor performer and general pain. You are ready for them to be out the door. Although you might be doing a happy dance in your head, it remains important not to give the employee any reason to believe that waiving the notice period is some type of retaliatory action. This is an issue discussed in the recent Iowa case we will cover in an upcoming blog post.
- **A great employee.** You are sad to see them go, but then during the notice period, the employee pulls a Jekyll and Hyde. Now you need to move them out before the notice period is done.
- **The never-ending notice period.** "I'll be quitting when..." naming some sort of future event such as when I sell my house, find a new job, or potentially find the lost city of El Dorado. The problem here is that you need a date certain so that you can do appropriate planning and hire to fill the position.

It's fairly common to see the never-ending notice period when someone is thinking about retirement, but you have to be careful that you are not giving the impression that you are treating the employee differently because of their age. Retiring employees should be treated the same as any of the other never-ending notice period situations.

## Employer Discretion

Termination sections in many employment manuals discuss the necessity for notice, including policies limiting the payout of accrued but unused PTO if notice is not given. Employers should ensure that their policies indicate to employees that the employer, in its sole discretion, may waive the notice period. Having such a policy is useful if you need to waive notice because it gives employees fair warning that while notice is required, it will not always be worked.

## Performance Changes

There are significant issues to consider when you are managing an employee who is within their notice period. This

includes falling employee morale as the leaving employee may slow down or not create the same quality work product in their notice period, putting pressure on co-employees. Insubordination may also become an issue.

There may also be issues with customer interactions when employees are at the end of their job and are less willing to put their all into customer service.

## Access to Data

A clear legal issue is when we talk about employees who have access to data such as personally identifiable information from clients, hospitals, or other covered entities under HIPAA and HITECH.

The Office of Civil Rights, which enforces HIPAA/HITECH, is very concerned with issues relating to access to data and records protected by HIPAA/HITECH by employees in a notice period or who are terminated. Multiple fines have been issued when access continues past what OCR considers to be reasonable.

While a longer notice period might be necessary for things like patient transfer or cross-training for essential functions, the sooner you can get an employee out the door and cut off their access to highly confidential information, the more likely you are complying with requirements and expectations under HIPAA/HITECH, the Red Flag Rules, and other statutes. Additionally, allowing employees to have continued open-ended access to your intellectual property can create significant concern, particularly if that employee is heading to a competitor.

## PTO During Notice Period

In Iowa, your termination policy can prohibit employees from using accrued PTO during any notice period. PTO, except in some instances for FMLA and ADA issues, needs to be preapproved and is subject to business necessity and needs. You can decline to grant PTO during a notice period if you need employees to cross-train or perform specific functions before leaving. Most employers have had the experience of an employee who gives notice and then basically never returns, using up accrued sick leave and other PTO to the detriment of the employer. If you have policies where you do not pay out PTO upon termination of employment, you should consult your employment attorney regarding the structure of those policies and how to implement them. While this is acceptable in Iowa, there can be circumstances that could create issues with the Department of Labor.

## Job Service

For job service, if a notice is waived and the employee is unemployed for a substantive period of time, they may be able to obtain job service benefits from Iowa Workforce Development. Job service has been somewhat erratic in decisions relating to whether or not employees can get unemployment benefits during a break between employers. The shorter the notice period, certainly the less likely that the benefits would apply. However, in some instances, particularly for longer or nonspecific notice periods, IWD has granted job service benefits.

An additional concern for HR managers is whether waiving a notice period can somehow be considered discriminatory. We'll take a look at that issue and review two recent decisions from the Iowa Court of Appeals in the next post.

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