

# Employee Terminations 101: Firing Legally and Fairly

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# NFIB Small Business Legal Center

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# Four Truths about Employment Law

1. Juries care about fairness, not legality.
2. Juries favor employees.
3. Juries always give employees the benefit of the doubt.
4. The government is not neutral.

# Millionaire Question

What percentage of jurors would try to return a verdict for an employee who is unfairly treated yet no law has been broken?

- 10%
- 35%
- 51%
- 68%



# At-Will Employment

Employment relationships generally fall into two categories:

- Contractual – termination must be handled per terms of contract
- “at-will” – employment may be terminated by employee or employer at any time and for any reason, except an illegal one

# Laws that Protect Employees

- Title VII of the Civil Rights Act of 1964 (Title VII): Prohibits discrimination/harassment based on race, color, religion, genetic information, and national origin
- Americans with Disabilities Act (ADA): Prohibits discrimination against qualified individuals with disabilities
- Pregnancy Discrimination Act (PDA): Prohibits discrimination against employees based on pregnancy, childbirth, or related medical conditions

# Laws that Protect Employees

- Occupational Safety and Health Act (OSH Act):  
Makes it illegal to fire someone in retaliation for reporting safety/health violations or participating in an investigation
- Fair Labor Standards Act (FLSA): Prohibits retaliation against employees who complain of FLSA violations or participate in investigations
- Age Discrimination in Employment Act (ADEA):  
Prohibits age discrimination against individuals 40 years of age or older

# Termination of Employment

- Can be initiated by the employee (resignation) or the employer (dismissal/termination)
- Employer initiated in cases of:
  - unacceptable job performance,
  - misconduct, or
  - economic reasons (budget cutbacks, reorganization, downsizing)
- *Focusing today on employer-initiated terminations*

# Legal Reasons to Terminate An Employee

- Poor performance
- Policy violation
- Failure to meet eligibility requirements
- Failure to meet job qualifications
- Layoff or elimination of position

# Discipline and Documentation Process

A discipline process:

- lays the groundwork for fair and legal firings
- puts the employee on notice of the problem and potential consequences

Documentation:

- records the problem and actions taken, especially if termination is the last resort
- Should be complete and thorough

# Progressive Discipline

Most employers follow progressive discipline.  
For example, an employee may get:

1. A verbal warning for first offense
2. A written warning if the problem continues
3. A final written warning
4. Termination as a last step

# How to Document Discipline

For complete and effective documentation, be sure to cover all the following elements:

- The facts, including details like the date, time, and location of the problem
- The specific rule or standard violated
- Objectives for improvement – what you expect the employee to do to correct the problem

# How to Document Discipline (cont.)

- Suggestions for meeting objectives: What you agree to do to help the employee meet the objectives.
- Consequences: The action you will take if the employee fails to meet the stated objective
- Signatures and dates: You and the employee should both sign

# Termination Checklist

- Was the employee informed of required standards of performance and conduct and the consequences of not meeting those standards?
- Was a proper investigation conducted -- did the employee have an adequate opportunity to tell his or her side of the story?
- Was the employee given adequate counseling or training and opportunity to correct the problem?
- Is the employee's employment history as documented consistent with discharge?

# Termination Checklist

- Have performance standards, work rules and disciplinary procedures been applied consistently?
- Do the facts make clear that the employee is not being discharged because of his or her race, sex, religion, age, national origin, disability or other improper reason?
- Is discharge the appropriate penalty?
- Was a proper termination interview conducted and complete documentation prepared?
  - ☐ In person, professional, private & witnessed
  - ☐ Keep short & avoid confrontation

# Common Errors in Termination of Employment

Error #1– Terminating the employee on the spot

- Do not act out of anger, frustration or impulse
- It is not recommended to terminate an employee on the spot.
- **INSTEAD** - Suspend the employee effective immediately, pending a review of the situation

# Common Errors in Termination of Employment

Error #2 – Lack of documentation to support the decision

- Do not construct documentation after the fact
- **INSTEAD** – document all through the employment relationship, in the normal course of business.
- **REMEMBER** – if it's not documented, it didn't happen!

# Common Errors in Termination of Employment

Error #3 – Losing control of the termination meeting

- The emotions of the situation take over the meeting
- **INSTEAD:** Prepare the manager for the meeting. Know what needs to be communicated to the employee and keep the meeting on track

# Unemployment Compensation

- Financial Eligibility rules vary from state to state.
- Usually based on working at least so many weeks in a certain time period.
- Find links to your state's unemployment agency at the [U.S. Department of Labor](#) Web site.



# Unemployment Compensation

## Generally eligible if:

- Laid off due to lack of work.
- Terminated for work related issue that do not rise to the level of "misconduct."

## Generally ineligible if:

- Voluntary quit.
- Terminated for work related misconduct.

# Unemployment Compensation

- Generally ineligible if employee voluntarily quit without good cause.
- Burden of proof on employee to prove good cause.



# Unemployment Compensation

- Not the same thing as “poor performance.”
  - Termination for poor performance will not usually disqualify.
  - Must be a violation of a uniformly enforced company policy



# Termination Scenario #1

An employee has begun to perform erratically and is suspected of having a problem with drugs. What can you say to him about it? The performance problem becomes more serious, possibly justifying termination. Should you terminate outright?

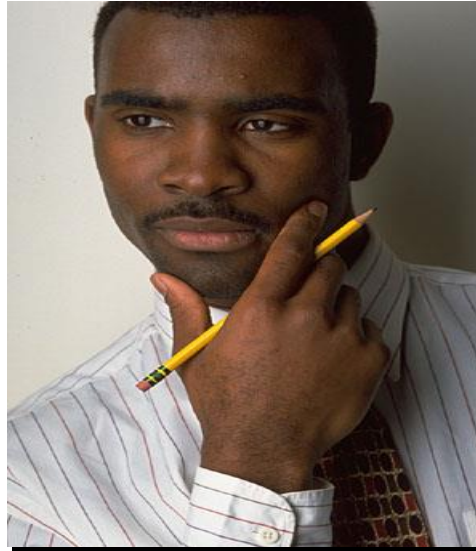
## Termination Scenario #2

Your company terminates an employee for being unproductive and abrasive. A few days later you receive a phone call from the owner of another business in town who asks you for a candid reference on the terminated employee. What can you say? Suppose the employee's attorney calls, threatens litigation, and asks for a reference as part of the settlement? Suppose the employee assaulted a co-worker?

# Remember . . .

- Nip problems in the bud – act quickly
- Be consistent
- Ensure fairness
- Be aware of laws, policies, procedures affecting decision

# Questions?



# THANK YOU!

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Thank you!

