Public Employment Relationships in New Hampshire and Their Effect on Discipline and Termination

At-Will Status: Definitions, Exceptions and Practical Concerns

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I. Employment “At-Will” is the General Rule Governing Public Employment Relationships in New Hampshire (But, Like All Rules, It Has Exceptions).

(1) Definition and Meaning of “At-Will” Status.

(a) An at-will employee is not employed for a specific period of time or under specific terms and conditions that cannot be modified.

(b) An at-will employee can be disciplined or discharged for a good reason, a bad reason or no reason at all as long as:

   • the reason is not an illegal reason;

   • the reason is not encompassed within an exception or variation to the at-will rule;

   • the employee, employer or employment relationship is not subject to an exception; or

   • the employment relationship has not been altered from at-will status.

(2) Every Employment Relationship Involves an Agreement of Some Kind. While the term “contract employee” has come to have a connotation that differs from employment at-will, from a legal perspective, every employment relationship involves a contract. The key to understanding at-will employment is to understand:

(a) the circumstances under which the employment relationship (agreement) can be severed (terminated);

(b) the nature of the obligations assumed as part of the employment relationship by the employer and the employee; and

(c) the consequences of severing the employment relationship.
The foregoing description should not suggest that the term “contract employee” is meaningless in the real world. The purpose, instead, is to create a basis for understanding the nature of at-will employment, and what actions or conduct can transform at-will status into the common notion of a “contract employee.”

(3) Good Faith Underlies any Relationship. New Hampshire, like other states, implies a “good faith” dealing obligation in any contract situation. The effect of this obligation is more fully examined in section II of this article, but it enters into the equation in a preliminary sense as well. For example, the more discretion an employer attempts to wield while holding an employee to strict terms, the less inclined courts will be to extend “equitable” treatment to the employer. Good faith has to be viewed as a two-way street that affects the volume and speed of traffic on the at-will employment “freeway.”

II. At-Will Employment Means Freedom – to a Degree.

(1) Even “True” At-Will Status Does Not Imply a Totally Free Hand. New Hampshire court decisions discussing the nature of at-will status do vest the employer with a great deal of discretion in how the employment relationship is carried out and terminated. However, New Hampshire cases place limits on total employer discretion. The limits arise from:

(a) the obligation to deal in good faith inherent in all “agreements” – even those that are oral and not supported by a written agreement or “memorandum of understanding” and

(b) a requirement that agreements (even unwritten, oral ones) will not be enforced if enforcement is based on a violation of public policy.²
(2) Consequences. These two requirements inherent in all dealings between parties mean that the traditional description of “at-will” employment as vesting complete and unfettered discretion in an employer needs to be qualified to some extent. In employment law, therefore, even an at-will employee will be protected to some degree from completely arbitrary and capricious actions by an employer. Employers are bound, also, not to act maliciously or with bad faith intent. This element of good faith does not mean that “just cause” or some other specific standard is required in order to impose discipline or termination in true at-will situations. Yet, it does signify that employers need to think through the possible consequences of terminating an at-will employee for reasons that may be viewed as irrational or completely without basis.

Another consequence of these limits on discretion means that an at-will employee cannot be disciplined or discharged for reasons that violate the sometimes vague concept of public policy. An example from case law may assist in understanding this concept. A grocery store manager was deemed an at-will employee and he objected to being required to physically take the day’s receipts to make late-night, after-hours deposits at a local bank’s night depository. Recognizing that such a requirement could place the manager in danger of physical harm from an attempted robbery, the New Hampshire Supreme Court ruled that terminating the manager from employment for refusing to make those night deposits was not a proper exercise of managerial discretion. Placing employees in situations where harm is more likely to occur, particularly when reasonable, safer alternatives exist, would constitute a violation of public policy that cannot support an employment action, even for an at-will employee.
(3) The Concept of Equity. An extended review of contract law principles is beyond the scope of this article. But it should be noted that enforcement or interpretation of contract provisions (including those created by an oral, informal agreement to create an employment relationship) can invoke what are termed “equitable” principles in a court. These types of cases, rather than just strictly applying principles of law, allow a court to assess the relative positions of parties and can open the door to judicial review that could be kept closed by more equitable conduct on the part of one of the parties. Courts generally dislike being cast in the role of an “employment disciplinary board of review.” However, one-sided arrangements, particularly where one party possesses all the bargaining power, can lead a court to decide, based on equitable principles, that normal contract remedies need to be altered to some extent.

At-will employers also must be careful of extending “unilateral” promises as contract law, under some circumstances, may enforce these as binding representations or may utilize some other remedy. Courts are prone to be sympathetic toward an employee whose employer has made representations and then seeks to negate those “promises” as not being enforceable because the employee is at-will or because the employee did not have the foresight to seek to have them reduced to writing.

While these limitations on total employer discretion do exist, at-will status is alive and well in New Hampshire, subject to the exceptions and alterations discussed in this section and the following section III. Thus, employers are well-advised to clarify employment relations to ensure retention of at-will status when possible and to the fullest extent possible, as suggested by some preventive actions reviewed in sections IV and V.

III. Exceptions, Alteration and Variations: At-Will Status Faces Many Additional Limitations.

(1) Introduction. Aside from the limitations on total employer discretion arising from implied obligations of persons dealing in good faith with one another and adhering to public policy considerations (as discussed
in parts I and II), the nature and extent of at-will employment, particularly in the public sector, is subject to modification by exceptions and alterations that are created by:

(a) operation of law,

(b) local governmental actions such as charters and ordinances,

(c) personnel policies and handbooks,

(d) employer practices, and

(e) collective bargaining and individual employment agreements (some of which may not be intended as such).

(2) Operation of Law. In our state and federal governmental system, local governments are required to conform to and comply with law enacted and regulations adopted by both the federal and state governments. Many of these laws and regulations affect employment. Several establish limitations on employer discretion to discipline or discharge even at-will employees. Other laws may create special procedures or protections for such employees that may come into play at any stage of discipline or termination (pre-action, during the process, or after the fact).

Constitutional Protections. State and federal constitutions protect certain rights of citizens from improper encroachment by government. Local governments are subject to such familiar “Bill of Rights” protections as those involving interference with rights of free speech, religion, and assembly; improper searches and seizures; and interference with property and liberty.

Thus, the protections of these citizen rights apply to public employment when they would not apply to private employment situations...
Local governments do not lose their identity as arms of the “state” in their capacity as employers. Thus, the protections of these citizen rights apply to public employment when they would not apply to private employment situations (except in limited instances when private employers may be deemed to be carrying out governmental functions). These constitutional protections for governmental employees apply regardless of whether the employee is an at-will employee or not.

Accordingly, government employer discretion over at-will employment is limited where that discretion would interfere with the “panoply” of constitutionally protected rights. These include to varying degrees:

- The right of free speech;
- The right of freedom of religion (including the right to exercise religion and to be free from governmental action imposing religious views on individuals);
- The right of freedom of assembly;
- The right to be free from improper and unjustified searches or seizures of their persons or property.

Although not stated expressly in most constitutions, individual rights of privacy now exist as a matter of constitutional right and are also protected by statutes. In New Hampshire as elsewhere, privacy rights exist in the workplace and are generally formed by legitimate and reasonable “expectations of privacy.” Thus, as an example, an attempt to discipline an at-will employee for private, personal use of an employer’s email system will more likely succeed if the employer has adopted and implemented a computer use policy advising employees that personal use is prohibited (or that

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personal use may be monitored). The effect of such a policy would be to minimize employee expectations of privacy in electronic personal communications made during the workday or by using the employer’s computer system.8

Another aspect of constitutional protection may arise if governmental action is taken which interferes with an employee’s legitimate expectation of continued employment. Such an expectation naturally would be presumed not to exist in a true at-will relationship. But employer actions may create or support employee expectations that they have a legitimate reason to believe they will continue in their employment, absent some form of significant problem. In that situation, an employee may be deemed to possess what are called “property rights” in employment. If such an expectation exists, employees then obtain “due process” rights in their employment which can be adversely affected (taken away) only for cause and in accordance with appropriate procedural protections for the employees.

Yet another aspect of constitutional protections for public employees may arise through constitutional protections that prevent a government from interfering with a person’s liberty. In this case, liberty does not mean the freedom to roam at will, but instead essentially refers to a person’s ability to maintain a personal reputation free from unjustified defamatory actions. When an employer’s actions are such that an employee’s reputation may be adversely affected, the employee may possess a liberty interest that would require, at a minimum, the opportunity to have a “name-clearing” hearing to attempt to set the record straight. An at-will employee may still be discharged or disciplined in such instances within broadly defined discretionary guidelines, but the employee’s post-termination rights need to be considered.

Thus, navigating the waters of constitutional protections, even in at-will currents, can be treacherous for public employers. If any questions exist as to the status of employees or as to the real basis for an employment action (see protective guidance under section IV), employers should
seek legal guidance and the time to do so is before, not after, an employment action is taken.

**Discrimination: Protected Status.** Perhaps the most notable and visible statutes and regulations affecting employment are the anti-discrimination laws enacted on both the federal and state levels. These laws prohibit discrimination by both private and public employers (subject to some threshold requirements) on the basis of prohibited criteria such as race, religion, national origin, and gender. These laws and others also prohibit discrimination on the basis of age and physical or mental disability. The impact of these types of laws on at-will employment is to limit the discretion of employers to take action that adversely affects a protected employee on the basis of prohibited criteria.

Importantly, though, an at-will employee in a protected class is still an at-will employee and can be discharged or disciplined at-will in the same manner as other employees. Problems may arise, however, if it can be argued that the employment action is tied in some manner to the criteria in question. The mere fact that an employee is within a protected class should not prevent an employer from acting as an employer. It suggests, though, that some additional homework might be needed to prevent or defend against a discrimination charge.

**Other Statutory Protections.** Beyond discrimination laws, state governments, including New Hampshire, have enacted limitations on employer discretion in at-will employment. Some of these laws entirely negate at-will status, while others may impose specific procedural requirements instead of modifying employment status. More than a few
laws impose, for example, a requirement that discipline or termination may be imposed only for “just cause” or “due cause” or some similar notion that employers need a “good” reason to act. The list of such statutes is long and is constantly subject to change or “tweaking” any time the legislature is in session.

A list of some of the primary statutes affecting local government employment in this manner is included as Appendix 2. It is doubtful that a complete list of all possible statutes could be compiled at any given time since employment statutes and local government laws are spread over virtually the entire multi-volume set of the New Hampshire Revised Statutes Annotated. A good risk management practice, therefore, is to analyze any proposed employment action in light of statutes applicable generally and to particular positions at the time of the proposed action. Once again, legal guidance in advance is a good risk management tool.

Federal laws in this category are less evident in that Congress has, as of now, not seen fit to so directly affect local employment status other than in those instances identified above and perhaps others. Congress, though, has considered but not adopted legislation that would, in effect, all but eliminate at-will employment in the public sector.

While the most visible protection for employees is the imposition of a “for cause” or similar limitation on employer discretion, the New Hampshire Legislature also has imposed a variety of what might be termed indirect protections. These can range from protections set forth in laws allowing municipalities to adopt the “Manager” form of government to those setting out collective bargaining rights for public employees. The latter law, known as the Public Employee Relations Act and contained in RSA 273-A, does not directly mandate a “for cause” requirement for discipline or discharge. However, public employee unions that represent employees pursuant to that law will seek to include a “for-cause” requirement as one of their proposed essential components of a collective bargaining agreement.
(3) **Charters.** Local government charters can be more flexible under current laws than under some of their predecessor laws and may include requirements pertaining to employee status and employer freedom to act. Charters adopted under prior law and many charters adopted under current law may contain protections for employees that may not extend to full “just cause” modification of at-will employment, but will significantly alter employer authority and discretion in a procedural, if not substantive, manner.9

(4) **Ordinances.** Local governments have many ordinances on a variety of subjects, some of which may affect internal personnel administration. In most instances, local governments will regulate personnel administration through personnel policies, as noted in the next subsection of this article. However, some legislative bodies – perhaps more so in cities than in towns – will have adopted ordinances or by-laws that seek to impose procedural requirements or substantive rules that may alter traditional employer discretion as to at-will employees.

(5) **Handbooks and Personnel Policies.** As noted in the previous subsection, most employers today have adopted personnel policies that seek to set out the “rules” governing employees, including provisions addressing benefits, terms and conditions of employment, and procedures. Sometimes policies may be adopted in piecemeal fashion, or specific policies may apply only to certain departments or positions. In some instances, these policies (perhaps along with other relevant information) are contained in an employee handbook.

All too often, these policies or handbooks are out of date and may reflect procedures and personalities and practices that changed a long time ago. They also may be out of step with current legal requirements as discussed above. When a deviation exists, it is a fair conclusion that any reviewing entity (e.g., a court, arbitrator, or governmental administrator) will adopt (or create) an interpretation most favorable to employees. The justification for this result lies in the fact that
All too often, these policies or handbooks are out of date and may reflect procedures and personalities and practices that changed a long time ago.

Both policies and handbooks routinely contain statements that purport to state that they do not create contractual obligations that can be enforced against an employer. Notwithstanding the essential nature of such language (often called “disclaimers”), employers need to craft policy and handbook language carefully to avoid creating enforceable obligations. At the same time, policymakers need to understand the impact of policies that appear favorable to employees who may then be told “Oh, that’s not what we meant.” Increasingly, today, employees are much more aware of their “rights” and constantly have access to advertisements telling them to be aware of their legal rights.

The purpose of the foregoing is not to denigrate the importance or utility of policies or handbooks, but rather to emphasize the importance of adopting and using them properly. More than one unhappy employment situation has been caused, for example, by a change in policy being floated, temporarily implemented, and then rescinded. Even more unhappy are the situations in which practices do not adhere to policies. For more guidance on employee handbooks, please consult the article in this issue entitled Creating an Employee Handbook – Not a Cure-All, But a Tool.

(6) Employment Practices. Nicely crafted, legally protective language in policies actually might work to protect an employer in a legal setting. But the nicest language in the world is not going to protect an
employer from improper practices in the workplace. As a rule of thumb, it can be said that practice will “trump” policies. Employers have the obligation to know what is happening in the workplace and must hold supervisors, department heads, and others accountable for what happens on their watches. Inconsistent application of policies can lead to trouble and has been the source of more than one petition for union certification as a collective bargaining agent or adverse results in grievance resolution or litigation.

One continuing difficulty can arise when an employer seeks to modify past or current practices that have come into being that are either at variance with or not addressed in employment policies or handbooks. As yet, no one has written the all-encompassing personnel policy handbook that will insulate an employee’s at-will status from any legal challenge. The challenge for employers is to maintain sufficient awareness of the workplace to understand when action is needed and to hold accountable those responsible. Solutions are not found by copying policies from a reference manual or library. Policies and practices need to be viewed as a unitary whole that creates and forms the working environment and the legal status of the participants.

(7) Employment Agreements. Modifications to at-will status resulting from collective bargaining agreements have been mentioned previously. However, individual employment agreements, whether written or oral, can affect at-will status, as well. Even when a written agreement refers to and incorporates employment policy language regarding at-will status,
employers may find that a poorly written or administered individual employment agreement will render the “boiler plate” policy disclaimer ineffective.10 Just as language in a handbook or policy can make “cause”, for example, more than just a word to be used at an employer’s discretion, an employment contract that speaks to a definite term, or that promises employment on a basis other than at the total discretion of the employer, may result in unintended consequences.

IV. So, What Does It All Mean? What’s a Poor Employer To Do?

Recent Primex’ work plans have used the phrase “Awareness, Action and Accountability” to denote risk management, claims management, and education and training program goals. It is these hallmarks that can serve to assist employers in retaining and utilizing at-will employment to their real advantage and ensuring that employment discipline and termination do not deviate from accepted norms based on an erroneous perception of retained employer discretion.

At the outset, employers should seek to make all parties fully aware of the circumstances under which an employment relationship is created. Vagueness or uncertainty will not prove to be an asset in this regard. Employers need to be aware of conduct in the workplace, including the actions and effectiveness of supervisors in adhering to policy directives. When problems arise, employers need to be prepared to act to remedy situations. Failure to act ultimately will result in employer acceptance of problematic conduct. Not every employee action will mandate severe discipline or discharge, but employers need to be wary of
creating situations when an employee’s defense asserts that “No one ever said there was a problem.” If problems arise, action needs to be taken and the employee’s record should contain documentation of the event and the actions taken. Finally, employers need to hold supervisors accountable. But more importantly, employers need to hold themselves accountable for administering personnel systems to retain control and effectiveness.

To that end, this article includes practical guidance and tips for administering discipline and termination in the public sector that are set forth in section V. Any set of guidelines should be reviewed and incorporated/adapted as appropriate to each member’s individual workplace needs. Once adopted, guidelines should be reviewed for effectiveness and to ascertain if the guidelines are being followed. The important point is not to adopt and administer guidelines without change; rather, the goal is to engender and encourage consideration of the need to know and understand employment laws and rules and to properly apply employer discretion when it exists.

V. Suggested Guidelines for Public Employment Discipline or Termination.

At some point in virtually any municipal or school employment situation, there will be instances in which discipline or termination of an employee appears to be the only acceptable option. The possible negative consequences of discipline or termination for both the employer and the employee mean that such an action should occur when necessary and appropriate.

Improper terminations are a source of liability. Proper terminations avoid that liability and also may assist in preventing unnecessary liability for unemployment compensation.

The following ten guidelines are intended to assist in making decisions to discipline or terminate an employee that are correct and defensible and so that the consequences of such decisions will be as positive for both parties as possible. These guidelines are not intended to be a
comprehensive guide to action and certainly should be supplemented by a review of the procedures and standards set forth in personnel policies. Additional tools to assist in proper employment decision-making include:

- A discipline or termination checklist; and
- A review of state statutes to determine if specific provisions apply to discipline, suspension, or termination of local government employees.

[Note: A sample discipline/termination checklist is attached as Appendix 1. A sampling of statutory provisions is set forth in Appendix 2. There is, of course, no substitute for specific legal guidance in any particular situation.]

Guideline #1: Assure Accurate Job Expectations.

Make sure that employees understand their job and the expectations of them. Meaningful and accurate job descriptions and communications about job content and performance may eliminate or lessen problems that could otherwise result in discipline or termination.

Guideline #2: Follow Correct Procedures.

Have proper personnel policies in place and follow them, as well as any procedures mandated by state law or local ordinance or charter. Personnel rules should be applied consistently to all employees subject to them. If notice or hearing is required prior to any action, make sure it is done, and done in a timely fashion. If an employee’s status is subject to a state law, charter provision, individual employment contract or a collective bargaining agreement, make sure that any required procedures are followed, and that the proper grounds for termination or discipline exist.

Guideline #3: Communicate Properly.

Determine the proper lines of communication, supervision and discipline, before an incident occurs, and follow these lines consistently. Inconsistency in communication can be a major frustration for
employees and supervisors. When required, communicate with employees in a timely fashion, close to the time of the incident giving rise to the need for communication. Make sure that the person making the employment decision is, in fact, authorized to do so.

**Guideline #4: Allow Correction.**

*Give the employee a fair chance to correct performance.* Unless an employee incident involves insubordination, criminal acts, or other serious conduct, it is generally expected that discipline will be imposed “progressively,” first providing oral notice, followed by written reprimand, and then consequences such as suspension or termination.

**Guideline #5: Be Consistent.**

*Be consistent.* The requirement to be consistent does not mean that each incident is necessarily treated in exactly the same way. Instead, persons who are similarly situated, and instances which are similar, should be treated consistently. This can usually be achieved by following procedures and standards in policies. Consistent application of the rules is often a good way to avoid and defend against discrimination or wrongful discipline or termination claims.


*Document your actions before, during and after disciplinary action is taken.* Documentation serves two major purposes. First, it ensures that an employee will be formally advised when performance is unacceptable and will record that the employee has been so notified. If further disciplinary action is required, the personnel record will then show that the employee is not surprised that performance has been unacceptable and that the imposition of discipline is not arbitrary or unjustified.

Above all, make sure that the reasons for the disciplinary action are those that have been documented and that other undocumented reasons are not the real source. Prior to making the decision to discipline or terminate, and certainly before speaking with the employee, it is wise to create a written “fact base” which outlines the employee’s history and,
most importantly, contains all facts relevant to the decision. In a related
vein, make sure that the reasons used for the action are the real reasons
why action is being taken and are not a “pretext” for action.

**Guideline #7: Get a Second Opinion.**

*Consider obtaining guidance.* Major employment decisions should not
be made in a vacuum and certainly never should be made without a full
investigation of the incident. When possible, the perspectives of others
may be helpful to assure that the decision is based on a correct view of
the facts. If stress between the employee and the immediate supervisor is
evident, the use of another individual to communicate with the
employee may be advisable. An exit interview might be used as a final
opportunity to catch wind of, or defuse, any potential claims of improper
termination. Participation of others, however, must be used in a manner
which respects employee privacy.

**Guideline #8: Be Humane in Your Human Relations.**

*Treat employees with sincere respect when they are being disciplined or
terminated.* In most instances, an employee does not enjoy being disci-
plined or terminated, and the event is stressful and upsetting. Focusing
on the employee’s conduct rather than self-image or personality can
make the circumstances of discipline or termination appear to be based
on facts and, thus, it is less likely that the employee will respond to
discipline with a grievance or other claim of improper action.

**Guideline #9: Think “Liberation,” Not “Discipline” or “Termination.”**

*View discipline or termination as a step in development.* Most people
would agree it is unfair to all concerned to retain an employee who
cannot succeed or who is unhappy in the work place. While most
employees will view discipline or termination as a negative occurrence,
a frank discussion of the reasons why it is necessary might lead the
employee to re-evaluate matters and could result in a long-term positive
event. Selective encouragement of self-examination of an employee’s
career path may be appropriate in some instances. Disciplinary action can be characterized as an opportunity to assist the employee in achieving acceptable behavior.

Guideline #10: Document the Discipline or Termination Action.

Document the circumstances under which the discipline or termination is implemented. When a decision has been made that discipline or termination is the appropriate action, the manner in which that decision is communicated to the employee should be documented carefully, including any statements made by the employee. In some cases, it may be appropriate to have a third person present as an independent witness to the circumstances. While documentation is a good thing, documenting that is done judiciously and with consideration of the possibility that others may read the documentation is an even better thing.

Summary

Following these guidelines will not guarantee that employee discipline or termination will be trouble-free; nor are these suggestions exhaustive of all the “correct” procedures that may be appropriate in all instances. However, following these guidelines should help to create a “fact base” which should assist in assuring that a disciplinary decision is:

1. procedurally correct;
2. premised upon consideration of appropriate facts; and
3. supported by sufficient documentation to prevent or prevail in appellate review of the decision whether that review takes the form of a grievance, an action before an administrative agency or department, or by legal action in a court of law.
Endnotes

1 Example: “I can fire you with no notice whatsoever; but you have to provide me with two weeks’ notice before you quit!”


5 For example, see Public Employees and Constitutional Free Speech: Maybe a Little Less Free? in Awareness in Action, Issue #3 2006 and Blogging in the Public Sector Workplace in Issue #4, 2006.


7 Including, for example, New Hampshire’s Invasion of Privacy law, RSA 644.9.

8 Electronic communications and policy considerations were reviewed in two articles in Awareness in Action, Issue #1, 2005: E-Government in New Hampshire and Can You See What I See?

9 RSA 49-D:4, for example, requires that local option town charters include provisions prohibiting individual elected body members from seeking to influence personnel decisions.

10 For an example, see Dillman v. New Hampshire College, 150 N.H. 431 (2003).
While Appendix 1 is a sample discipline/termination checklist, it is advisable to create an employer-specific checklist incorporating appropriate statutory, ordinance, charter, policy, or local employment or collective bargaining contract provisions as needed. That checklist should then be utilized in any instance in which discipline or termination may occur. Variations of checklists may be needed for different departments or positions.

Appendix 1: Sample Employee Discipline and Termination Checklist

1. Prior to action, review all documentation and applicable records:
   
   (a) Were policies and procedures properly followed?
   
   (b) What justifies action at this time? Are the reasons and prior discipline consistent with the action proposed now?
   
   (c) How recent is the conduct which justifies action? Have other events intervened that may affect the perception or success of this employment action?

2. Has there been personal contact with all persons who have material information? How recent was this contact?

3. For what reason(s) will this decision be made? Are these the stated reasons?

4. Has the employee been made aware, previously, that termination was possible or probable for the conduct complained of? Can the employee’s awareness be documented? Is this decision made as a result of continuation of prior complaints?

5. Was the employee provided an opportunity to improve performance or change the conduct complained of? If so, what was the result?
6. Is there a basis for discipline or discharge for the reasons cited? What has been the record in similar situations? Have employees been disciplined or discharged for similar reasons? If not, why not?

7. Discharges should be made by telephone or by letter only when absolutely necessary, and never by email. It is advisable and preferable to meet personally with the employee. However:

(a) Consider whether it is advisable for a competent “friendly” witness to be present at the discharge meeting.

(b) The meeting should be conducted in private, out of the hearing or sight of other employees.

8. The person conveying the decision to the employee and the witness should each prepare written memoranda concerning the statements made at the meeting and copies should be retained as permanent records. But, the contents should be compiled with the understanding that they may be subject to disclosure if the employee contests the action.

9. When appropriate, the reasons for action should be stated to the employee at the meeting. The reasons should be truthful and not “sugar-coated.” The reasons should coincide with those specified under checklist item #3. Failure to tell an employee why an action is occurring can be a source of employee dissatisfaction which leads to challenge. On the other hand, when an at-will employee is discharged for “discretionary reasons” (e.g., not for cause), it may not be advisable or feasible to disclose reasons. The script/scenario should be planned well in advance with due regard for post-termination risk management.

10. Payment of wages and accrued benefits, vacation and the like, should be discussed. Explanation of the opportunity for continuation of health insurance coverage and other benefits also
should be reviewed. All of these items should be reviewed carefully prior to the termination meeting so that the discussion of them is accurate, timely and complete.

11. Are there any special considerations applicable to this employment situation? For example, is the employee in a specially protected classification which merits additional documentation?

Appendix 2: Selected Statutory Provisions Relevant to Local Government Employee or Officer Discipline or Termination Proceedings

[Note: This document has been prepared with the intent of listing some of the relevant items pertaining to employment situations which Primex³ members may encounter. While it addresses many municipal, county and school employment situations, it should not be viewed as a completely exhaustive compilation. Instead, it instead should be considered to be a selected listing. In addition, the statutory references in it are subject to change by legislative amendment or judicial interpretation. Caution should be used in making any employment decision. Statutes, local charters or ordinances, personnel policies and individual or collective bargaining contracts must be reviewed as applicable to any position or employee prior to taking any employment action. This listing should not be viewed as a substitute for competent legal guidance in any situation.]

GENERAL PROCEDURES AND STANDARDS

Right-to-Know Law (RSA 91-A)
Access to Personnel Files (RSA 275:56)
Whistle-Blower Protection Act (RSA 275-E)
Municipal Charter Requirements; Personnel Policies
Collective Bargaining Agreements; Individual Employment Contracts
Anti-Discrimination Statutes (RSA 354-A and Federal Laws such as the Civil Rights Act, Age Discrimination in Employment Act, and Americans with Disabilities Act)

POSITION-SPECIFIC PROCEDURES, NOTICE AND STANDARD REQUIREMENTS

Town Manager (RSA 37)
Town Officers (RSA 42:1; 42:1-a)
City Officers (RSA 48)
City Charter Provisions (RSA 49-C:17 - :21; RSA 49-C:30)
Town Charter Provisions (RSA 49-D:4)
Police Officer (RSA 41:48)
Police Chief (RSA 105:2-a)
Police Officer in Unincorporated Places (RSA 53:2)
Police Officer under a Police Commission (RSA 105-C:4)
Fire Chief (RSA 154:5)
City Fire Chief and Deputy (RSA 47:9)
Village District Fire Official (RSA 52:11)
Local Emergency Management Director (RSA 21-P:39)
Health Officer (RSA 128:4)
Housing Authority Commissioner or Employee (RSA 203:5 and :7)
Road Agent (RSA 231:65)
Teacher and other School Employee (RSA 189:13 - :14-g; RSA 189:31 - :32)
School Superintendent and Administrative Employee (RSA 194-C:5, III)
Truant Officer (RSA 189:35)
Library Employee (RSA 202-A:17)
City Sealer of Weights and Measures (RSA 438:16)
Discontinuance of Optional Elected Town Office (RSA 669:17-b)
Discontinuance of Elected Treasurer Office (RSA 669:17-d)
Planning Board or Local Land Use Board Staff (RSA 673:16)
Planning Board or Local Land Use Board Member (RSA 673:13)
County Employee (RSA 28:10-a)

**POST-EMPLOYMENT ACTIONS**

Wage Payments (RSA 275, including RSA 275:43 - :55)

Unemployment Compensation Law Non-waiver Requirement
(RSA 282-A:157)

Response to Unemployment Compensation Claim

*Additionally, notices regarding termination of employment may be required to be sent to state agencies for certain positions such as Police Officers, Teachers, Local Emergency Management Directors.*