HOW TO LEGALLY TERMINATE INEFFECTIVE AND UNPRODUCTIVE EMPLOYEES

Participant Notebook
Before You Make the Decision to Terminate …

Understanding Employment at Will

Employment at will — In the absence of an individual employment contract or a union collective bargaining agreement, employees can be hired or fired for any reason at any time other than an unlawful one.

Exceptions to Employment at Will

- Protective class status
  - Race
  - Color
  - Sex
  - Age
  - Religion
  - Disability
  - National origin
  - Veteran status
  - Other protected classes under state law

- Protection for those who further public policy
  - Whistleblowers
  - Jury members
  - Military duty

- Implied contracts

- Equitable estoppel

Just Cause

Is there a legitimate business reason for the action?
Explore Your Alternatives to Firing Before Beginning the Termination Process

**Overriding question for the employer:**
Have we done all that we should?

**Overriding question for the jury:**
Did the employer behave fairly?

1. Have we been fair?

2. Did we follow the disciplinary process in the employee handbook?

3. If a rules violation occurred, how were others who violated the same or similar rules treated?

4. Could this look like retaliation for an issue the employee has raised?

5. Has anyone made a promise to the employee that we are violating?

6. Have we investigated the situation thoroughly and fairly?

7. Have we lined up our documentation? Will it help and not hurt us?

8. Have we considered using a settlement and release document?

9. Are we prepared for the impact on other employees and customers?

10. Are we letting employees leave with dignity?
Understand the Legally Acceptable Grounds for Termination

1. A violation of organization policy

2. Consistent underperformance
   - The employee won’t do the work
   - The employee can’t do the work

3. Threats or physical violence

4. Illegal acts

5. Theft

6. Falsified information
Your Best Legal Defense: How to Put Together Airtight Documentation

Gray Areas for Firing and How to Use Documentation to Justify the Action

1. Gray area: Documentation is insufficient — it is inaccurate or does not reflect the reality of the situation.
   - Explain changes in procedures.
   - Slow down the process of terminating.
   - Use more than one warning.

2. Gray area: A formerly good employee turns bad.
   - Forgive, but don’t forget.
   - Warn that a repetition of this action could result in termination.

3. Gray area: The job changes.
   - Consider transferring the employee.
   - Coach employees to improve job performance.
   - Warn that a lack of job improvement could result in termination.
Why Releases and Separation Agreements Can Be Your Best Legal Protection

Release

Language that says an employee gives up, relinquishes, or releases his or her rights without any admission of liability on the employer's part to sue the organization.

Consideration

Something above and beyond that which the employer would normally give at the time of termination.

Examples of Consideration

- Severance pay, if not a part of the employment policy
- Continuation of the employer health plan
- Access to some of the employer's communication systems
- Access to employer's technology
- Continuation of memberships in industry associations

Items to Include in a Release

- Confidentiality provision
- Reminder about proprietary information
- Restrictions against contacting former clients or current employees
- Reference to the Age Discrimination in Employment Act (ADEA)
- Time to consider signing the release
- Reminder that the employee has the right to consult with an attorney
- The right to rescind the signature within a certain number of days
The Legal Documentation You’ll Be Expected to Provide in Court if You’re Sued

Good documentation shows that:

• The employer clearly communicated expectations.

• Expectations were enforced uniformly and evenhandedly.

• The employer gave clear notice that the employee’s behavior violated a rule or standards of behavior or did not meet performance expectations.

• The consequences of continued unacceptable performance or unacceptable behavior were clearly stated.

• The employee was given a meaningful opportunity to improve.

• The employer offered assistance to the employee in a reasonable manner.

• Despite all of the attempts on the part of the employer, the employee continued on a course of unacceptable performance or behavior.
When All Else Fails: When and How to Legally Fire Employees

When to Skip the Discipline Process and Go Right to Termination

1. Significant rules violation

2. Significant error, especially in the eyes of others

3. Minor rules violation, but without employee remorse
Ensuring Your Termination Procedure Is Legally Airtight

Laying the Groundwork

- Establish clear and fair work rules, policies, and job performance standards.

- Engage in fair and visible performance leadership using progressive disciplinary measures when necessary.
  - Coaching and counseling
  - Retraining, if appropriate to the situation
  - Verbal warning with notes to the file to substantiate the conversation
  - Written warning signed by the employee
  - Suspension with the opportunity for the employee to write out an action plan for change

- Investigate problems thoroughly and professionally.

- Establish a solid performance feedback system.

- Investigate the “last-straw” incident carefully.

- Make the discipline proportionate to the offense.

- Do not speak negatively about employees after they leave.
Ensuring Your Termination Procedure Is Legally Airtight, continued

A good process and good documentation:

1. States a legitimate reason for the termination.

2. Identifies the rule or standard violated.

3. Demonstrates that the rule or standard was communicated.

4. Describes the efforts to coach, counsel, and warn the employee of the consequences of continued misconduct or nonperformance.

5. Clearly outlined future expectations and consequences of failure to meet them.

6. Gave the employee the chance to clarify any ambiguities or concerns.

7. Outlined the additional resources, including training, that the organization is going to provide.

8. Is dated and signed by the author.

9. Is dated and signed by the employee or witnessed by another manager.

10. Is surrounded by discretion.

11. Uses plain, commonsense language that a jury can understand.
How a Termination Meeting Should Be Conducted

General Considerations

1. Use a neutral space.
2. Decide ahead of time the people who will be present and their roles.
3. Prepare termination documentation before the meeting.
4. Consider the timing.
5. Have security on alert, if necessary.
6. Prepare a checklist of items to be recovered from employee.
7. Role play the meeting to anticipate the employee’s reactions.

What You Should — and Should Never — Say During the Firing Process

1. Get to the point quickly.
2. State the reason for the decision, focusing on job performance, not personal attributes.
3. Use the word terminated or fired.
4. Listen.
5. Don’t defend.
6. Don’t change your mind unless a dramatic piece of new information comes to light.
7. Avoid platitudes and promises.
8. Provide structure. Be clear about final pay and benefits.
9. End the meeting decisively.
10. Respect the departed employee’s privacy.
Recommended Resources

Audio CDs

The Art of Being Assertive
Communicate With Confidence
Effective Coaching
How to Handle Conflict and Confrontation
How to Handle Difficult People
How to Manage Projects, Priorities & Deadlines
Mastering the 7 Habits (4-program set)
Money Mastery (with CD-ROM)
Motivation and Goal-Setting
The Power of Persuasion

Manuals

Learn to Listen
The Manager’s Role as Coach
Negaholics™ No More
Smart Hiring: The Complete Guide to Finding and Hiring the Right People
Think Like a Manager, Third Edition

Books

101 Sample Write-Ups
3003 Ideas in a Box (3-volume set)
Discipline Without Punishment
Fair, Square, and Legal
Lifescripts (with CD-ROM)

To order resources, call Customer Service at 1-800-258-7246 or visit our Web site at www.NationalSeminarsTraining.com.
Dear Customer,

You are a valued customer and to say “thank you,” we have included the following as a bonus for you. We believe you’ll find it helpful as a job aid or to further your knowledge beyond today’s broadcast.

Thank you,

Susan Enyeart  
Director, Curriculum Development
Bonus Materials:
DOCUMENTATION CHECKLIST

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CONFERENCE SERIES,

A DIVISION OF ROCKHURST

UNIVERSITY CONTINUING

EDUCATION CENTER, INC.
Documentation Checklist

Beginning the Process:

Begin your process of thorough documentation with these steps:

1. Establish the goals, standards, specification, training feedback, and competencies as part of a complete job description that you can discuss with the employee.
2. Hold a private discussion with the employee to review the job description and to raise any concerns. (This should be done at least twice a year.)
3. Clarify expectations, standards and requirements; avoid misunderstanding of expectations and reveal potential problems.
4. Use an ongoing informal feedback worksheet to discuss performance quarterly with each employee.

Document Behavior and Attitude:

1. Keep a running record of all of your discussions with the employee as you point out any problems and the effect of the behavior or attitude.
2. Build your file based on clear evidence and specific dates of examples.
3. If the principle problem is attitude, make certain to identify the resulting behavior or performance issues.
4. Clarify your concerns with the employee to be sure he or she understands your expectations.
5. Be consistent and fair.
6. State consequences and your expectations clearly.
7. If the incident is serious or has occurred frequently, also document the discussion in a memo to the employee with a copy to the file.
Documentation Checklist, continued

Documentation Checklist

☐ What resources and opportunities are available for the employee and what dates these were offered

☐ The company has consistently applied its policies for progressive discipline.

☐ The employee has been offered every resource and opportunity to change his or her behavior; that he or she has not in fact changed, and there is no reasonable expectation that change will occur. Document what the resources and opportunities are and the dates offered.

☐ All options have been considered, such as transfer, and that the employee has, where appropriate, been offered those options.

☐ All company property has been returned.

☐ Any post-termination actions have taken place.

Ensure that:

☐ All documentation and records are complete.

☐ The appropriate approvals — owner, department manager, human resources — have been given in writing.

☐ Appropriate written notice has been given to the owner, department manager, and human resources.

☐ Appropriate written notice has been given to the employee.

☐ All final pay, severance, and vacation time have been properly calculated.

☐ All records have been distributed — owner, human resources, and department manager.
Bonus Materials: THE EMOTIONAL SIDE OF TERMINATIONS: A SURVIVAL GUIDE

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Prepare Yourself Emotionally

Issues to Consider

1. **Public Policy** — Employers may not discipline or terminate employees for reasons that violate public policy or for behavior that supports the public good. Employees should not be disciplined or terminated:
   - As Retaliation for reporting safety hazards or violations of law.
   - For exercising legal rights or meeting legal obligations.
   - With a motive of avoiding legal obligations.
   - For refusing to take part in illegal activity.

2. **Malicious Termination** — Employees should not be subjected to outrageous behavior which causes undue emotional stress.

3. **Good Faith and Fair Dealing** — Employers have the obligation to act based on honest intentions and beliefs. Discipline or discharge which attempts to defraud or to take unscrupulous advantage of the employee is in “bad faith.”

4. **Implied Contract** — In spite of the absence of an express or written employment contract, acts or conduct can create an implied understanding or agreement between the employer and employer about the terms of employment.

5. **Discrimination** — an employee can not be treated adversely or terminated based on his or her membership in a protected class. Discrimination is against protected groups in employment decisions and practices is prohibited on the basis of the following:
   - **Race, Color, National Origin** — Civil Rights Act, Equal Opportunity Act, and Immigration Reform and Control Act
   - **Religion** — Civil Rights Act and Equal Opportunity Act
   - **Sex** — Civil Rights Act, the Equal Pay Act, Equal Employment Opportunity Act, and Pregnancy Discrimination Act
   - **Age** — Age Discrimination in Employment Act and the Employee Retirement Income Security Act
   - **Disability** — Vocational Rehabilitation Act, Pregnancy Discrimination Act, and the Americans With Disabilities Act
Prepare Yourself Emotionally, continued

Other Issues to Consider

1. **Personal Liability** — Managers can be held personally liable for actions taken or for failure to take action when needed in the workplace.

2. **Employee Safety** — Company liability is absolute if other employees are harmed because of management failure to take action in a known or should-have-known situation.

3. **Employee Privacy** — Employee privacy must be observed when disciplining or terminating employees. Managers can be found guilty of libel or slander if inaccurate information about the employee is shared freely. The termination process must be confidential. After confrontation, confirmation, and termination, the manager can disclose and document disciplinary or termination information to the file and other management as necessary.
Termination Guidelines

1. Be clear about the reason.
2. Gain support from upper management.
3. Give the grounds for dismissal.
4. Back it up with fact and provide documentation.
5. When in doubt, get a witness.
6. Give guidance and support as possible.

Employee Actions That May Call for Immediate Termination

1. Theft
2. Insubordination
3. Sabotage
4. Failure to follow safety procedures
5. Use of alcohol or drugs on the job
6. Violence in the workplace
7. Sexual harassment
Keep It Productive

Choose the Right Time and Place

- As soon as possible
- Early in the week
- In private
- When the situation is critical, terminate immediately and in a secured location.

Choose the Right Words

Use:
- “I” statements
- Clear and specific terms
- Questions to check for understanding

Avoid:
- Words that evoke negative responses
- Comparisons
- Absolutes
- Criticisms of a person individually

Keep It Focused

1. Stick to the point
   - Cover one point at a time.
   - Do not beat around the bush.

2. Keep it job-related
   - Identify what the performance expectations were and where the employee failed to meet them.
   - Identify steps previously taken to correct the problem (if termination is not due to a gross violation of company policy and immediate).
   - Review employee’s failure to meet performance standards and the consequences — termination.
# Deal With the Emotional Responses That Come From Terminated Employees

<table>
<thead>
<tr>
<th>The Reaction</th>
<th>Your Response</th>
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| Tears                      | • Do not terminate the session.  
                              • Give the employee time to regain his or her composure then continue.  
                              • Do not reinforce the emotion.  |
| Jeers                      | • Let them speak without interrupting.  
                              • Review employee’s opportunities and failure to meet performance standards.  
                              • Keep all discussion job-related. Don’t make it personal and don’t take it personally.  
                              • State the decision to terminate as final.  |
| Anger                      | • Do not buy into the anger.  
                              • Use a low and even voice tone.  
                              • Respond appropriately — keep responses directed to the job and the employee’s failure to meet performance standards.  
                              • Maintain eye contact.  |
| Begging                    | • Review the employee’s opportunities to correct the problem.  
                              • Note that the termination is the result of the employee’s failure to correct the problem.  
                              • State the termination as a final decision and effective immediately.  |
| Denial or Defensiveness    | • Get to the point.  
                              • Stand firm.  
                              • Do not back down.  |
**Protect Yourself From Litigation**

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<th>Reason for termination:</th>
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<th>Documentation</th>
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<td>☐ Performance evaluations</td>
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<td>☐ Counseling and disciplinary documentation</td>
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<td>☐ Employee signed statement of receipt of disciplinary documentation</td>
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<td>☐ Termination documentation</td>
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<td>☐ Employee separation agreement and terms</td>
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<td>☐ COBRA and HIPAA information</td>
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<td>☐ Other: ____________________</td>
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<th>Anticipated reaction:</th>
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<th>Your planned response:</th>
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<th>Evaluate Your Effectiveness</th>
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<td>☐ I was prepared for the termination meeting. I related the problem behavior to the termination decision, outlined expectations that the employee did not meet and the termination decision. I collected specific instances when the behavior had occurred and tied them to the consequences resulting in termination.</td>
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<tr>
<td>☐ I have objectively documented the employee performance problems as based on the job description.</td>
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<td>☐ I scheduled the meeting at the most productive and private date and time.</td>
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<td>☐ I preserved the employee’s privacy before, during, and after the meeting by scheduling the session at a time and place that was neither conspicuous nor public. I only discussed the employee termination with senior management.</td>
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<td>☐ I showed the employee proper respect by refraining from criticizing personally, questioning character, swearing, or calling the employee names.</td>
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<td>☐ I did not exaggerate or blow things out of proportion to illustrate my point of view.</td>
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<td>☐ I gave the employee adequate time and opportunity to correct the problem.</td>
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<td>☐ I listened carefully and was receptive to the employee’s side of the story and listened to his or her ideas.</td>
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<tr>
<td>☐ I provided the employee with documentation from past counseling or disciplinary sessions.</td>
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<tr>
<td>☐ I secured the employee’s signature of acknowledgement on the termination documentation.</td>
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<tr>
<td>☐ I ended the termination meeting professionally and gave the employee specific direction on how the termination process would proceed and what to expect.</td>
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Bonus Materials: TERMINATION POLICY AND PROCEDURE

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Termination Policy and Procedure

Ensuring a Termination Policy/Procedure Is Legally Airtight

The ability to “fire right” depends on the groundwork laid prior to hiring someone.

- Establish fair work rules and policies.

- Enforce rules.
  - Be fair; use progressive disciplinary measure when necessary.

  — Be consistent; enforce rules uniformly.

The Steps of Progressive Discipline

1. Coaching and counseling

2. Retraining (if appropriate to the situation)

3. Verbal warning

4. Written warning

5. Suspension (helping employees get one last chance)

6. Termination

  - Establish a performance feedback system.
  - Investigate the “last straw” incident thoroughly. (Not only does this ensure that subsequent actions are legal, appropriate, and proportionate to the offense committed, but it also helps take the guilt out of a termination by demonstrating that the firing is 100 percent warranted.)
Termination Policy and Procedure, continued

Coaching Techniques That Will Prove in Court That You Tried to Help an Employee

1. New employees should be provided with a copy of the organization’s employee handbook.
2. Orient new employees in general conduct requirements as listed in the employee handbook.
3. Orient employees in the specific conduct requirements of their positions.
4. Counsel subordinate employees in a timely manner concerning questionable conduct, pointing out specific areas of deficiency, specific improvements required, and the possible consequences of continued conduct deficiencies.
5. Supervisory counseling should include an offer to assist the employee in improving conduct and to be available, within reasonable limitations, for any further consultation the employee may request.
6. Advise the employee of the availability of the Employee Assistance Program (EAP) for assistance in handling any alcohol, drug, or other personal problem including stress, financial, marital, family, legal, or emotional difficulties. Refrain from making a determination as to whether the employee has a problem, diagnosing a suspected problem, and assuming the role of an EAP counselor in dealing directly with the employee’s problem.
7. Counseling sessions should be documented and a copy of the record should be provided to the employee.

Making Sure All Pre-termination Counseling Sessions Are Legal

- Customize the review for each department and job.
- Two schools of thought:
  — Link performance reviews to raises or bonuses.
  — Decouple performance reviews and compensation.
- Be consistent in format, approach, and ratings throughout the company.
- Be honest.
- Consider 360-degree reviews for “good performers” who have poisonous attitudes that wreck morale.
- Documentation should record all important facts and the basis for any decision in a manner that is understandable and persuasive to a judge or jury.
Termination Policy and Procedure, continued

Good Documentation Keeps a Lawsuit From Being a Case of “He Said/She Said” by Evidencing That:

- The employer clearly communicated its expectations.
- Those expectations were enforced uniformly and evenhandedly.
- The employer gave clear notice that the employee’s performance or behavior was unacceptable.
- The consequences of continued unacceptable performance or behavior were clearly stated.
- The employee was given meaningful opportunities to improve.
- The employer offered to assist the employee in every reasonable manner.
Termination Policy and Procedure, continued

Good Documentation:

1. Identifies the rule or standard that was violated
2. States the legitimate reason for that rule or standard or why the rule or standard is fair (for example, in situations involving a performance standard, note that all employees are expected to, and do, comply)
3. Demonstrates how the rule or standard was communicated
4. Describes any previous counseling or discipline given for related events or previous steps in the progressive discipline process. Ideally, these prior occasions of counseling or discipline are also documented. If they are, copies of the earlier documentation should be attached to the new document
5. Recounts the effect on the institution of the employee’s failure to satisfy the rule or to meet the standard in the most recent incident
6. Clearly states future expectations, even if that means restating the rule
7. Invites the employee to ask if he or she has any questions, hereby leaving no room for claimed misunderstanding
8. Plainly states the consequences of an additional violation
9. Expressly states the institution’s willingness to assist in any reasonable manner possible and the institution’s hope that the employee will succeed
10. Is dated
11. Identifies the author
   Is signed and dated by the employee (if the employee refuses, note the date and time that the employee was presented with the document and the fact that he or she refused to sign it; then sign the document under the notations)
13. Is noted to be “confidential” and is handled in a confidential manner by distributing it only to those with a real need to know
14. Is legible
15. Uses plain, non-technical language that a jury can understand
16. Avoids hyperbole or conclusory, inflammatory language