

Properly Terminating Employees

The NFIB Small Business Legal Center is the voice for small business in the courts and the legal resource for small business owners nationwide.

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Terminations

They are like divorces.

You want to avoid them.

But sometimes . . .

they're inevitable.



What's At Stake?

\$1135,000 – Luby's

\$90,000 – AVI Food Systems

\$250,000 – Preferred People Staffing

\$690,000 – Hickory Hills Country Club



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The Scenario

- 56-year old engineer in an architecture firm was terminated after 10 years.
- Clients had complained about her poor performance and inflexibility.
- When she learned that her replacement was a 32-year old male, she filed an age and sex discrimination claim.

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The Resolution

- Firm had not adequately documented performance issues or customer complaints.
- E-mail from partner said "*Firm desperately needs fresh ideas and could benefit from young blood with more techno savvy.*"
- Employees were at-will.
- Counsel recommended settlement of \$100,000; attorney expenses were \$75,000.

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The Rules

Terminations are illegal if the action

- Discriminates
- Retaliates
- Breaches a contract or
- Violates other federal or state laws or public policies



The Rules

- The Civil Rights Act
- The Age Discrimination in Employment Act
- The Equal Pay Act
- The Americans with Disabilities Act
- The Pregnancy Discrimination Act
- The Uniformed Services Employment and Reemployment Act
- National Labor Relations Act
- Immigration Control & Reform Act
- WARN Act



The Rules

- Race
- Color
- Sex
- Pregnancy
- Age (40 and over)
- Religion
- Veteran Status
- Disability
- National Origin
- Citizenship



The Rules

Possible Protected Categories Under State Laws:

- Marital status
- Sexual orientation
- Political affiliation
- Smoking



Some Advice

- Establish fair work rules and policies.
- Educate employees on rules and policies.
- Enforce rules and policies consistently.
- Use and document progressive disciplinary and performance measures.



Some Advice

- Avoid creating an expectation of an employment contract. Use an "at will" statement.
- The safest way to terminate an employment relationship is to ensure you have a valid, non-discriminatory business reason for the action – and documentation to prove it.



Performance Evaluation Checklist

- ✓ Conduct at regular intervals.
- ✓ Include objective criteria.
- ✓ Be honest and critical, if necessary.
- ✓ Document employee response.



At-Will Employment Statement

Employment at this company is at-will. An at-will employment relationship can be terminated at any time, with or without reason or notice by either the employer or employee. This at-will employment relationship exists regardless of any statements by office personnel to the contrary.



The Scenario

- On-site construction manager went out on workers' comp disability for back surgery.
- One month after surgery firm laid off the employee.
- Employee learned that in the month after surgery firm gave most employees 18% raises, but excluded the two employees who were workers' compensation claimants.



The Resolution

- Eliminating the injured employee's position as a way of getting around firing the employee will likely be seen as retaliatory.
- The firm settled for six-months severance pay and attorneys' fees (\$70,000) to avoid negative publicity.



The Rules

- You cannot retaliate – that means take an “adverse action” - against an employee for exercising some legal right.
- Layoffs for financial reasons can be a legitimate rationale for discharging an employee.



Some Advice

- Retaliation is broadly construed and frequently arises where an employee has complained about discrimination in the workplace or complained about workplace issues.



Protected activities that could trigger a retaliation suit

- Complaining about discrimination, workplace safety or wages
- Opposing unlawful practices or participating in an investigation
- Union organizing or concerted activity
- Asserting a workers' compensation claim
- Exercising other legal rights



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The Scenario

- Justin an electrical contractor has received two written warnings over the last 1 ½ years for rudeness to clients. Over the three months his co-workers have complained unpredictable and sometimes verbally abusive behavior.
- Today Justin's manager meets to provide a last-chance warning. Furious Justin grabs a chair and throws it at the wall. Justin storms off and slams the door. The manager locks the door and Justin begins banging on it.
- The manager calls security and also calls Justin's home notifying him that he is terminated and should not set foot on company property.



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The Resolution

- Justin filed a complaint with the EEOC alleging that his termination was due to his age, disability and claiming that he was not paid his final wages after his termination. The claim was dismissed.
- The company successfully contested Justin's unemployment benefit claim because documentation proved Justin's misconduct.



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The Rules

- Encourage employees to report and log all incidents and threats of workplace violence and report violent incidents to local police.
- Make sure you check state laws regarding when a final paycheck is due.



Some Advice

- Be consistent.
- Establish a consistent pattern in your treatment of employees.
- Treating employees consistently reduces the risk that an employee will allege she was fired improperly.



Disciplinary Checklist

- ✓ Investigate and retain evidence that employee acted or failed to act in the manner described.
- ✓ Discuss situation with employee and provide opportunity for explanation.
- ✓ Ensure the standard or rule in question was applied uniformly in past.



Always Remember

- Be objective and fair – think first, act second
- Always investigate the matter thoroughly
- Don't make snap judgments – no rule says that you have to impose discipline then and there
- Be consistent
- Don't let things slide – avoid the "last straw syndrome"



Question

**Immediate termination:
When is it a good idea?**

**Answer:
ALMOST NEVER!**



Termination Meeting

Prepare!

- Rehearse - consider using a termination letter
- Have all paperwork ready



Termination Meeting

- Scheduling is important.
 - Avoid major holidays and birthdays.
 - Poor timing can make you more vulnerable to a suit for discrimination or retaliation. For example, avoid terminating a woman when she is pregnant, or terminating an employee shortly after the employee complained of workplace discrimination.



Termination Meeting Paperwork



- Termination letter
- Severance agreement
- Final paycheck, or information about it
- Documents supporting your legitimate reasons for termination
- Information regarding COBRA or retirement plans, if applicable



Severance Agreements

- A "severance agreement" is a written contract between an employer and a departing employee.
- Employer pays the employee *additional* money in exchange for the employee releasing all known and unknown legal claims against the employer
- Attorney should draft!



Termination Meeting Participants

- Employee's manager
- A third party (such as an HR representative) to take notes and serve as a witness
- NO other unnecessary parties



Conduct of Meeting

- Stick to the facts
- Treat the employee with respect
- Answer employee's questions, but do not argue. Emphasize that the decision is final.
- Do not withhold your legitimate reason for termination from the employee



Pay the Employee

- Pay the employee for any wages, commission, or accrued paid time off that is due; preferably at the time of the meeting (this is required in some states).
- The employee must be paid for all hours worked, even if he or she was terminated for causing harm to the company.



Avoid Defamation

- Lawsuits alleging defamation can be another side-effect of an employee termination
- You increase your risk of a defamation lawsuit when you tell other people about the circumstances of the employee's termination.



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QUIZ TIME



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TRUE or FALSE

If you have an **at-will** employment agreement with your employees that states you can terminate their employment at any time for any reason or no reason at all, your employees cannot sue you for wrongful termination.

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Answer - FALSE

- Law **does** place limits on **at-will** employment.
- Employee can allege that termination was based on a discriminatory reason.
- Always consider ways to reduce the possibility that an employee will allege that you fired her for an improper reason.



A Final Checklist

- DO** set out clear, reasonable expectations of the employees from the beginning.
- DO** have a written policy regarding discipline and termination
- DO** follow your written policies and procedures
- DO** document any disciplinary action
- DONT** treat employees differently
- DONT** fire employees based on emotion
- DONT** withhold wages
- DO** consider consulting an employment attorney in your state before terminating an employee. Employment laws vary from state to state.



Help is Available!



- **NFIB Model Employee Handbook for Small Business**
- Available at www.nfib.com/legal
- Also NFIB's Employment Law Hotline at 866-678-6342.



Additional Information



- Visit the EEOC homepage at: www.eeoc.gov
- Call the EEOC at 800-669-4000



Thank you!

Contact us at: legalcenter@nfib.org


