

## Successful Separations



### Presented by:

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**Heffernan Consulting**



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## Your Presenter: Ann Marie Malino, SPHR

- National Certification through the Human Resources Certification Institute (HRCI) as a Senior Professional in Human Resources (SPHR)
- 25 years of practical HR management and corporate training experience
- Former President of Society of Human Resource Management (SHRM) – San Diego Chapter
- Instructor for HR and management courses
- Investigator for harassment and discrimination complaints



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## Content disclaimer

- The information presented is general in nature and is intended to present an overview of employment practices. The written and verbal contents of the presentation are not intended to constitute consulting and/or advice and no client relationship is established between the presenter and attendees.



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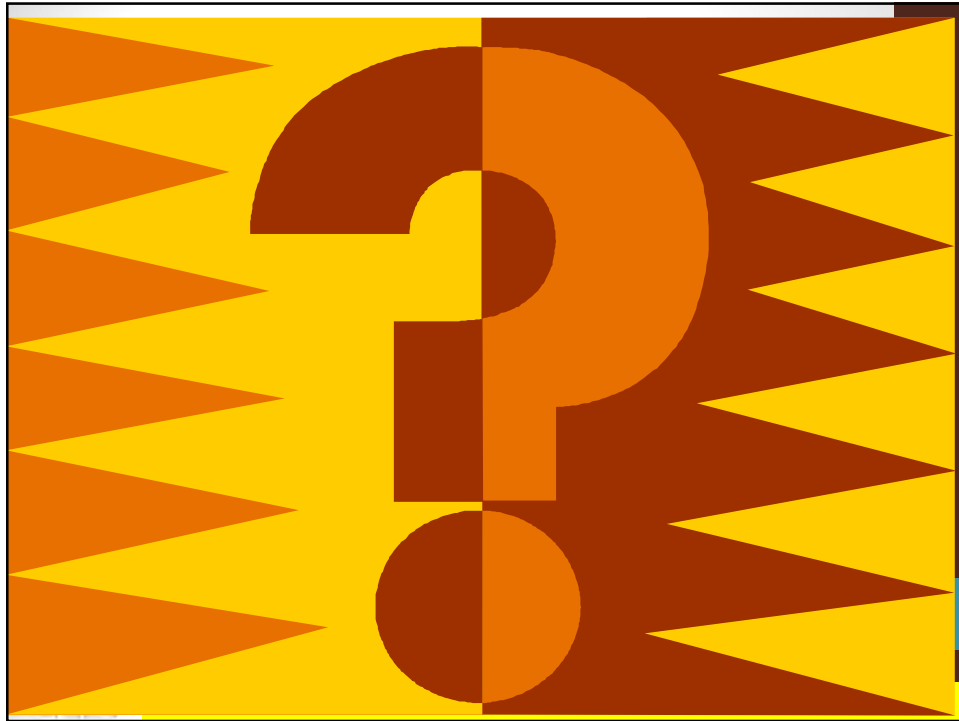
## Session Objectives

### **Assist you to:**

- Understand employment relationships
- Identify the employment laws that affect termination
- Recognize legitimate reasons for terminating employees
- Prevent wrongful discharge and discrimination lawsuits



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## Employment Relationships

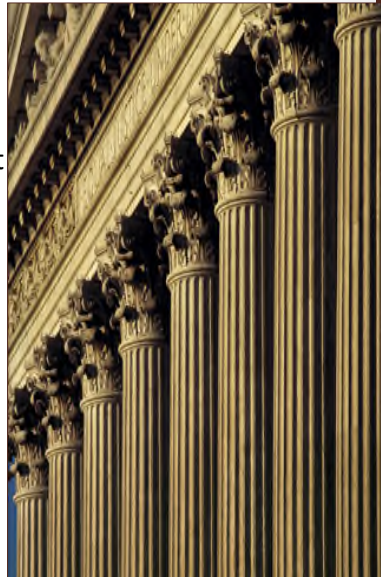
- **Employment contracts**
  - Agreement that formally outlines the details of employment. Usually used only for top executives.
- **Employment-at-will**
  - Common-law doctrine stating that employers have the right to hire, fire, demote, or promote whomever they choose, unless there is a law or contract to the contrary.
- **Psychological contract**
  - The unwritten expectations employees and employers have about the nature of their work relationships.



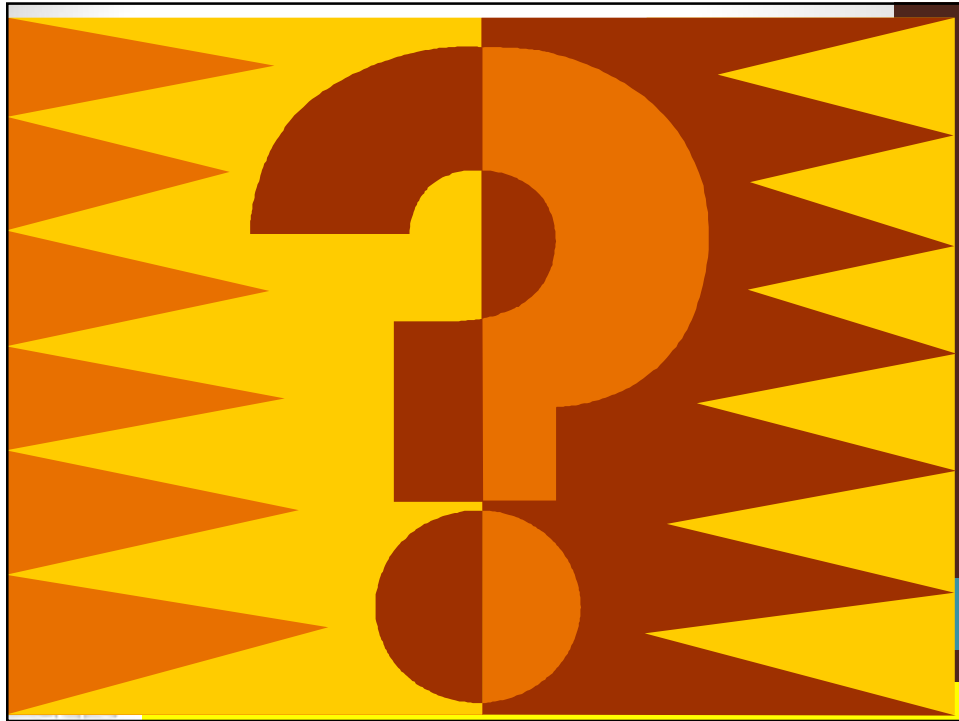


## Legal Limitations on Termination

- Civil Rights Act of 1964
- Fair Labor Standards Act
- National Labor Relations Act
- Occupational Safety and Health Act
- Age Discrimination in Employment Act
- Whistleblowers Protection Act of 1989
- Employee Retirement Income Security Act
- Rehabilitation Act of 1973 and Americans with Disabilities Act of 1990



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## Poor Performance

• You have the right to terminate for poor performance, BUT:

- Exhaust other possibilities before resorting to termination
- ✓ DOCUMENT, DOCUMENT, DOCUMENT!



# Insubordination

• You must be able to prove that:

- The employee understood what was expected
- The expectation wasn't illegal
- The expectation was important
- The employee was required to comply
- The insubordination was intentional

☐ Also:

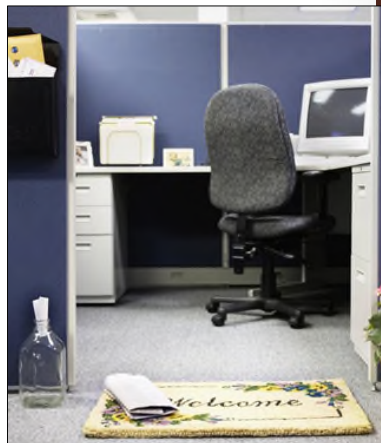
- ✓ Focus on the most serious offenses
- ✓ Consider alternatives before termination
- ✓ DOCUMENT, DOCUMENT, DOCUMENT!



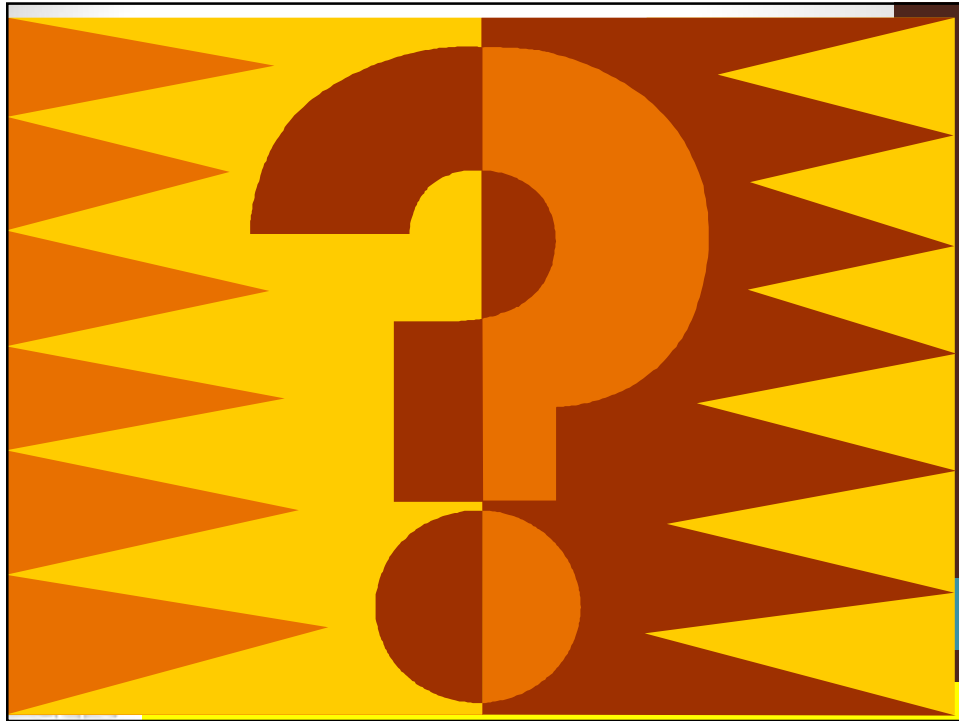
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# Poor Attendance and Tardiness

- Make sure employees understand attendance policies and procedures
- Distinguish between excused and unexcused absences
- Interpret and apply the rules reasonably and fairly
- ✓ DOCUMENT, DOCUMENT, DOCUMENT!



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## Attendance and Tardiness: Legal Considerations

- Family and Medical Leave Act
- Title VII
- Americans with Disabilities Act
- Workers' compensation laws
- CA Paid Sick Leave



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## Other violations of Company Policy

- Standards of conduct
- Abusive Conduct (Bullying)
- Dress code
- Harassment
- Etc....



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## Violations of Company Policy

- Make sure employees understand company policies
- Include a review of key policies during new employee orientation
- Communicate expectations clearly
- Describe possible consequences of violations
- ✓ DOCUMENT, DOCUMENT, DOCUMENT!
- Apply appropriate consequences



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## Breaking the Law

• *Be sure to ask questions like these:*

- Did the illegal activity take place at work or outside of work?
- Has the employee been convicted of the crime?
- Is the crime related to the job?



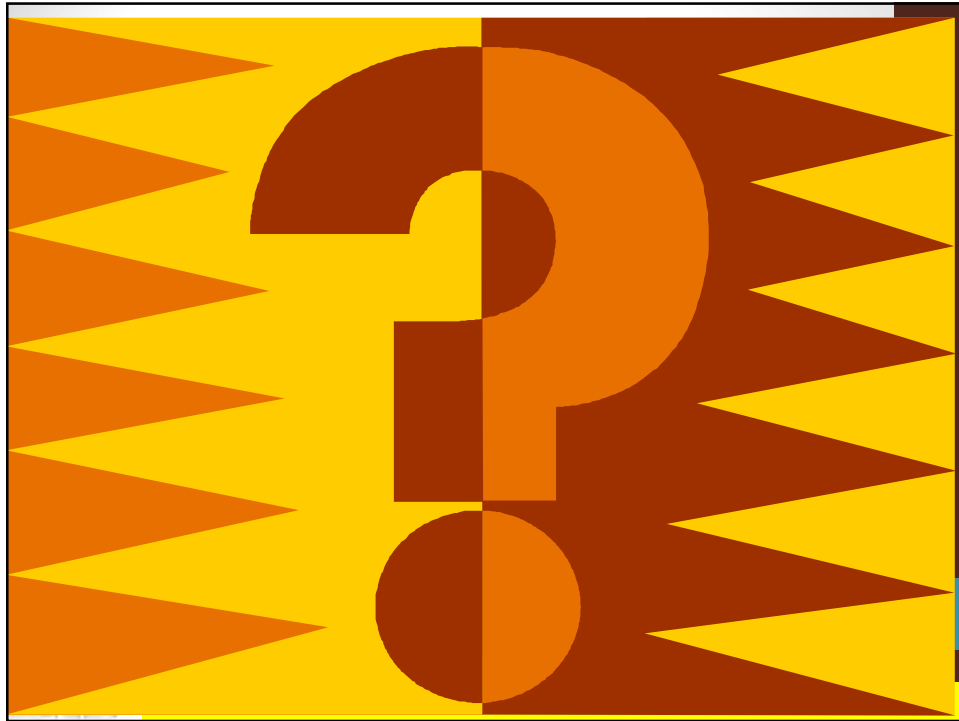
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## Dishonesty

- Dishonest behavior must be work related
- Make sure you have solid evidence
- Have employees sign a code of ethics



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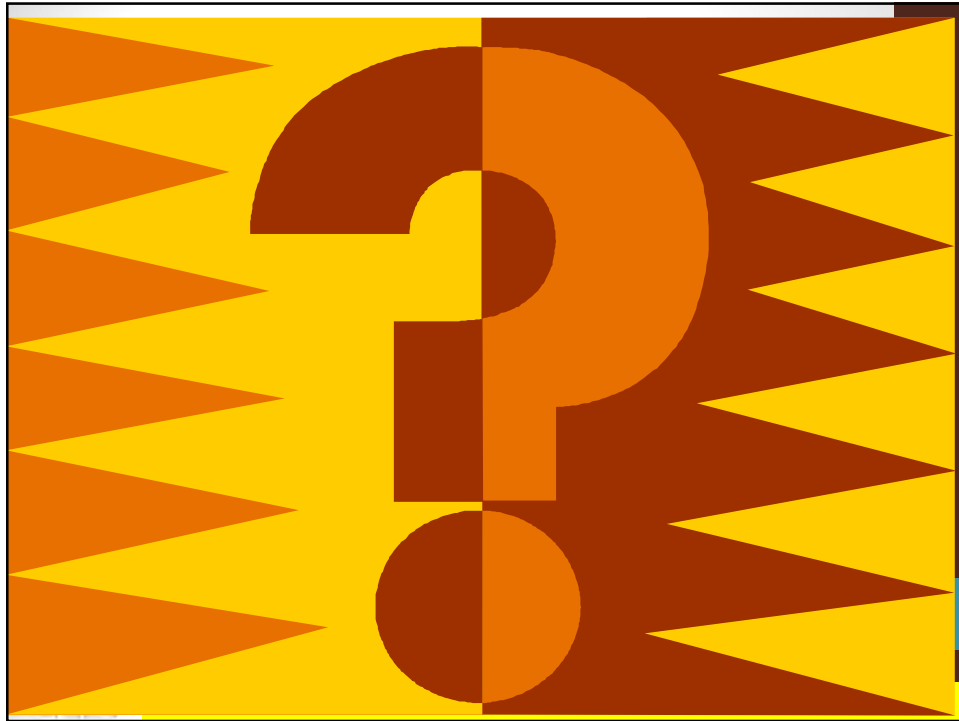


## Threats to Workplace Safety

- **You may be able to fire an employee for:**

- Drug and alcohol policy violations
- Reckless behavior
- Threats and intimidation
- **DOCUMENT, DOCUMENT, DOCUMENT!**





## Threats to Workplace Safety (cont.)

- **You CANNOT fire an employee for:**

- Seeking help for drug addiction or alcoholism
- Complaining about safety issues
- Cooperating with OSHA inspectors
- Refusing to perform a dangerous job that puts safety at risk



## Layoffs - RIF

- What is the business reason for the layoff or reduction in force?
- Give effective notice
- Comply with the WARN Act if applicable  
[http://www.edd.ca.gov/jobs\\_and\\_training/layoff\\_services\\_warn.htm](http://www.edd.ca.gov/jobs_and_training/layoff_services_warn.htm)
- Make sure workers receive pay and benefits to which they're entitled
- Consider timing of notification
- Address the impact on the remaining employees



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## Before Termination CONSIDER:

- At-will or employment contract?
- Length of employment?
- Time in job?
- Protected class status?
- Violation of Public Policy?
- Co-employer relationship?
- Obligation under WARN?



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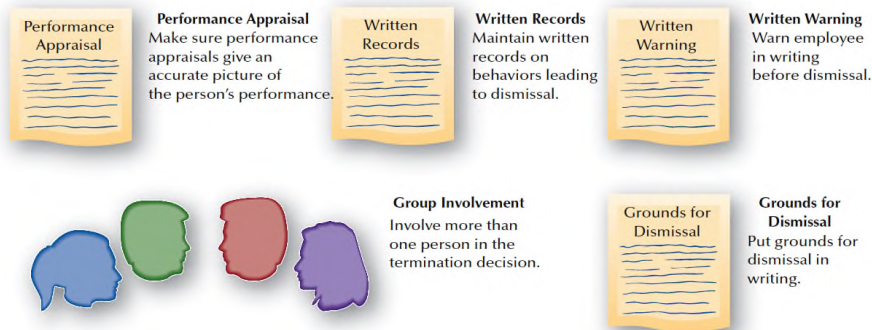
## Before Termination ASK:

- Is the job being replaced?
- History of complaints from employee?
- Who, how and when has the company responded to employee complaints?
- Does the perception of hostile work environment exist?
- Will this come as a surprise to the employee?
- Did I DOCUMENT, DOCUMENT, DOCUMENT?
- Does a “paper trail” exist and would that be beneficial or detrimental?



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## The “Paper Trail”



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## Criteria for Evaluating Fairness

### JUST-CAUSE DETERMINANTS

- Was the employee warned of the consequences of the conduct?
- Was the employer's rule reasonable?
- Did management investigate before disciplining?
- Was the investigation fair and impartial?
- Was there evidence of guilt?
- Were the rules and penalties applied evenhandedly?
- Was the penalty reasonable, given the offense?



### DUE PROCESS CONSIDERATIONS

- How have precedents been handled?
- Is a complaint process available?
- Was the complaint process used?
- Was retaliation used against the employee?
- Was the decision based on facts?
- Were the actions and processes viewed as fair by outside entities?



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## Termination Decisions

- **Employment attorney consultation?**
- **Severance?**
- **Separation agreement?**
- **Final pay (what must be included)?**
- **Bonus payout pending or due?**
- **Benefit continuance?**
- **Outplacement assistance?**



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## Termination-Risk Assessment

- Workplace violence
- Security - IT
- Possession/return of company assets & property
- Confidentiality and proprietary agreements
- Company response to inquiries about employee
- Company reputation



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## Final Observations

- Think carefully before deciding to terminate
- Consult with legal counsel
- Move quickly once the decision is made
- Fire employees in private
- Have an HR specialist at the meeting, if necessary
- HR conduct an exit interview, if appropriate
- Communicate internally (employees) and externally (customers)



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Thank you!



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