

*Here's How and When to Do It*

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# ***ACTION GUIDE***

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## **Handling a Wrongful Termination Action**

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CONTINUING EDUCATION OF THE BAR ■ CALIFORNIA  
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# Handling a Wrongful Termination Action

by William M. Crosby

## When Interviewing Terminated Employee Client

### STEP 1. DETERMINE WHETHER YOU OR STAFF MEMBER WILL INTERVIEW THE CLIENT

#### CONDUCT INITIAL SCREENING

Because you may be unable to help all the terminated employees who contact you, *e.g.*, those whose employment was of short duration and who were not terminated for an unlawful reason, screen callers for, *e.g.*:

- a. Those you or your paralegal will interview because you might take their cases (see [step 28](#), below, for discussion of contingency fee arrangement);
- b. Those you will advise in exchange for a consultation fee; and
- c. Those you will be unable to interview or advise.

#### IF YOU INTERVIEW CLIENT

By interviewing client personally, you can, *e.g.*:

- a. Begin evaluating client's credibility; and
- b. Ask follow-up questions to elicit necessary facts as client's story unfolds.

#### IF PARALEGAL INTERVIEWS CLIENT

- a. It may be more efficient and cost-effective to have a paralegal or other staff member interview the client; but
- b. The paralegal or other staff member should explain to the client why the attorney is not conducting the interview.

#### NOTE

Even if a staff member conducts the interview, you should still meet with the client before taking the case.

#### CONSIDER USING CLIENT INTERVIEW FORM

Consider developing a client interview form that you can use to obtain basic client information by:

- a. Having client complete form before the interview; or
- b. Filling out form when you or staff conduct the interview.

**Sample Form:** For a sample interview form, see [Appendix A](#).

#### NOTE

If the client completes the form, consider including on the form a statement that until you and the client execute a retainer agreement, your office does not represent him or her.

**STEP 2. GATHER BASIC INFORMATION ABOUT THE PARTIES****ABOUT THE EMPLOYER**

Ascertain:

- a. Correct legal name, address, state of incorporation, and principal place of business;
- b. Nature of business;
- c. Any potentially related entities, *e.g.*, a parent company (for purposes of jurisdiction, calculating net worth, and identifying conflicts);
- d. Number of employees (see, *e.g.*, *Jennings v Marralle* (1994) 8 C4th 121, 32 CR2d 275 (employer of fewer than 5 employees not subject to Fair Employment and Housing Act (FEHA) age-discrimination prohibition); Govt C §§12926(d), 12940(a) (employers of 5 or more subject to sexual orientation discrimination prohibition); Govt C §12945.2(b) (employer of 50 or more within 75 mile radius of worksite subject to Family Rights Act));
- e. Employer's financial health; and
- f. Any prior and current employment lawsuits in which employer is involved.

**NOTE**

A direct employment relationship is not a prerequisite to Title VII liability if the defendant exercises sufficient power over an individual's employment opportunities. *Association of Mexican-American Educators v California* (9th Cir 2000) 231 F3d 572, 580.

**If Government Employer**Ascertain whether employer is a government entity, because public employee may be, *e.g.*:

- a. Protected from termination without cause (see Civil Service Reform Act of 1978 (CSRA) (5 USC §7513));
- b. Unable to sue for breach of contract (see *Kemmerer v County of Fresno* (1988) 200 CA3d 1426, 246 CR 609);
- c. Expressly protected by statute, *e.g.*, California Whistleblower Protection Act (Govt C §§8547–8547.12);
- d. Required to file government tort claim before bringing suit (see *Handling Claims Against Government Entities*, steps 4–5 (Cal CEB Action Guide Winter 2000));
- e. Entitled to due process hearing before termination (see *Skelly v State Personnel Bd.* (1975) 15 C3d 194, 124 CR 14); or
- f. Protected by constitutional provisions that may not apply to private sector employees (see, *e.g.*, *Pickering v Board of Educ.* (1968) 391 US 563, 201 L Ed 2d 811, 88 S Ct 1731 (freedom of speech)).

**Further Research:** For a list of representative statutes and cases affecting public employees, see Appendix D.

<b>ABOUT THE EMPLOYEE</b>	Ascertain:
<b>Member of Protected Class</b>	<p>a. If employee is a member of a class protected by statute or by federal or state constitutions, <i>e.g.</i>, determine employee's:</p> <ol style="list-style-type: none"> <li>(1) Race;</li> <li>(2) National origin;</li> <li>(3) Age;</li> <li>(4) Sex or gender;</li> <li>(5) Religion;</li> <li>(6) Disability;</li> <li>(7) Sexual orientation; and</li> <li>(8) Family status (for possible application of California <a href="#">Family Rights Act</a>); and</li> </ol>

**NOTE** 

b. Whether employee's claim relates to membership in any protected class.

Because the civil rights statutes provide broad protection, *e.g.*, [Title VII](#) prohibits same-sex sexual harassment (see *Oncale v Sundowner Offshore Servs.* (1998) 523 US 75, 140 L Ed 2d 201, 118 S Ct 998 (harassment of male subordinate by male supervisor)), and state law protects men as well as women from sexual harassment (see *Mogilefsky v Superior Court* (1993) 20 CA4th 1409, 26 CR2d 116 (male-on-male sexual harassment)), each employee may be a member of several protected classes. For a discussion of employment discrimination claims, see [Wrongful Employment Termination Practice, chap 2](#) (2d ed Cal CEB 1997), referred to throughout this Action Guide as Wrongful Emp Term.

<b>Work History</b>	Employee's work and salary history with <i>previous</i> employers.
<b>Previous Problems</b>	Whether employee has had similar problems in <i>previous</i> jobs, <i>i.e.</i> , litigation with former employer(s).
<b>Personal Situation</b>	Whether employee's personal situation may explain problems at work or may be a separate cause of employee's emotional distress.

**NOTE** 

If the client has a therapist, *before taking the case*, you may want to obtain a release from the client that permits you to talk with the therapist. It may also be helpful to obtain and review copies of the client's medical records.

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**STEP 3. GATHER BASIC INFORMATION ABOUT THE EMPLOYEE'S RELATIONSHIP WITH THE EMPLOYER**


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**EMPLOYMENT HISTORY**

<b>Employment Records/Job History</b>	Obtain employee's job history with employer (see <a href="#">Lab C §§432, 1198.5(a)</a> ), <i>e.g.</i> :
---------------------------------------	--

- a. Application forms signed before or during employment;
- b. Description of all positions held;
- c. Length of service;
- d. Commendations;
- e. Disciplinary actions;
- f. Promotions;
- g. Pay raises; and
- h. Copy of employee's personnel file (including any application forms), or description of its contents.

**Agreements Applicable to Employment**

Obtain agreements and evidence of agreements (see [Lab C §§432, 198.5\(g\)](#)), *e.g.*:

- a. Copy of collective bargaining agreement if employee belonged to union at time of termination;
- b. Copy of any arbitration or other agreement signed by employee;
- c. Verbal assurances or representations of job security and/or continued employment; and
- d. Correspondence between employer and employee regarding, *e.g.*, application or terms of employment.

**EMPLOYMENT POLICIES**

Obtain written documents pertaining to termination or length of employment, *e.g.*:

- a. Personnel policies;
- b. Employment application language;
- c. Personnel manuals;
- d. Termination guidelines;
- e. Employee handbooks; and
- f. Benefit applications.

**Further Research:** For a checklist of documents to obtain from the client, see [Wrongful Emp Term §9.38](#).

**ARBITRATION AGREEMENT**

Ascertain whether there is an arbitration clause in the employment agreement or other document, *e.g.*, registration with securities associations.

**Preemption of State Discrimination Claims**

An arbitration agreement might preempt state discrimination claims if the agreement (*Armendariz v Foundation Health Psychcare Servs., Inc. (2000) 24 C4th 83, 91, 99 CR2d 745*):

- a. Permits the employee to vindicate his or her statutory rights and obtain all types of relief available in court; and
- b. Meets certain fairness requirements, including:

- (1) Neutrality of the arbitrator;
- (2) Provision of adequate discovery;
- (3) A written decision that permits a limited form of judicial review; and
- (4) Limitations on the costs of arbitration.

**Preemption of State Claim for Wrongful Termination in Violation of Public Policy**

An arbitration agreement might preempt state claims for wrongful termination in violation of public policy if its terms meet the minimum standards for statutory claims in *Armendariz v Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 116, 99 CR2d 745. *Little v Auto Stiegler, Inc.* (2003) 29 C4th 1064, 130 CR2d 892 (employee cannot be compelled to arbitrate claim of wrongful termination in violation of public policy unless arbitration meets *Armendariz* standards for statutory discrimination claims).

**Preemption of Other State Wrongful Termination Claims**

An arbitration agreement might preempt other state wrongful termination claims, *e.g.*, for breach of covenant of good faith and fair dealing, if its terms are not unconscionable. See *Armendariz v Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 116, 99 CR2d 745.

**Preemption of Federal Discrimination Claims**

An arbitration agreement might preempt federal discrimination claims. See, *e.g.*:

- a. *Circuit City Stores, Inc. v Adams* (2001) 532 US 105, 149 L Ed 2d 234, 121 S Ct 1302 (Federal Arbitration Act (FAA) exempts only transportation workers);
- b. *Gilmer v Interstate/Johnson Lane Corp.* (1991) 500 US 20, 114 L Ed 2d 26, 111 S Ct 1647 (Federal Arbitration Act preempted ADEA claims);
- c. *EEOC v Luce, Forward, Hamilton & Scripps* (9th Cir 2003) 345 F3d 742 (employers may require applicants and employees, as a condition of employment, to sign agreements to arbitrate Title VII claims, overruling *Duffield v Robertson Stephens & Co.* (9th Cir 1998) 144 F3d 1182 (arbitration agreement not enforceable as to Title VII discrimination claims)).

**Further Research:** For a discussion of when arbitration agreements are not enforceable, see Wrongful Emp Term §§13.29–13.33. See also *Kinney v United HealthCare Servs., Inc.* (1999) 70 CA4th 1322, 83 CR2d 348; *24 Hour Fitness, Inc. v Superior Court* (1998) 66 CA4th 1199, 1212, 78 CR2d 533; *Cione v Foresters Equity Servs., Inc.* (1997) 58 CA4th 625, 68 CR2d 167; *Stirlen v Supercuts, Inc.* (1997) 51 CA4th 1519, 60 CR2d 138; *Vianna v Doctors' Mgmt. Co.* (1994) 27 CA4th 1186, 33 CR2d 188.

**STEP 4. GATHER BASIC INFORMATION ABOUT THE RESIGNATION OR TERMINATION**

**IF RESIGNATION**

If employee resigned, gather same information as though employee had been terminated (see below), *plus*:

**Constructive Discharge** Determine whether (see *Turner v Anheuser-Busch, Inc.* (1994) 7 C4th 1238, 1251, 32 CR2d 223; *Gibson v Aro Corp.* (1995) 32 CA4th 1628, 1635, 38 CR2d 882):

- a. Employer either intentionally created or knowingly permitted “intolerable” or “unusually aggravated” working conditions (as defined in *Turner*);
- b. Employee notified employer of these conditions;
- c. A reasonable person would have felt compelled to resign in light of employer’s treatment of employee; and therefore
- d. Employee was constructively discharged.

**Further Research:** See *Pennsylvania State Police v Suders* (2004) \_\_\_ US \_\_\_, 159 L Ed 2d 204, 124 S Ct 2342 (constructive discharge claim can be brought under Title VII).

**How Long Employee Endured Intolerable Working Conditions** Although there is an outer limit beyond which an employee cannot remain on the job and still claim constructive discharge, use of the applicable statute of limitations to define that limit is too arbitrary. *Turner v Anheuser-Busch, Inc.* (1994) 7 C4th 1238, 1254, 32 CR2d 223, disapproving *Panopulos v Westinghouse Elec. Corp.* (1989) 216 CA3d 660, 669, 264 CR 810.

**When Statute of Limitations Begins to Run**

- a. *Constructive discharge:* The statute of limitations on an action based on constructive discharge begins to run on the last day of employment, at least as to contract claims. *Mullins v Rockwell Int’l Corp.* (1997) 15 C4th 731, 63 CR2d 636.
- b. *No constructive discharge:* FEHA action based on employer’s continuing course of illegal conduct (see [step 8](#), below) accrues when either the (*Richards v CH2M Hill, Inc.* (2001) 26 C4th 798, 111 CR2d 87 (FEHA disability discrimination action for failure to reasonably accommodate disability)):
  - (1) Course of conduct is brought to an end; or
  - (2) Employee is on notice that further efforts to end the unlawful conduct will be in vain.

**Further Research:** See, e.g., *Tonry v Security Experts, Inc.* (9th Cir 1994) 20 F3d 967, 971; *Addy v Bliss & Glennon* (1996) 44 CA4th 205, 219, 51 CR2d 642; *Valdez v City of Los Angeles* (1991) 231 CA3d 1043, 1056, 282 CR 726. See also Wrongful Emp Term §§9.78–9.80.

## IF TERMINATION

Ascertain:

- a. Circumstances, including dates, leading to termination;
- b. Person(s) who decided to terminate and informed employee of decision;
- c. Evidence of malicious conduct, e.g.:
  - (1) Name calling;
  - (2) Defamatory statements; or

- (3) Deprivation of protections assured under company policy;
- d. Reasons employer gave for termination, and any information indicating pretext or inconsistent/disparate treatment;
- e. Name, age, seniority, and job experience of any incumbent or new employee(s) who after the termination:
  - (1) Replaced employee; or
  - (2) Assumed employee's former job assignments (whether all or part);
- f. Financial terms of discharge and terms of any termination or release agreement proposed and/or signed; and
- g. How the termination meeting was conducted, *e.g.*:
  - (1) Door open; or
  - (2) Other employees present.

**Further Research:** See *Wrongful Emp Term* §§9.9–9.21.

**OBTAIN  
DOCUMENTATION**

Obtain:

- a. Documented reasons for termination (including any investigation conducted by employer);
- b. Any evidence that documentation may be incorrect; and
- c. All other documents relating to termination.

**IDENTIFY WITNESSES**

Find names of witnesses you could contact about employee's performance and termination; *but*:

**Do Not Contact Current  
Company Managers**

Once you have learned that employer is represented by counsel in the matter, do *not* approach current managers, because they are covered by:

- a. Lawyer-client privilege (see *D.I. Chadbourne, Inc. v Superior Court* (1964) 60 C2d 723, 36 CR 468); and
- b. *Cal Rules of Prof Cond 2–100* (see below). See *Snider v Superior Court* (2003) 113 CA4th 1187, 7 CR3d 1119; *Triple A Mach. Shop, Inc. v State* (1989) 213 CA3d 131, 261 CR 493.

**Current Employees**

Be careful when approaching other *current* employees, because an employee may be considered a party represented by counsel, whom you may not contact *ex parte* when (*Cal Rules of Prof Cond 2–100*):

- a. Subject of communication is an act/omission of employee that could be imputed to employer for purposes of establishing liability; or
- b. Employee's statement could constitute an admission by employer for purposes of establishing liability.

**Further Research:** See *Triple A Mach. Shop, Inc. v State, supra*.

**Former Employees,  
Including Managers**

You may communicate with *former* officers, directors, and manager or recipient witness employees if they are not represented by counsel. [Cal Rules of Prof Cond 2–100](#). See [Nalian Truck Lines, Inc. v Nakano Warehouse & Transp. Corp. \(1992\) 6 CA4th 1256, 1261, 8 CR2d 467](#); see also [Continental Ins. Co. v Superior Court \(1995\) 32 CA4th 94, 111, 37 CR2d 843](#) (communication with former employee permissible even if it involves his or her act or omission that may be binding on former employer for purposes of liability).

**NOTE** 

In some cases you will want to obtain witness statements before alerting employer to potential claim, *e.g.*, before writing demand letter.

**STEP 5. GATHER INFORMATION ABOUT EVENTS AFTER THE TERMINATION****GATHER INFORMATION**

Collect information, *e.g.*:

**About Employee's  
Activities**

Determine whether employee:

- a. Is making efforts to mitigate problem (*e.g.*, ascertain scope of employee's job search efforts and details of any employment held since termination);
- b. Has any current employment prospects;
- c. In any job held since termination, has experienced problems similar to those with the potential defendant;
- d. Filed any discrimination claim(s) with any government entity and, if so, ascertain status of the claims (*i.e.*, whether entity issued a right-to-sue letter (see [Wrongful Emp Term §§9.49–9.59](#); see also [Appendix D](#)));
- e. Applied or intends to apply for unemployment or workers' compensation or disability benefits, and, if so, review claim to identify possible effect on wrongful termination action and the status or outcome of application (see, *e.g.*, [Jefferson v California Dep't of Youth Auth. \(2002\) 28 C4th 299, 121 CR2d 391](#) (plaintiff's discrimination suit barred by prior workers' compensation compromise and release and attachment); but see [Claxton v Waters \(2004\) 34 C4th 367, 18 CR3d 246](#) (plaintiff's harassment suit not barred because, unlike *Jefferson*, no separate statement of intent to release other employment claims was included with workers' compensation release));
- f. Discussed termination or events surrounding termination with anyone, *e.g.*, job counselors or out-placement consultants;
- g. Consulted any physicians or counselors about problems caused by or related to the termination; and
- h. Filed for bankruptcy after the termination. See, *e.g.*, [Cloud v Northrop Grumman Corp. \(1998\) 67 CA4th 995, 79 CR2d 544](#) (once plaintiff filed bankruptcy petition, she no longer had standing to pursue wrongful termination claim against former employer; only bankruptcy trustee had standing).