

White Paper

# **TERMINATION GUIDELINES**

# Termination Guidelines

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Employee terminations are always a difficult situation for everyone involved. However, beyond the discomfort of the situation, modern employers must truly consider the potential fallout. That doesn't mean you can't let an employee go, but you must do it the right way.

In this special report, we'll look at termination guidelines for firing an employee legally. You'll learn about issues such as exercising your right to fire at will, laying the groundwork with progressive discipline, avoiding wrongful termination lawsuits, preventing constructive discharge claims, conducting termination meetings and exit interviews, and handling layoffs with care.

**Whether you're a small business or a Fortune 500 company — Business Management Daily has the tips you need to stay ahead.**

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Your company may need to downsize for economic reasons. Or perhaps you're looking to get rid of a problem employee with behavioral/performance issues. Either way, terminating someone is never pleasant or easy.

Employee terminations always present a difficult situation for everyone involved. However, beyond the discomfort of the situation, modern employers must truly consider the potential fallout. Easy-to-find online information means workers nowadays are more aware of their rights under the law. That also makes them more likely to seek the advice of an attorney if they think they've been discriminated against or treated unjustly. In fact, many employees who suspect they are about to be terminated will visit an attorney before you actually terminate them and will be armed with legal advice on what to say or not say and what documents to copy before the fateful meeting. And even if they don't take you to court, their harsh words on social media and company review sites can result in long-lasting damage to your brand.

That doesn't mean you can't let an employee go, but you must do it the right way. In this special report, we'll look at termination guidelines for firing an employee legally. You'll learn about issues such as exercising your right to fire at will, laying the groundwork with progressive discipline, avoiding wrongful termination lawsuits, preventing constructive discharge claims, conducting termination meetings and exit interviews, and handling layoffs with care.

## **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 usually specifies the reasons you can terminate the employee.

You should also be aware that in some states, a promise made by a hiring manager may create a quasi-contract if the new employee relies on the promises to his detriment. For example, if an applicant is induced to leave his old job, sell her house at a loss and move cross country based on the promise of a permanent job, there may be an implied or quasi-contract. It's one good reason you should always tell hiring managers that they must make no oral promises about the job and include an at-will statement in job advertisements and job offers as well as in the handbook.

## **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, genetic information, military service or a disability, among other reasons. Some states add other limitations—for example, in many states, you can't fire an employee for sporting a natural hairstyle. Be sure to understand any state, or even city, protections that might be in place.

### **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 who's behind on child support, you can't fire him merely to save yourself the hassle of additional paperwork.

### **Exception 3: “Just cause” promise**

If you tell your workers they will be fired for cause only—or otherwise establish guidelines that spell out how and when terminations will be handled—you may be creating an implied employment contract.

If you don’t follow the disciplinary rules outlined in your employee handbook to the letter, you could find yourself on the losing end of a lawsuit.

### **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.

## **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 as well as the job the employee is actually doing.

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 straighten up.

## 7 classic firing mistakes to avoid

How can you avoid the anger of fired employees that might later manifest itself as a lawsuit? 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.
2. **Avoid surprises.** Workers should never be 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. It also demonstrates good faith.
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. Also, when hiring workers, don't make promises you can't keep.

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 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. That someone should not have been involved in the termination decision.
- Write a memo afterward about the meeting and have the witness sign it.
- If the employee raises complaints or questions about discrimination or harassment that you haven't heard before, tell them you will investigate the matter but don't call off the termination unless it is crystal clear that the claim has merit. If your investigation reveals that the employee had indeed been harassed or discriminated against, work with counsel to determine whether you should rehire the employee.



# 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 own 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:

### **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.

### **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 steps to improve the employee's performance and shows a good—faith effort on the part of the business.

Be sure to 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.

### **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.

### **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 significant say in hiring and firing decisions. Some organizations suspend employees while they investigate and decide whether to terminate.

Before acting, make sure 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, or other discrimination was the true reason for your actions. Document your action and reasoning.

### **Termination**

If you make the decision to fire, meet with the employee and deliver a termination letter that states the reasons for dismissal. These do not need to be extensive.

### **Conducting Investigations**

During the disciplinary process, it is important that HR conducts 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. The idea is that if you conduct a thorough, unbiased investigation and remedy the harassment if you conclude it occurred, you cut your company's liability for that harassment in most cases while punishing the harasser.

Many organizations have banned all relationships, even clearly consensual ones between supervisors and subordinates as a way to prevent harassment from happening. Additionally, many public organizations have set up legal defense funds to support victims filing sexual harassment suits against employers. This means it's more dangerous than ever to ignore harassment but conversely less likely that firing a harassing worker will mean losing a wrongful termination lawsuit.

### **Is your discipline fair?**

The perception that management is “against” workers, once earned, 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?** Have different supervisors disciplined others differently for similar conduct?
3. **Has the discipline been administered after a proper investigation of the facts?** Be a neutral fact-finder until you gather all the facts.
4. **Is the discipline being taken quickly?** A simple investigation that takes weeks could be seen as though your organization is trying to find problems. 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. Speaking out on issues with which your organization disagrees?
3. Refusing to engage in activities they felt violated state or federal statutes?
4. Reporting suspected health hazards to a state agency?
5. Missing time because of jury duty or military service?
6. Blowing the whistle on a superior or a co-worker who violated a law or company policy?
7. Filing a wage-hour complaint?
8. Filing charges with or giving testimony to a state or federal agency for workplace violations?
9. Having wages garnished?
10. Opposing an alleged discriminatory employment practice or filing a charge?
11. Testifying or helping in an employment-related investigation?
12. Requesting a reasonable accommodation for disability, religious, or pregnancy-related reasons, asking for FMLA leave, or taking PUMP Act breaks?

## Beware of constructive discharge

Constructive discharge occurs when employees claim their working conditions were so intolerable that they were forced to quit. Employers must stay within federal employment laws so they don't contribute to factors that trigger constructive discharge claims, and don't heighten the risk of employee lawsuits.

### **1. What do the 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.
- 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
- reassignment to work under a younger supervisor
- involuntary transfer to a less desirable position
- badgering, harassment, or humiliation by the employer
- offers of early retirement or encouragement to retire
- offers of continued employment on terms less favorable than the employee’s former status
- a threat of violence or actual physical assault
- a threat of termination

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 or even a demotion or transfer, as long as the supervisor can prove that such a negative report is valid.

### **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.
2. You have to 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. You should never try 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.
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.

## Issues surrounding layoffs

Situations sometimes arise in which a company reduces its number of employees in order to improve financial conditions. 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.

Using objective criteria such as seniority or the type of position being eliminated 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.

### 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.

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 – companies may want to consider the following:

- Communicating lay-off decisions in a professional, empathetic manner.
- Offering severance packages to terminated employees in exchange for a release of claims. But be mindful that older workers are protected by the Older Workers Benefits Protection Act (OWBPA) and that any severance pay offers must comply with OWBPA notice and time to consider rules.
- Helping to cover COBRA payments for a period of time to keep them on the company health insurance plan.
- Providing 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 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. Allow the person to offer his or her side of the story—and even vent a little emotion—without interruption.

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. If video calls aren't common in your organization, a phone call may also be a viable option.

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. Be sure to check the rules in your state because you may have to provide all pay due at the time of discharge in some jurisdictions.
6. **Be prepared to answer questions.** Few employees are fully prepared to be fired, and may have questions regarding the reasons behind your decision.
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. Advise that other options were explored, if applicable.
- 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. Many states have very specific rules about when the employee must receive any wages due and payouts for accumulated paid time off.
- Outline the next steps in the termination process, such as the return of company property; how the employee can collect his belongings; when he must leave the premises.
- Review the employee's confidentiality obligations.
- 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:

## Conducting exit interviews

Many employers think that conducting exit interviews with employees who have been fired is a waste of time. After all, angry or bitter ex-employees would not be

motivated to do something beneficial for the organization that just let them go. And if they're harboring negative feelings toward the company, how helpful could their feedback be?

But there are several reasons you should conduct an exit interview with an employee who has been fired or otherwise terminated:

1. To discover any unknown causes of an involuntary termination; that information could prevent the recurrence of such an action in the future.
2. To learn of any problems the employee may have had with the organization that could be corrected or could spur a lawsuit like a claim of sexual harassment and retaliation the employee brings up now.
3. To learn of any misunderstanding or conflict between an employee and the immediate supervisor so that a similar situation can be avoided in the future.
4. To ensure the employee understands what compensation, allowances, benefits, and payments he or she is entitled to receive.
5. To make sure company property has been returned.

Exit interviews, whether with an employee who has been fired or who has resigned, can be a valuable resource. Information learned in an exit interview can pinpoint areas of concern and provide a foundation for implementing changes. If the employee raises a new claim of harassment, discrimination or other legal problem, tell the employee you will investigate the claim as you would for any employee raising similar concerns.