



Termination tools

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Termination mistakes

10. Not telling the real reasons
9. Poorly planned termination meeting
8. Ignoring policies and contracts
7. Poor post-termination communication
6. Ignoring past practice
5. Reacting based on emotion rather than facts
4. Not getting a release
3. Inadequate documentation
2. Not treating the employee with dignity and respect
1. NOT firing someone who should be fired

Termination red flags

Discrimination

- Race/color
 - National origin/citizenship
 - Gender
 - Religion
 - Age
 - Disability
 - Pregnancy
 - Military service
 - Union activity
 - Marital status*
 - Parental status*
 - Sexual orientation*
 - Arrest/conviction record*
 - Lawful product use*
 - Trans-gender identification*
 - Physical appearance*
 - Genetic information (soon)
 - “Association”
 - “Disparate impact”
- *only in some states

Retaliation

- Complaints about discrimination, safety, working conditions, wage and hour, etc.
- Opposing unlawful practices or participating in an investigation, proceeding or hearing
- Union organizing or other protected concerted activity
- Workers' comp claims
- ERISA rights
- Refusing/failing polygraph
- Wage garnishment, bad credit or bankruptcy
- Demanding personnel file
- Exercising other legal rights

Termination red flags

Breach of Contract

- Express (e.g., contract)
- Implied (e.g., handbook)

Whistleblower

- Health and safety
- Sarbanes-Oxley
- Any other

Leave Protection

- Medical
- Military
- Jury duty
- Witness duty
- Any other

Tort Claims

- Constructive discharge
- Defamation
- Infliction of emotional distress
- Assault and battery
- False imprisonment
- Good faith and fair dealing
- Blacklisting
- Malicious prosecution
- Negligent hiring/retention

Other Statutes

- WARN: plant closing, layoff
- COBRA: post-term benefits
- HIPAA: release of medical info
- 409A: deferred comp tax

Other Risk Areas

- Off-duty conduct
- Recent move or rejected offers
- Long tenure with no significant performance/disciplinary issues

Termination green flags

Key: focus on legitimate job-related business reasons

Gross or Repeated Misconduct

Major or repeated violations of work rules (e.g., workplace violence, harassment, gross insubordination, embezzlement).

Poor Performance

Failure to meet clearly articulated expectations despite opportunities to improve.

Breach of Contract

Failure to perform a material term or condition.

Employee Handbook

- Employment-at-will statement
- “No contract” disclaimer
- Work rules (illustrative not exhaustive)
- Discipline policy (progressive but discretion)
- Periodic legal review

Collective Bargaining Agreement

- Bargain hard for fair provisions
- Know the details

Employment Agreements

- Develop overall philosophy
- Key provisions
 - Clear “cause” definition
 - Severance
 - Noncompete (narrow)
 - Nonsolicitation
 - Nondisclosure
 - Nondisparagement
 - Release

Manager Training

- Employment law
“red flags”
- “SMART” objective-setting
- Performance evaluations
 - Honest and accurate
 - Timely
- Disciplinary process
 - Easy-to-use corrective action forms
 - Objective
 - avoid subjective
 - “SMART” with consequences

Investigation Process

- Follow Prepare/
Investigate Checklist
- Fair and thorough
- Audit for consistency

Other Policies

- Severance
- References
- Re-hire
- IT, Security
- Employment Practices
Liability Insurance (EPLI)

Termination test

1. **Notice:** Did the company give reasonable notice of the consequences of the conduct?
2. **Rule:** Is the rule reasonably related to (1) orderly, efficient and safe operations and (2) performance the company should reasonably expect?
3. **Investigation:** Did the company conduct a full, fair and timely investigation into the facts?
4. **Proof:** Is there sufficient evidence that the employee is guilty as charged?
5. **Consistency:** Has the company applied the rule consistently to all employees?
6. **Penalty:** Does the punishment fit the crime, considering (1) the seriousness of the offense and (2) the employee's service record?

Documents

- Employee handbook
- Personnel file
- Employment agreement
- Collective bargaining agreement
- Performance appraisals
- Disciplinary notices
- Severance policy
- Manager files, notes, logs, etc.
- All communications (e-mails)

Investigation

- Investigator unbiased?
- All key witnesses interviewed?
- All key documents or other evidence reviewed?
- Employee given a chance to tell his/her side?

Analysis

- Apply Termination Test
- Any Termination Red Flags?
- Any preferable alternatives?
 - Final written warning?
 - Decision-making leave?
 - Suspension?
 - Demotion?
 - Transfer?
 - Re-assignment?
- Performance improvement plan?
- Coaching/ counseling/ training?
- Resignation?
- Severance?
- Outplacement?
- Independent review?

Termination meeting

Who?

- Manager (communicates decision)
- HR (witness, note-taker)
- No third parties (except union rep)
- Security?
- Outplacement consultant?

Where?

- Preferably not manager's office
- Private conference room
- Sit near door in case of violence
- Tissues, water, phone
- Remove any potential weapons

When?

- Mid-week #1, Friday #2, Monday worst
- End of day #1, morning #2
- Avoid holidays/vacations

How?

- Compassionate
- In person
- Don't block exit
- Tissues, water, phone
- Escort only if violence/theft risk

What?

- Manager key messages
 - Direct, honest, simple
 - Decision made to termination employment
 - Effective date
 - Key reasons and facts
 - Followed company policies
 - Allow questions but don't get into debate
- HR key messages
 - Termination package
 - Final pay*
 - Accrued vacation
 - Benefits (COBRA, retirement plans, stock options, etc.)
 - Severance?
 - Outplacement?
 - Termination notice*
- Return of company property
- Post-termination restrictions
- Exit process
- Contact person

*required at termination in some states

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