



White Paper

FIRE AN EMPLOYEE LEGALLY: 6 TERMINATION GUIDELINES

BusinessManagement
DAILY

Fire an Employee Legally: 6 Termination Guidelines

Ending an employment relationship—whether due to performance issues, misconduct, or business necessity—is one of the most challenging responsibilities employers face. Beyond the emotional weight of the decision, terminations carry significant legal and reputational risks. Employees today are more informed about their rights and more willing to challenge decisions they believe are unfair, whether through legal action or public forums like social media and employer review sites.

In this special report, we've collected the best of our advice on employee terminations and how to handle them legally, professionally, and with care. Whether you're a small business or a Fortune 500 company — Business Management Daily has the guidance you need to stay ahead.

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Termination Guideline #1: Employers' rights & at-will employment

Under the law in most states, if there's no employment contract, workers are employed on an "at-will" basis. That means employers have the right to fire employees at any time for any reason or no reason at all. Conversely, employees have the right to leave the organization at any time.

If an employee is under contract, though, the terms of the contract apply. A written contract may specify the reasons you can terminate the employee – the opposite of at-will employment. And oral promises made by a hiring manager may override at-will employment under certain circumstances such as when a new hire relied on the promise to their detriment. That means the employer can terminate the worker only for poor performance, dereliction of duty, an act of dishonesty or insubordination, or because the company needs to eliminate the employee's position. Before using employment contracts, make sure they have been reviewed by counsel. You don't want to limit your options too much. Such agreements should be reserved for higher-level positions and be the exception to the rule.

At-will employment limitations

Over the years, the employer's right to fire at will has been limited, as courts have recognized exceptions to the at-will doctrine. Here are three major exceptions where termination could result in legal issues for the employer:

Exception 1: Discrimination

Under federal law, it's illegal to terminate workers because of their age, race, religion, sex including sexual orientation and gender identity, national origin, pregnancy, genetic information, military service or disability. Some states add

other limitations. Be sure to understand any state, or even city, protections that might be in place. In short, employers can fire at-will employees for any reason, except an illegal one under local, state or federal laws.

Exception 2: Public policy

You cannot legally terminate an employee for reasons that violate public policy. That means you can't fire one of your engineers for informing the EPA that your company has been dumping toxic waste in the river. By the same token, if a court orders you to garnish the wages of a worker behind on child support, you can't fire them merely to save yourself the hassle of additional paperwork. That would be against the public policy of providing for children's welfare because firing the parent who is obligated to pay child support would cut off support.

Exception 3: "Just cause" promise

If you tell your workers that they will be fired for cause only—or otherwise establish guidelines that spell out how and when terminations will be handled without also specifying that you can bypass handbook rules at your discretion—you may be creating an implied employment contract. It is best to make no promises that could be read as guarantees and that employees might reasonably rely on to their detriment.

Always fire with cause

In short, employment-at-will still exists, but it has been so deeply eroded with exceptions that you'd be wise to follow a simple rule: Don't fire a worker without a good reason that you can articulate clearly and document convincingly should the former employee sue you. And treat all workers the same. If you fire one worker for breaking a rule, fire others who break the same rule unless you can document a good legal and business reason for treating the rule violations differently.

Termination Guidelines #2: The right way to fire:

Lay the groundwork

It's a lot easier to discipline a worker if you've made your expectations clear from the beginning. Each employee should have a job description that lists the tasks you expect accomplished daily or weekly. Make it clear, however, that these tasks are subject to change depending on the organization's needs. Even better, regularly update job descriptions each year to ensure they match the employee's expected duties. Employees should sign off, acknowledging that they have read their job description and that it accurately describes the job they actually perform. If the description doesn't match what the job is, either counsel the employee to follow the description or change the job description if that's merited. This is insurance against later claims their job was different.

If you have rules specifying how certain tasks should be performed, post them in the work area. That helps workers do their jobs correctly and helps you point out when a rule is broken.

When you're unhappy with a worker's performance, the first step is to point out the problem and suggest ways to correct it. This may be done in the form of a warning, disciplinary meeting, or even as part of normal performance reviews. Be objective, direct, and specific. Ideally, the employee will acknowledge the problem and do what it takes to correct it. That problem may be performance-based or behavioral. Either way, apply your disciplinary rules even-handedly.

6 classic firing mistakes to avoid

How can you avoid the anger of fired employees that might later manifest itself as a lawsuit? Avoid drama and follow these guidelines:

1. **Keep your cool.** Avoid heightening an already emotional situation. Don't spring the news suddenly, shout names or berate the worker in front of other employees or in private.
2. **Avoid surprises.** Workers should never be completely surprised by a termination. Give your employees regular feedback on their performance and suggest methods for improvement. At the very least, progressive discipline proves to a court that you had valid reasons for terminating a worker and that you gave them every opportunity to improve.
3. **Play by the rules.** Follow your established discipline policy. If your employee handbook says you'll provide a verbal warning, a written warning, and a probationary period, then do each step. Of course, your handbook also should give you the right to terminate workers immediately who engage in serious misconduct. But before skipping progressive discipline, be sure of your facts. It's not enough to hear rumors of wrongdoing from others. Conduct a thorough investigation, then ask the employee for his side.
4. **Watch what you say.** Workers will remember whatever you say on the day you fire them—or in the preceding weeks—in the worst possible light. While you should always avoid making statements that could be construed as discriminatory, you should be especially cautious if you may have to fire a worker.
5. **Don't be too kind.** Sometimes you may feel compassion for a worker you must

fire, but don't express your feelings in the wrong way. If a worker's performance is substandard, don't offer compliments on his job performance. Doing so may make you feel better, but it will only infuriate the worker because it will appear that he is being fired for no reason. And that can easily spark a wrongful termination suit.

6. **Keep quiet.** Don't discuss your reasons for the termination with other employees. It's enough to say, "Jamie will not be working with us anymore." Some employers have spoken too freely about the reasons for a departed worker's termination, only to find themselves in court defending a defamation of character suit.
7. **Don't forget to document.** He-said-she-said doesn't hold up well in court. Write a few notes about what the employee is doing wrong or failing to do right and reference the standards you've communicated. Include the date of specific failings. Document every warning. Keep enough of a record that you can remember what happened, but not so much that it looks like a setup.

The firing line

If you've been careful to set standards, discuss shortcomings and suggest improvements, you may see enough progress that you don't have to terminate the worker. If nothing else, giving constant feedback should make the firing process easier because the worker will see it coming. That doesn't mean, of course, that the process will be easy. Some employees will get teary, others might even turn violent, and all might try to distort the events of the actual firing.

To protect yourself:

- Have someone else with you when you talk to the employee so there's no question of what was said.

- Write a memo afterward about the meeting and have the witness sign it.
- If the employee brings up new allegations of harassment or discrimination, tell them you will investigate. Then do so. Contact your attorney right away, too. But unless there's reason to believe you would not have fired the worker if you knew about the complaint, you shouldn't reverse your termination. Do run your investigation through counsel, though. He or she may recommend a different response if there's evidence of harassment or discrimination.

Termination Guidelines #3: Avoid wrongful termination suits: Use a progressive discipline policy

While no federal or state law requires you to create and follow a progressive discipline policy, courts often come down hard on employers that promise progressive discipline but fail to deliver it.

An increasing number of lawsuits have been filed in which terminated employees complain that employers have violated their progressive discipline policies by firing the employee before working through all the rungs on the progressive discipline ladder.

The most reliable way to protect your organization from wrongful termination charges is to establish a progressive discipline system and make sure your supervisors enforce it. However, your policy should also include language allowing you to skip progressive discipline and fire employees immediately for particularly egregious behavior.

While it's usually your right to terminate at-will employees at any time for misconduct or lax performance, a progressive discipline policy lets you make clear that problems exist and need improvement.

Your policy simply increases the severity of a penalty each time an employee breaks a rule. Typically, a policy progresses from oral warnings to written warnings, suspensions, and then termination. That way, employees won't be surprised when they reach the end and are fired. By taking the surprise out of the firing, you lessen your risk of a wrongful termination lawsuit.

Five-step model policy

Here are the five standard steps of progressive discipline:

1. **Oral warning/reprimand.** As soon as a supervisor perceives performance or behavior problems, he or she should issue oral reprimands. Ask the worker if any long-term problems or skill deficiencies need correcting.

Make sure the supervisor keeps detailed (and dated) notes on the reason for the warning and the response. This step is vital. Don't assume that managers will remember specifics about disciplinary actions—or even remain employed by your organization—when a complaint makes its way to court.

2. **Written warning/reprimand.** If the problem persists (or more problems emerge), the supervisor should meet with the worker and provide a written warning that details the problem and the steps needed to improve. If possible, ask another person (a management-level employee or HR rep) to sit in on the meeting.

The written warning should summarize the issues discussed, set a timeline for action, and describe in detail the corrective steps agreed upon. Explain

the standards that will be used to judge the employee. At this point, some may choose to develop an official performance improvement plan for the employee. This documents the steps to improve the employee's performance and shows a good—faith effort on the part of the business.

Explain the consequences of continued poor performance, including termination. Require the employee to sign this form, acknowledging that he or she has received it. Place the document in the employee's personnel file.

3. **Final written warning.** If the performance doesn't improve, deliver a final written warning, possibly including a "last chance agreement." Show the worker copies of previous warnings, illustrating specific areas in which he or she must improve. Specify the time period and, again, obtain the employee's signature on the warning.
4. **Termination review.** If problems continue, the supervisor should notify HR. In general, supervisors shouldn't hold solo firing authority. However, to preserve supervisors' exempt status under the Fair Labor Standards Act, they should have a significant say in hiring and firing decisions. Some organizations suspend employees while they investigate and decide whether to terminate.

Before acting, make sure that your disciplinary measures are consistent with those you've taken in other similar situations. If you don't, a court could say illegal age, sex, race discrimination or some other protected characteristic was the true reason for your actions. Document your action and reasoning.

5. **Termination.** If you make the decision to fire, meet with the employee and deliver a termination letter. This should not be very specific. Instead, keep it simple. A statement that says, for example, that you have been terminated for poor performance is enough.

Conducting Investigations

During the disciplinary process, it is important that human resources conduct a thorough investigation of the facts. Before firing someone, you should have well-documented details to support the case.

This is especially true in the wake of the #MeToo movement, where many companies have changed their policies to more aggressively go over possible sexual harassment. Many organizations have banned all relationships, even clearly consensual ones between supervisors and subordinates. Additionally, many public organizations have set up legal defense funds to support victims filing sexual harassment suits against employers.

With such cases getting increased attention, it's vital to show you conducted a proper investigation.

Is your discipline fair?

The perception that management is "against" workers is hard to shake. That's why it's vital to ensure that you treat employees fairly during disciplinary investigations. Before handing down discipline, ask these five questions:

1. Does the punishment fit the crime? Or is the employee being singled out?
2. Is the discipline consistent? Has the supervisor disciplined others differently for similar conduct?
3. Has the discipline been administered after a proper investigation of the facts? Be a neutral factfinder until you gather all the information.
4. Is the discipline being taken quickly? Sitting on the investigation may indicate you don't take it seriously. Inform the employee of the steps you're going through, as well as when you'll respond.

Self-audit: wrongful termination

Before firing anyone, ask yourself the following questions to gauge whether you could defend yourself in a wrongful discharge suit. If you answer “Yes” to any, your risk of sparking a lawsuit greatly increases.

Does your company have a history of discharging employees for any of these reasons?

1. Filing a workers' comp claim?
2. Refusing to engage in activities they felt violated state or federal statutes?
3. Reporting suspected health hazards to a state agency?
4. Missing time because of jury duty?
5. Blowing the whistle on a superior or a co-worker who violated a law or company policy?
6. Filing a wage-hour complaint?
7. Filing charges with or giving testimony to a state or federal agency for workplace violations?
8. Having wages garnished?
9. Opposing a discriminatory employment practice or filing a charge?
10. Testifying or helping in an employment-related investigation?

Termination Guidelines #4: Beware of constructive discharge

Constructive discharge occurs when employees claim their working conditions were so intolerable that they were forced to quit. Supervisors who purposely try to drive a worker to quit often trigger constructive discharge lawsuits.

1. What do courts look at when it comes to claims of constructive discharge? What types of actions can lead to such a claim?

Here's how one state supreme court defined constructive discharge: "An employee who is forced to resign due to actions and conditions so intolerable or aggravated at the time of his resignation that a reasonable person in the employee's position would have resigned, and whose employer had actual or constructive knowledge of the intolerable actions and conditions and of their impact on the employee and could have remedied the situation, but did not, is constructively discharged."

What falls into the intolerable or aggravated category?

Some examples include:

- Actions intended to humiliate such as demoting a vice president to janitor overnight.
- Actions intended to harass such as requiring a black employee to work extra hours for the same pay as White co-workers and punch a clock while others do not.
- Actions intended to destroy the employee's career or guarantee job loss (e.g., sudden, unexplained drops in performance ratings, skipped promotions, forced demotions, pay cuts).

2. What other types of factors contribute to a constructive discharge claim?

Factors that may contribute to a constructive discharge claim—either singly or in combination—include whether an employee suffered:

- A demotion
- Reduction in salary
- Reduction in job responsibilities
- Reassignment to menial or degrading work
- Involuntary transfer to a less desirable position
- Badgering, harassment, or humiliation by the employer
- Offers of early retirement or encouragement to retire outside an offer that allows other employees to participate
- Offers of continued employment on terms less favorable than the employee's former status
- A threat of violence or actual physical assault

There are other factors that don't substantiate claims of constructive discharge, such as:

- A one-time inappropriate comment from a supervisor
- Expecting employees to live up to what's demanded on the job
- Not being very friendly or communicative
- Handing out a less-than-expected pay raise, demotion or transfer based on legitimate performance issues, economic conditions or the like

3. Do employers have to tread carefully when disciplining an employee who has filed a complaint for fear of a constructive discharge claim?

You don't have to feel handcuffed in your dealings with an employee who has filed a complaint. But you do have to be careful with any disciplinary action taken, particularly after the charge has been filed. Here are six points to keep in mind before you discipline an employee who could strike back with a claim of constructive discharge.

1. You must be able to show that the behavior of the employee you want to discipline violates written company policy or is so outrageous that a reasonable employer would have been unlikely to anticipate such conduct. Here's where a clause that reserves the right to discipline for any other similar violation comes in handy.
2. You must prove that the employee was aware of the policy and the possible consequences for violating it.
3. Your recommended discipline must be consistent with actions you have taken in the past against other employees who have not filed any charges against the company. Make sure both extremes are avoided—special treatment or retaliation.
4. Be cautious when trying to build a case against employees who have filed a complaint. Putting them under special scrutiny or constructing a file filled with reprimands and/or unsatisfactory performance appraisals will make matters worse unless you can show legitimate objective reasons for the moves.
5. Remember that even if an employee's original complaint against the company is dismissed, the person is still protected. Retaliation under such circumstances can turn an innocent employer into a guilty one if

the employee can prove retaliation.

6. Take a close look at all undesirable jobs. Make sure supervisors don't use them as a weapon to punish complaining employees.

Termination Guidelines #5:

Issues surrounding layoffs

Situations sometimes arise in which a company reduces its number of employees to improve financial conditions, to change the direction of the company or just to increase profits for shareholders or owners. However, decisions about which staff members to lay off (and when) cannot be made haphazardly. Legal considerations must be paramount.

Potential charges of discrimination

Before trimming payroll, be cautious – and highly organized – when coming up with a selection process for who gets laid off. Terminated employees can pursue legal action if they feel they were chosen for dismissal instead of their peers because of a factor such as age, disability, race, gender, religion, or sexual orientation. Prior to final lay-off decisions, companies should thoroughly analyze whether there is a disparate impact on any protected groups. That analysis is best done with the help of a lawyer to preserve the attorney client privilege.

Using objective criteria can help minimize the risk of discrimination claims. You may venture into subjective territory, such as keeping on certain people whose skills are deemed best for the continued success of the slimmer organization. In this case, the basis for the selections should be articulated in writing and reviewed by upper management, HR, and legal counsel to preserve attorney client privilege

Worker Adjustment and Retraining Notification Act (WARN)

Companies with more than 100 full-time employees or that employ at least 100 workers who collectively work a total of 4,000 hours per week need to be aware of the WARN Act. Basically, this federal law protects workers at large organizations from mass layoffs without notification. Your business may be obligated to provide 60 days advance notice to affected employees or provide back pay for the difference. Most states have their own versions of the federal law, covering smaller employers. At least one state requires employers pay an additional penalty for not providing notice including an automatic severance payment based on years of service in addition to advance notice.

Decision-makers should work closely with legal counsel to understand the specifics of the WARN Act, especially in times of turmoil. Statements within the WARN Act cover exceptions to the prior-notice rules, such as because of “unforeseeable business circumstances” or “government action” (like mandatory orders to close during the COVID-19 pandemic). Since some states have their own versions of the WARN Act (often dubbed “mini-WARNs”), legal professionals can ensure compliance with those regulations, too.

Easing tensions

Layoffs create a tense environment. To reduce feelings of ill-will – and potential legal action from disgruntled laid-off workers looking to retaliate - do the following:

- Communicate lay-off decisions in a professional, empathetic manner.
- Offer severance packages to terminated employees in exchange for a release of claims. Special rules apply for employees over age 40.
- Help cover COBRA payments for a period of time to keep them on the

company health insurance plan.

- Provide placement assistance in finding a new job. Demonstrating concern during this difficult time leaves a better final impression, and it paves the way to a possible employment relationship again should circumstances change.

Termination Guidelines #6:

Termination meeting

The time has arrived ... You've evaluated all the reasons why an employee should be terminated. You've run the decision through an employment law audit and made sure you have appropriate records and documentation supporting the decision. Now it's time to tell the employee that he or she is about to become a former employee.

How you break the news to the employee is key: Follow basic rules of legal and business etiquette to allow the employee to leave with dignity—and not return with a lawsuit.

If the employee's manager, rather than HR, is designated the bearer of bad news, at least have an HR rep present at the meeting to answer questions the employee may have and to help reduce the risk of legal exposure by keeping both sides focused on the matter at hand. Also, it helps to have a witness, in case the employee challenges the termination later.

Briefly deliver the news by summarizing the well-documented, job-related reasons for the termination. That way, while the employee may not like it, he or she will have little to dispute.

Also, avoid using any harsh words during termination meetings that would serve

only to inflame the issue. Stick to the facts; don't make generalizing statements.

7 basic procedures to follow

Although termination meetings are unpleasant, these practices and procedures can help make the situation as painless—and legally safe—as possible:

1. **Conduct the termination meeting in a neutral location.** A face-to-face meeting is always ideal. If a conference room or other neutral location is not available, conduct the meeting in the employee's office. The employee will be less likely to become defensive in their own territory. However, with many employees now working remotely, face-to-face communication may not always be possible. In this case, a video call is preferable.
2. **Keep the termination meeting brief.** On average, a termination meeting should last 10 to 15 minutes. Typically, the less said, the better. For the most part, it should be a one-way conversation; don't let it turn into a debate. But that's not to say you shouldn't let the employee speak at all. Give the employee a chance to respond. Forcing the employee to bottle up feelings will just make the person more disgruntled.
3. **Tell the employee the real reason for the dismissal.** Trying to sugarcoat a serious problem can backfire later in court. Make sure the reason you state is fully supported by the employee's record. If you have done the job of progressive discipline properly, the employee should know most of the facts already.
4. **Be firm in your termination decision.** Don't give the employee the impression the decision may be reversed. If an employee tries to challenge the decision, let him or her know that the termination is final.
5. **Provide necessary documents.** If the employee will be provided severance pay,

is eligible for unemployment benefits, will be receiving a vacation time payout, or more, you should provide information and appropriate paperwork here. Inform employees when they can expect their last paycheck. Remember that in some states you have to present that final paycheck as part of the termination.

6. **Be prepared to answer questions.** Few employees are fully prepared to be fired and may have questions about benefit termination and the like.
7. **Document.** Complete a “General Separation Notice” and retain a copy in the employee’s personnel file should any questions arise post-termination. Ensure you highlight a proper legal reason for the termination.

Termination Meeting Checklist

- Tell the employee the purpose of the meeting.
- Emphasize that all relevant factors were reviewed and the decision is final and cannot be reversed.
- Tell the employee the effective date of the termination.
- Review with the employee a written summary of benefits.
- Verify the employee’s address and that of his/her dependents.
- Explain the company’s policy on providing references to prospective employers, and have the employee sign a reference release form.
- Have their final paycheck ready, or state when the employee can expect to receive it.
- Outline the next steps in the termination process, such as the return of company property; how the employee can collect his belongings; and when he must leave the premises.

- Explain any available outplacement assistance services.
- After the meeting, update the employee’s personnel file before placing it into inactive status. Then, make sure the employee’s name is removed from company directories, including email, and have business mail routed to the individual who will handle the former employee’s duties.

General Separation Notice

[Note: Employees may sign this form during their exit interview or when they receive their final paycheck.]

Company:	Job Title:
Employee:	Previous Dates of Employment:
Dates of Employment (Start & Last):	Overtime? Yes ___ No ___
Working Hours:	Union involved? Yes ___ No ___
Rate of Pay:	Voluntary Quit ___ Discharge ____ Lack of Work ____
Severance Pay:	Occurrence:
Type of Discipline:	Date Issued:
Type of Discipline:	Date Issued:

What were the factors leading to separation if no discipline was applied?

What other circumstances, if any, were taken into consideration?

Employee's Comments

Employee's Signature:

Date:

Immediate Supervisor's Signature:

Date:

Is this individual eligible for
rehire? Yes ____ No ____

If No, Reason: