Directors, managers and supervisors almost always agree that terminating an employee generates more anxiety for all involved than most other tasks. Human resources has an opportunity to assist in this difficult process and part of that assistance rests with a practical checklist. A practical checklist can enhance the uniformity of the termination process, which may increase fairness and reduce potential employer liability. Following are the ingredients of a termination checklist:

1. Has the employer clearly defined the rules?
   Fair employers define employee success and failure through employer documents like employee handbooks, standard operating procedures and job descriptions. These documents of delegation define employer expectations of employees in the workplace. Consistent with due process, fundamental fairness and common sense, employers should not hold employees accountable to rules which the employer has failed to define. By clearly defining employee expectations in employer documents, the employer has established the measuring stick for terminating employees who have not met the defined standards.

   In evaluating whether the employer has clearly defined standards, the employer should also determine whether the consequences of a failure to meet the defined standards are cleared addressed. Some employers tell employees about all of the ways employees can find trouble in the workplace but sometimes those employers have not defined the consequences of trouble. Will certain behaviors generate a verbal coaching while other behavior may mean termination. Do your employees understand the difference?

   Employers should also define the legal standard for termination. Are you an at-will or for-cause employer? By defining these standards in employer documents, employers provide a road map for the termination process.

2. Has the employee been given notice of the rules?
   Sometimes employers invoke the “everyone knows you cannot do that” rule and hold employees accountable to standards that are not explicitly defined but so common that everyone should know it cannot be tolerated. Employers cannot anticipate all of the potential trouble employees may offer, but employers should be able to anticipate and define most poor behavior in the workplace. The more employers can demonstrate that employees were aware of the rules before the employee breaks the rules, the more the employer is providing due process to employees.

3. Are there reliable facts to support the alleged violation of the rules?
   Tribal employers strive to understand the facts before deciding to terminate an employee. Part of understanding the facts involves scrutiny of the information received. Is it enough to rely on the manager’s report of employee misconduct or is an investigation necessary to determine the facts? Is the manager’s recommendation influenced by another employee’s views which may violate the tribe’s rules? For instance the manager recommends terminating an employee for poor customer service but the manager is relying on a supervisor’s report which is heavily influenced by the supervisor’s racial animus. This so-called “cat’s paw” liability when the stated reason for termination was influenced by an illegal purpose creates potential problems in the termination process.

   Have you talked to the employee about the incident? Getting the employee’s side of the story is an important aspect of due process and may enhance the strength of your case in unemployment proceedings if the employee admits the wrongdoing.

4. Does termination fit the crime?
   The gravity of the misconduct should have an impact on whether an employee is terminated or another disciplinary tool is more appropriate under the circumstances. Individual managers should have the discretion to make decisions about discipline and termination; however those decisions should be scrutinized by the chain of command with the assistance of human resources. Sometimes a manager makes a hot headed decision in the moment to terminate an employee and the cooler heads in human resources can encourage the calm reasoning necessary to make a fair decision which is consistent with precedent set in similar cases.

   An aspect of this conversation should determine whether the manager has exhausted the viable alternatives for rehabilitating an under performing employee into an employee who exceeds expectations. Through training, mentoring, coaching and other management tools, is there a way to save the employee from termination and save the employer from starting over with a job vacancy?

5. Are the documents complete and consistent?
   Check to determine whether the documents that record the behavior are consistent with the manager’s story, and almost as importantly, check to see if historical documents reflect a pattern of behavior. Sometimes model employees violate important rules which justify immediate termination. Think employee theft. On the other hand, a manager allegation that
an employee is not productive when the employee’s thick personnel file sings consistent praise for the employee, some scrutiny of the manager’s observation is reasonable. Accordingly, examine the present documents that record the latest incident and review previous documents to determine whether the behavior is part of a pattern or an outlier.

6. Have the potential legal issues been evaluated?

There could be numerous potential legal issues, therefore, involving human resources and your lawyers in termination decisions is a good idea. Of the many potential legal issues, consider whether the employee is entitled to job protected leave, has recently made allegations of harassment or has raised whistle blower concerns. If an employee is entitled to job protected leave that may not be enough to save their job if termination is warranted, but pausing long enough to get legal advice may put you in a much better position to make a sound decision.

7. Are there any anticipated concerns stemming from the termination?

There is not a short checklist that covers all potential concerns caused by some terminations but a couple examples illustrate the issue. Do you anticipate the potential for violence during or after the termination? Be on the safe side by anticipating this issue and take the necessary precautions to protect everyone.

As another example of anticipated concerns, have you taken steps to cover the work that will not get done because the employee is leaving? Employee termination can significantly disrupt the workplace in myriad ways as the termination may bring anxiety or relief to other employees. Whether the employees celebrate or cry at the departure of their colleague, someone has to cover the shift, complete the task or delegate the responsibility.

8. Have you given the employee notice of grievance and other rights?

Some employers give employees the right to question the termination through a grievance or other process. If employees possess that right, giving the employee written notice of the right is consistent with due process. Additionally, employers should provide notice of an employee’s right to continued health care coverage and other benefits.

9. Have you planned for the termination meeting?

Thinking about the termination meeting is an important aspect of the termination process. Preparation of the termination paperwork before the meeting is consistent with best practices. Part of the decision-making will be whether the documents reflect an at-will termination or a termination based on a reason. The employer’s handbook or policy manual should define the legal standard for termination and the termination paperwork must be consistent with those defined standards.

A supervisor should serve as a silent witness to the termination meeting and should take contemporaneous notes during the meeting. Employers should have a process for assisting employees in gathering their personal belongings. Employers should approach the termination process with respect for employee dignity. When dignity is missing from the employer’s checklist, it fuels employee animus and may prompt litigation, violence and ill-will.

10. Have you considered post-termination tasks?

Do you have a process for documenting the issuance of employer property to individual employees and do you have a process for the return of that property to the employer? Getting employees to return keys, phones, laptops, credit cards, uniforms and ipads will go smoothly if the employer has documented the issuance of its property to employees, which in turn creates its own checklist for returning the goods. Those documents will also help in the recovery of the employer property if the employee is reluctant to cooperate.

Will you issue a final paycheck at the time of termination or shortly thereafter? There are lots of state laws which address an employer’s legal duty to quickly issue final paychecks and those laws may, or may not, apply to you and whether the federal wage and hour laws apply is uncertain as well. Tribal employers should develop an internal policy dealing with the timing of final paychecks and whether there will be deductions from those checks for monies owed to the employer because of a failure to return employer property.

Have you foreclosed the employee’s access to your computer network? Taking reasonable steps to limit an employee’s opportunity to sabotage computer systems or steal player club information should be part of your termination checklist.

Have you reminded the employee of her obligation to maintain confidentiality even after the employee’s termination? If you have the right confidentiality agreement or policy, employee promises of confidentiality will survive employee termination. Protect yourself from former employees going to your competitors and sharing your marketing strategy for 2014.

Recommendation: Develop a checklist which fits your protocols and train your people to follow the checklist. Determine whether your termination related documents are refined to reflect your checklist and industry best practices.

Richard McGee is a Minnesota attorney and author of “A Guide to Tribal Employment.” He can be reached by calling (612) 812-9673 or email richardmcgee@comcast.net.