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Last Chance Agreements

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For the last twenty-five years, the federal civil service hearing authority, the [Merit Systems Protection Board](#), has relied on prehearing conferences and settlement negotiations to resolve many thousands of appeals, including Last Chance Agreements (LCAs).

They also are used in state and local government personnel systems.

A. Why do parties settle a termination action with an LCA?

1. Civil service boards, hearing examiners, administrative law judges and arbitrators have limited choices: to affirm or overturn a dismissal or reduce the punishment for valid and stated reasons.

- An LCA is an agreement of an employer and employee; it can state whatever terms the parties agree to, for whatever period the parties choose, and violations of the LCA have a limited and focused review.

2. Employers expend substantial funds in the recruitment, selection, classroom instruction and on-the-job training of employees. An LCA is cost-effective for the employer if the worker corrects his or her behavior; the worker is given a second chance, which financially benefits his dependents and avoids unemployment compensation claims.

- Although national statistics are not known, some studies reveal that a large number of private sector workers are fired for violating an LCA. (1999, Bamberger, *at pp. 10-13*)

3. Litigation and administrative appeals are never a “slam-dunk.” Things can go wrong: witnesses can weasel, documents and evidence can get “lost” and enemies can change sides. From a workplace perspective, a management “win” could undermine morale if the terminated employee is well liked; a management “loss” can precipitate a diminished faith in the fairness of the disciplinary system.

4. The agreement ends any claims of gender, race, religion or national origin bias, as well as allegations of age, disability, marital or parental status or sexual orientation discrimination raised by the employee.

5. The agreement also avoids any claims of retaliation or disparate punishment, as well as pregnancy or military leave and whistleblower violations.

6. Settlements avoid stressful confrontations between supervisors and workers, acrimonious depositions and testimony, and expensive, time-consuming hearings and appeals. (1986, Provine)

7. The agreement waives the employee’s normally applied rights to just cause and due process considerations, any procedural protections, or a progressive discipline schedule that is recognized in a bargaining agreement or personnel manual.

- The interpretation of the LCA, whether by an arbitrator, board or court is limited to a determination of whether the employee engaged in the conduct, which, under the terms of the agreement, would result in termination. (2007, *Multi-County Corr. Ctr.*)

B. What are the typical subject matters of LCAs?

Absenteeism, alcoholism, discourtesy, insubordination, minor drug abuse and tardiness are common reasons for LCAs. The LCA can require an employee to attend counseling sessions or programs to curtail substance abuse or to promote anger management. Generally, an unexcused failure to complete those requirements will result in termination. (2004, *O’Brien v. Hackensack*; 1998, *Wolfe v. Jurczynski*)

If substance abuse is a factor, the LCA will typically provide for unannounced testing for a stated period, e.g., two years, but the duration of the LCA can be for the remainder of the employee’s tenure. (2007, *Bowater and Steelworkers*)

Who pays for counseling or abatement programs and whether participation is on or off the time clock needs to be addressed in the LCA. Contractual overtime provisions in a bargaining agreement and statutory overtime provisions in the Fair Labor Standards Act might apply.

- The Seventh Circuit has held that a city was liable for overtime earned by a 911 dispatcher while attending mandatory psychotherapy sessions, plus travel time. [Sehie v. City of Aurora](#), #04-2308, 432 F.3d 749 (7th Cir. 2005). The court noted that the psychological condition arose in a job-related setting, the employee was not allowed to visit her personal therapist, and the city paid 90% of the costs of attendance.

If some employees receive free assistance programs while on duty time, and others must attend programs on their off-duty time and at their personal expense, there must be rational reasons for the distinctions. Moreover, the differentiating reasons should not adversely impact one gender or a protected minority.

Generally, the LCA will provide for an immediate dismissal with a limited right of review, if the terms are breached.

- It is important that the LCA allows the employee the right to appeal a claim of innocence to a neutral decision-maker, such as an arbitrator. A drug screen could be faulty, or the worker might have an excusable explanation for the activity or event.

C. Who must, who should agree to the LCA?

If the employee is a member of a collective bargaining unit, the union must agree to a precedent-setting LCA. A side agreement that is negotiated directly with a member of a bargaining unit is generally not enforceable. (2002, *Martin County*)

To hold otherwise could undermine the whole purpose of collective bargaining, and would allow employers to defeat a bargaining agreement by pressuring individual workers to agree to terms and conditions that are negotiated on an ad hoc basis.

If an LCA is not precedent-setting, that is, it cannot be cited by other employees who raise a claim of disproportionate punishment, some authorities have enforced it even if the union was not a party to the LCA. (1997, *Tampa and PBA*)

Although the LCA might be a valid contract, a union is likely to file an *Unfair Practice Charge* with the state's Public Employment Relations Board (or similar body). The union is likely to prevail.

If the employee is not a member of a bargaining unit, but is protected by civil service or similar tenure, the LCA should be approved by his or her attorney.

If the employee is at-will, such as a probationary officer, the better practice is to require the non-tenured employee to engage an attorney to approve the settlement.

- While the CBA is technically not applicable, it is a recommended practice to advise the union's president of the outcome, as a professional courtesy, particularly if the employee will eventually become a member of the bargaining unit with continued satisfactory service.

D. Is an LCA a separate agreement or part of the CBA?

Some argue that an LCA should be regarded as a side agreement to the collective bargaining agreement, because they "constitute formal contractual agreements of labor disputes, and so the standard of review is no different from that of any other contract." (2005, Birkhofer, *at p. 473*)

Because an LCA is created after the collective bargaining agreement, it could supersede the collective bargaining agreement in whole or in part. (1999, *Int. Oper. Eng. v. Cooper*)

Federal appellate courts have split on the interpretation of side and separate settlement agreements. If the subject of a side or settlement agreement is dissimilar to the subject of the underlying collective bargaining agreement, courts may assume that the parties must have intended to create a wholly new and self-contained set of contractual obligations. (2003, Bales, *at p. 597*)

To avoid unnecessary litigation, a settlement document should clearly specify:

1. Whether it is precedent setting;
2. Whether it is a part of or separate from the bargaining agreement;
3. If separate, what effect (if any) will it have on the CBA;
4. What the review process will be, if the agreement is breached.

E. Failure to offer an LCA.

Terminated employees sometimes claim that they should have been offered an LCA, and that race, gender or other discrimination played a role in management's decision not to offer a settlement.

Recently the Seventh Circuit sustained the termination of a corrections officer for bringing contraband into a prison. The panel said there was no evidence that the failure to

offer him an LCA was influenced by national origin discrimination. “An independent investigator and independent arbitrator separately reached the conclusion that [he] had engaged in the prohibited conduct of trading and trafficking” and said that there was no evidence they “bore any discriminatory animus ...” (2007, *Jennings v. Ill. DoC*)

Some critics of LCAs claim that they are an employee’s “insurance policy” against disciplinary action for misconduct. Some employers have signed second and third **last** chance agreements. (2005, Birkhofer)

Attorneys for employers often recommend that management:

1. Consult with a union, if any, and stipulate that an LCA is not precedent setting. (2004, *S.F. Firefighters v. S.F.*)
2. Be reasonable and fair when interpreting the LCA, but do not excuse a willful breach.
3. Do not agree to a second LCA. Politically, if not legally, it creates a horrible precedent.

F. Breaches must be material and significant.

A DEA investigator was convicted of drunk driving and signed an LCA, which provided that he could be dismissed if he did not undergo treatment, successfully abstain from alcohol, and satisfy post-treatment monitoring requirements.

Because of a change in health care insurance, the agent could no longer see the psychologist who had been monitoring his progress. Despite being free from alcohol use for more than two years, the agency fired him for breach of the agreement. An Administrative Law Judge upheld the termination.

A three-judge appeals panel reversed. It explained that an LCA is a contract, and not every breach entitles a party to void the agreement. The breach must be “material” and relate to a matter of vital importance, or vitiate the essence of the contract.

Here, the agent had faithfully abstained from alcohol use and had successfully participated in a monitoring program. Technically, he had not been discharged from further psychological counseling, although continued therapy was of dubious value.

Because of his substantial compliance with the LCA, the agency should not have terminated his employment. (2003, *Gilbert v. DoJ*)

G. Some recommended elements of an LCA.

1. Clearly indicate that the employer has just cause to terminate the employee for the grounds that are enumerated in the agreement, but is foregoing that action in exchange for the employee's commitment to strictly abide by the terms and conditions of the LCA.
2. In cases where the employee has a substance abuse problem, the LCA should identify specific misconduct or performance deficiencies, rather than describing the abuse itself. The employer is punishing unacceptable conduct or sub-performance, not an addiction or a dependency.
3. Compliance with all other policies, procedures, rules and regulations is mandatory. Disciplinary action for reasons other than those specified in the LCA can be grieved or appealed in the usual manner.
4. Any violation of the terms of the LCA will result in immediate termination. The parties agree that the LCA will continue in force for the duration of the period of employment, unless a finite date is specified.
5. If the employee is required to attend counseling sessions or to participate in abatement programs, specify that attendance is mandatory.
6. Indicate who will pay for the sessions, whether the employee's time is compensable and whether travel expenses are reimbursable. If an employee is authorized to use compensable sick leave, indicate any limitations or caps. If co-payments or deductible amounts apply to counseling or program expenses, so indicate. Health plans and providers can change; lock in the mutual obligations.
7. If the employee is required to discontinue the use of alcohol, specified pharmaceutical drugs or other substances, the employee agrees to undergo scheduled and unannounced substance testing as a condition of continued employment. Specify the duration of the testing period.
8. If a union is a party to the LCA, it should agree not to pursue a grievance if the employee violates any condition of the LCA. If the employee is covered by civil service, the employee agrees to forego an appeal. If the employment is at will, the employee acknowledges that the LCA does not create an expectation of continued employment. The forbearance requirement should be binding on successor bargaining parties.
9. The union should agree that the LCA does not create an employment precedent or past practice. It is a self-enforcing, stand-alone document, and does not modify or otherwise affect an otherwise applicable bargaining agreement.

10. If the employee is accused of and denies a breach of the LCA, a hearing will be conducted by a neutral fact-finder that will issue a binding determination. Specify the procedure, and clearly indicate that the ultimate penalty cannot be reduced or rescinded, if guilt is established.
11. Employers should say what they mean, mean what they say, and enforce LCAs in a systematic, non-discriminatory, rational and fair manner.

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