

# Terminating Without Fear: What Employers Need to Know

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PERFORMANCE MANAGEMENT



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# Terminating Without Fear: What Employers Need to Know

In a competitive business environment, there's little margin for error in personnel decisions.

For good companies trying to get better, these issues boil down to hiring and keeping the right people – and thinning your ranks of the ones who don't contribute.

It's a simple plan, but these are complicated times. Employment laws are more complex than ever.

It's understandable that fears of potential legal problems often cloud managers' judgment about pulling the trigger on terminations.

Every employee falls into at least one "protected" category, be it age, gender, race, religion, national origin, disability, etc. No one's excluded.

If managers limited their firing just to people outside protected categories, there'd be no one left to dismiss.

The vast majority of companies adhere to FMLA and ADA rules and regs. They fulfill their workers' compensation obligations. They follow the rules of Title VII of the Civil Rights Act, which governs discrimination.

But employees still file unlawful termination lawsuits in huge numbers.

Many complaints are without merit and easily dismissed. But defending against even the most frivolous cases can cost employers tens of thousands of dollars in legal expenses, staff time and lost productivity.

This report lays out proven steps and measures employers should take when dismissing employees so that managers can truly fire – when it is necessary – without fear.

## The ‘at-will’ myth

The vast majority of states operate under the “at-will” doctrine of employment, which gives both employers and employees the right to terminate a working relationship at any time, for any reason – or for no reason at all.

But misunderstandings about the at-will doctrine often gives supervisors a false sense of security: “Hey, we’re operating on an at-will basis here. If I want to fire ‘em, I fire ‘em. I don’t need a reason.”

That’s only true up to the point that an employee sues for discrimination or retaliation, or any number of other possible violations of federal, state and even local laws.

When an employee’s attorney asks the manager why that person was dismissed, the manager answers, “I didn’t have a reason. I didn’t need one. He was an at-will employee, so I was within my rights to fire him.”

What happens next is a classic case of filling in the blanks ... to suit an agenda.

Since the manager left the reason for the firing essentially “blank,” the lawyer simply begins filling in that blank with past interactions between the employee and the manager, portrayed solely from the employee’s point of view and tilted in the employee’s favor.

And because the manager has no stated reasons for the firing, or at least no documentation for those reasons, it’s very hard to counter an employee’s allegation that bias led to the firing.

It’s the plaintiff’s attorney’s job to create the suspicion of discrimination in the minds of jurors. In the courtroom, years after the encounters have occurred, that’s not hard for a good lawyer to

do if the manager has no documents supporting his or her actions.

And that's why employers are well-advised – even in at-will situations – to not only establish good reasons for firing an employee, but to be sure to create and preserve the critical documentation that backs up the decision.

## Clearly illegal reasons for firing workers

Here's a quick refresher on the more common types of employment litigation related to firings:

**Discrimination.** Under federal law, companies can't terminate on the basis of the employee's race, gender, national origin, disability, religion or age (40 years and above). There are laws that also prohibit employers from firing someone because that person is pregnant, plans to get pregnant or has a medical condition related to pregnancy.

**Retaliation.** It's illegal for employers to fire employees because they have made claims or otherwise asserted their rights under state and federal anti-discrimination laws. An employee can bring a retaliation lawsuit even if the original discrimination claim is found to be without legal merit.

**Refusing to take a lie detector test.** Under federal statute, employees can't be fired for refusing to undergo a polygraph test.

**Immigrant status.** Employers can't use an employee's immigrant status as a reason for termination, as long as the employee is legally eligible to work.

**Complaining about OSHA/safety violations.** Companies can't terminate an employee who claims working conditions are unsafe or in violation of state or federal workplace safety laws.

**Violations of public policy.** This gets a little murky, but the rule comes down to this: Companies are barred from firing an employee for reasons most people would find ethically or morally wrong. That includes things like:

- dismissing an employee for refusing to do something illegal (like falsifying the company's finances in order to avoid paying taxes)
- firing someone for complaining about an employer's illegal conduct (like paying workers less than minimum wage), and
- terminating an employee for exercising a legal right (like going to jury duty, taking family medical leave or participating in legal political activities away from work).

## Common pitfalls

Here are some common mistakes employers make when handling difficult employees:

### ■ Not firing bad employees.

Sure, everybody knows that keeping marginal people around holds back productivity, and it certainly doesn't help morale.

But there aren't any legal ramifications, right?

Wrong. If a company allows a sub-par performer to stay on the job for an extended period of time, it's possible the employer will set a "customary practice" precedent.

And some judges have ruled such a customary practice is an implied contract – meaning the employer implicitly recognizes that poor performance is acceptable and not a firing offense – for anyone.

### ■ Making an employee so miserable that he or she eventually quits.

Instead of firing the person, a manager sets out to make that person's life at work unbearable, or undoable, such as by creating an impossible work schedule or deadline.

Called "constructive discharge," this is a legally shaky way to get rid of a problem employee – often riskier than an outright firing.

Courts view constructive discharge as putting an employee in a situation that leaves the person with no choice but to quit. It is the basis of many successful retaliation lawsuits.

### ■ Asking an employee to resign.

While on the surface this seem like the humane way to go, it can lead to legal problems down the road.

For instance: How do you handle reference requests about the departed employee, especially if the employee has indicated a potential to be violent or disruptive?

In fact, asking an employee to resign is viewed by courts and juries as an “adverse legal action,” which can underpin an employee’s case for claiming illegal dismissal.

### ■ Relying on a probationary period as blanket protection for firing.

The idea of probationary periods grew out of unionized businesses and government operations.

Originally, it was a guarantee for the employer that the new employee couldn’t file a grievance if they were let go before the end of probation.

Non-unionized, private sector firms adopted the practice, many assuming it was a “safety valve” to allow them to shed new hires that didn’t work out.

But legally, probation periods have their shortcomings, too.

Probationary employees have exactly the same legal protections their longer-tenured colleagues enjoy.

And if their termination doesn’t conform with the law, they can bring a lawsuit just like everybody else.

Clearly there are many landmines around letting an employee go,

even if you have cause. So, how can companies get to the point where they can fire without fear?

## Preparation is key

Companies that can fire without fear have built a strong foundation of specific expectations for employees – and then taken steps to communicate those expectations clearly.

They also invest time and resources in training managers on how to document employee problems and handle the uncomfortable confrontations those problems can produce.

How can employers communicate basic employee expectations? One key component is the employee handbook.

Time was, employers made a conscious decision to not have an employee handbook. Many felt it was too confining and wanted to keep their options open.

That approach is fading now – largely because savvy execs realize they can set up basic employee standards without painting themselves into a legal corner.

Employers now routinely use employee handbooks to outline the kinds of behavior they expect from workers. Take this real-life example:

*Behavior standard: Maintain a positive work atmosphere by acting and communicating in a manner that helps you get along with customers, clients, co-workers and management.*

Naturally, most handbooks also outline policies on attendance and the progressive discipline process.

In some cases, however, the most effective approach might be to NOT set down hard and fast rules.

Example: “If performance doesn’t improve after verbal and written warnings, the employee will be terminated.”

That’s painting yourself into a legal corner.

Better to say something like, “Under-performing employees will be subject to a progressive discipline policy, which, at our discretion, could include verbal and written warnings. Failure to exhibit acceptable improvement may result in further discipline, up to and including termination.”

Of course, employee handbooks are just the start. It’s always good to remind managers that the real work is done through day-to-day observation and communication with employees.

If managers are truly on top of what their workers are doing – and take appropriate steps to improve behavior and performance on a regular basis – companies will consistently fare much better legally on whatever employment action they decide to take, including termination.

## **Firing for attitude**

There’s a school of thought that says, “You can’t fire employees just because they exhibit a bad attitude. As long as they meet your minimum standards, you can’t let them go.”

Wrong.

To begin with, a bad attitude doesn’t meet anybody’s minimum standards – and a lot of companies are making that clear from the first day.

Take a look at that “behavior standard” on the prior page. It tries to address workers’ overall mindset about their jobs. It’s the way they approach getting their work done as part of a team. It’s about their attitude.

More and more employers are recognizing just how corrosive bad worker attitudes can be. After all, if an employee personally meets minimum standards, but disrupts other employees’ jobs and alienates customers, what’s the net cost to the company?

Employers can, indeed, fire for attitude. The judgment process simply must go from subjective – “He’s miserable to be around”

– to the objective – “His constant bickering with co-workers causes disruptions that make people reluctant to want to work and cooperate with him. This caustic behavior has resulted in a measurable overall drop in productivity of the group.”

**Lesson:** Drop the term “attitude” and replace it with “behavior.”

## Little things mean a lot

Another common problem area for managers is the employee who’s constantly making small blunders – a little late arriving at work, a little slow completing duties, a little sloppy in other work.

No single blunder is a big deal, but each is irritating, and each one sends the wrong message to the offender’s co-workers.

But managers are slow to take action – you can’t really fire somebody for being five minutes late, can you?

And anybody could make a clerical error now and then.

The key here is the cumulative effect of the employee’s actions.

Fixing one small mistake may be no big deal. Fixing 20 small mistakes starts to take a quantifiable chunk of worker time.

Grounds for firing this employee? An “unproductive work pattern.” And companies can make it stick through solid documentation.

## Firing Comes with the Job

Good managers don’t relish the thought of firing people.

That’s a good thing. Any human being who’d get a kick out of taking away another person’s livelihood is certainly not fit to manage employees.

But letting people go is part and parcel of the manager’s franchise. Some of the most common reasons people get fired:

## ■ Correcting a recruiting mistake

No-brainer: The perfect way to avoid having to fire workers is to hire the right people in the first place. But who's perfect?

Some applicants are great interviewees and lousy employees. Some don't bring the skills companies thought they'd bring. And some just never quite fit for any number of subjective reasons.

## ■ People change

It's often said the only certainty is change – and that's especially true with employees. They may join the firm with an enthusiastic attitude, only to grow sullen and less motivated as the years go on. Sometimes people just tire of their jobs or develop personality conflicts with co-workers.

What counts is performance: It may sound cold-blooded, but in today's business climate, companies can't just keep workers around because they used to be productive.

## ■ Jobs change

This is truer today than ever before. With advances in technology and ever-increasing pressure for productivity, some workers simply can't grow fast enough to handle their new responsibilities.

## ■ Absenteeism

Here's another factor that's grown in importance, as companies grow leaner and staffs shrink. For many employees, it's a simple truth: You can't help us succeed when you're not here. Case closed.

## ■ 'Smoking in the dynamite factory'

That's HR consultant Hunter Lott's term for specific offenses that are so egregious the employee must be terminated on the spot. These are things such as willful violations of safety rules, violent behavior, stealing or other criminal acts, and breaking key company rules and policies.

## Documentation: Building a Solid Foundation

There's no overstating the importance of having solid documentation when embarking on the process of firing an employee.

In the best situations, that documentation was being compiled on a regular basis long before the process, or notion, of firing ever came about.

Documentation is the written record of how a termination decision came to be. It offers a chronology of what the employee did, how the manager responded and when.

Done correctly, it provides a clear road map of how both employee and employer made their way to the eventual destination – the employee's termination.

Documentation is also the foundation of a company's defense, should the employee bring suit.

Oftentimes, a bulletproof documentary record can stop a lawsuit in its tracks. A plaintiff's attorney, presented with strong, thorough and indisputable documentation of the company's action, may well decide to pack up the briefcase and go home.

And, if a case actually goes to trial, an employer is best positioned to obtain a favorable outcome if the jury is presented with written proof that the employer engaged in ongoing communications about performance problems and set clear expectations for the employee.

### Handling verbal warnings

Verbal warnings are a reliable first step when trying to get people back on the right track without making a big to-do.

But it can be a bit of a judgment call.

A non-specific verbal warning, such as "Bob, you need to dial up

your attention to detail” probably isn’t worth the time it’d take to make a written record of the interaction.

It doesn’t say enough.

Instead, try: “Bob, today is the third day in a row you failed to put the extra washer on the thingamajig. You know that step’s been added to the assembly process, and I’ve mentioned it to you several times, and it is mandatory. I’m going to be monitoring your attention to detail, and if you continue to make the same mistake, I will have to move on to the next disciplinary step.”

After an encounter such as that, a manager should make a written note of the interaction – as precisely as possible – making sure to include exactly what the employee was told, the date and time of day. Also include the employee’s actions or response.

The paperwork should be filed away but, since it is a written record of a verbal warning, it is not necessary to get the employee to sign off on the document at this point.

If the employee then fails to improve, the manager might begin a more formal process of progressive discipline.

And in the first write-up, the manager should refer to earlier verbal coaching: “As we’ve discussed on several occasions, your attention to detail ...”

If the employee claims he wasn’t given prior notice that his performance or behavior was unacceptable, the manager has the earlier notes to fall back on, and can and should recount the specifics of those earlier interactions with the worker again.

## **Nuts and bolts of paperwork**

A manager may well think an employee’s performance is half-hearted, selfish, boorish and all sorts of other unpleasant things. But relying on these subjective and vague descriptions in disciplinary documentation is dangerous and has little value.

If the narrative is long on emotion and personality judgments and short on facts, it's less likely to stand up legally.

Effective documentation describes specific behavior, work outcomes or the impact of the employee's behavior on the overall operation.

So managers are well advised to borrow a line from the old Jack Webb mantra on the TV show *Dragnet*: Just the facts, ma'am.

When documenting employee behavior, managers must ask themselves a couple of key questions:

1. *Have I described what happened and its effect on our operation?*
2. *Have I avoided making emotional interpretations of the employee's behavior?*

A couple of examples:

Weak: "Bob was being half-hearted and not paying attention in the thingamajig assembly process."

Stronger: "Bob failed to install one of the washers involved in the thingamajig assembly process. When his mistake was discovered, we had to stop the line, disassemble 14 units, add the washer and reassemble the units. The do-overs halted production for a total of two hours."

## Getting employees to sign off

Ideally, managers want employees to sign all written disciplinary documents. But employees often refuse.

What's the answer? Managers have a few options.

- "Agree/don't agree" check boxes. The employee puts a mark in the appropriate box, and then signs on the dotted line.
- The "I refuse to sign" technique. The manager just asks the employee to turn the memo over, write, "I refuse to sign," and then initial it.

Both approaches achieve the desired result: Solid evidence that the employee has received the disciplinary document and has read through its contents.

Whether the employee agrees with what's in the document isn't the point. The important part: The manager can prove the employee received the information.

## Termination Conversations

Here's the part managers dread most. And they'll go to almost any length to avoid this confrontation.

Here are a few of the more common rationalizations supervisors use to avoid dropping the axe – and why these avoidance tactics don't make sense:

### ■ 'Maybe they'll improve'

This is usually an idle hope – if they were going to improve, wouldn't they have done so before things got this far? If the proper remediation steps have been taken and minimal standards still aren't being met, it's time to take action.

### ■ 'Better to have a warm body in the job than nobody at all'

All too often, the opposite is the case. Bad employees not only don't do their own jobs well, they drag down everybody else. If the function is critical to the company's operation, the supervisor may have to delay the termination until a way can be found to remedy that problem.

It's also possible that the supervisor, with an assist from other workers in the department, may be able to carry the load until a replacement is sorted out.

Finally, the situation might provide an opportunity to see if there's a better, more economical way of performing the functions of the departing employee.

## ■ **'Other workers will think we're cruel – they'll hate me'**

Sometimes managers are hesitant to pull the trigger out of fear that other employees might “think I’m a bad person.” It’s a common sentiment, and a misplaced one, too.

Just remember: Good employees know who the bad ones are. Good people are looking to management to do something about it.

If an employee’s not performing up to standards, his or her co-workers know it.

They’re probably wondering why the person’s still around, and they’re likely growing resentful that they’re fulfilling their duties while the other worker isn’t.

The longer managers wait before proceeding to the actual termination, the more respect they can lose in the eyes of their other workers. Employees prefer to work for supervisors who enforce high standards evenly, uniformly and fairly.

## ■ **'Maybe they'd do better in another position'**

In rare cases – very rare – this could be a legitimate concern. But it probably should have been considered long before the situation progressed to the point of termination.

For employees with a good attitude and work ethic, along with appropriate skills, it might be worth a shot to grant a transfer to a different job.

But workers with questionable attitudes and sub-par performance should never be considered as candidates for transfer. That’s just moving the cancer from one part of the body to another.

## ■ **'This could get ugly – they might cry or even get violent'**

While this might be a legitimate concern in specific instances, it’s certainly not a reason to delay termination. On the contrary, it’s a

reason to get it over with and avoid prolonging the drama.

Human Resources can help to arrange the right time and circumstances to minimize the possibility of disruptive behavior and arrange for adequate security, if the concern is serious enough.

## The Moment of Truth

So, the documentation's in place, HR's agreed to sit in on the conversation as a witness and the employee's been called to the manager's office.

Here are some common mistakes managers make in these high-pressure conversations, any one of which has the potential to cause a nasty legal problem:

### ■ They lose their cool.

When you're punched, it's hard not to punch back. Employees will be upset when they hear they're no longer employed, even if they know the news is coming.

It's up to managers to avoid heightening an already-emotional situation. It's not easy.

After all, it's likely the manager and the employee have been at odds for some time.

There's a lot of pent-up emotion on both sides.

Managers should let employees give their side of the story, without comment, and then firmly and politely say the discussion is over.

The decision's been made, and it's final.

### ■ They don't prepare well enough.

It's very safe to say the terminated employee will remember every word the manager utters in the worst possible light.

So shooting from the hip is highly discouraged.

The manager should rehearse exactly what he or she intends to say – perhaps even committing the opening statement to paper.

Managers also need to prepare for topics they want to avoid discussing.

The employee will probably have at least one issue he or she will muster in a last-ditch effort to counter the company's decision.

Managers should be prepared to cut off unproductive debates.

### ■ They try to soften the blow.

Managers often feel compassion for the person they must fire.

Expressing those feelings, however, can backfire big time. Example: If an employee's being fired for substandard performance, the manager shouldn't offer compliments on any aspect of his performance.

Doing so might make the manager feel better, but it will only give the employee cause to question and challenge the company's termination decision.

Those off-hand comments can easily turn up as evidence in a wrongful-termination suit – and be used against the manager.

## One Possible Script

Once you've prepared the ground for terminating an employee, it's time for that tough final talk. Here's an example of an appropriately handled termination conversation:

**Manager:** *Bob, I've asked you to meet with the HR director and me today because, as you are aware, we have been working closely with you to boost the quality of your work.*

*We've met with you several times over the past few months, pinpointing the areas you needed to improve. Unfortunately, we haven't seen the improvement we insisted on.*

*For that reason, we are ending your employment effective right now.*

**Bob:** *I'm fired?*

**Manager:** *That's right. We've given you a chance to improve. We gave you two written warnings and several verbal warnings. But you weren't able to make the kind of progress we required of you.*

**Bob:** *Wait a minute. My supervisor said I did a great job on that project we finished last month.*

**Manager:** *Bob, you've been kept up to date every step of the process here. I think we've made it very clear what was required of you, and what you've been able to accomplish has not reached that level.*

**Bob:** *You're firing me and keeping that idiot Kenny? He's certainly screwed up a lot more than I have. How come you're not getting rid of him?*

**Manager:** *Bob, I'm not going to talk about any other employees. We're here to talk about your performance. And we've decided it's no longer acceptable. We're letting you go.*

**Bob:** *A few months ago, I mentioned I might be interested in another assignment, and you said then it could be possible. What about that? Could I get a transfer to a different position?*

**Manager:** *Bob, that's not possible. It's time to part ways and move on. It's a difficult decision for all of us. But the decision has been made.*

## **What About Severance?**

Many employers offer severance packages to employees who've been let go for reasons other than serious misconduct.

There's solid rationale for that. First, severance softens the blow of being fired.

Secondly, a severance package is given on the condition of the employee signing a release that protects the company from later lawsuits.

Companies are obligated to give severance if there's:

- a written contract stating that severance would be paid, or
- a promise of severance that's documented in an employee handbook or written personnel policies.

Companies could be required to offer severance if:

- the firm has a history of paying severance to other employees in the same position, or
- someone in authority's made an oral promise to a specific employee.

While offering severance is optional, companies that do decide to offer the benefit must be consistent.

Severance amounts can vary depending on length of service and job category – but workers in similar situations should be treated equally. Otherwise, companies leave themselves open to discrimination claims.

## What's included in a severance package?

There are no hard-and-fast rules on what severance packages must contain.

The idea is that the employer seeks to put together a package that eases the burden on the dismissed worker – while limiting the possibility of later legal problems.

Here are some examples of what might be included in today's severance packages:

- **A lump-sum payment.** This is normally the most critical component of the severance offering. Many employers calculate the amount using a consistent formula, for example providing one week of salary for each year of service. Other companies pay a set amount, like a month's salary, to each departing worker, no matter their length of employment.

- **Insurance benefits.** Nowadays, this segment of the package can be almost as important to terminated employees as a cash payout. Employers pay for continuation of health, life or disability insurance coverage for a period of time after an employee is fired. The length of the extended coverage often varies with length of service and job level.
- **Uncontested unemployment compensation.** A guarantee not to contest a fired worker's application for unemployment benefits is often an effective way to soften the blow of losing a job.
- **References.** Some employers agree to provide a positive reference for a departing worker. Employers need to be careful here, however, as explained below.

## After the Departure

Unfortunately, the termination tale doesn't end after the fired employee goes through the door. Two main issues remain.

### What to tell the fired employee's co-workers

Co-workers of the fired employee may or may not have known that their colleague was in trouble.

Even if they were aware of problems, they are sure to have questions.

Some of the interest will simply be for gossip's sake. Some will reflect genuine concern that stems, in part, from uncertainty about the details and what it might mean for them.

In other words, some people will want to know if they are in hot water, too.

Managers should simply state that the terminated employee's no longer with the company. No details on the firing should be shared, but the managers can offer a general statement about how things will continue with the worker no longer there.

If people press for details, managers can simply say, "I am not at liberty to discuss it. It's strictly confidential."

## Handling reference requests

This can be a trouble spot for companies. The best policy when a potential employer calls for a reference for an employee who was fired? Say as little as possible and stick to facts that can be proven.

Many employers only allow the HR department to respond to requests for references with dates of employment, job title and final salary.

Be careful about the last item, however. An increasing number of states and localities have adopted laws that bar employers from requesting salary history from job applicants. Some also prohibit disclosing a current or former employee's salary information without their consent.

More organizations are becoming proactive in this area – requiring former employees to sign a release giving the company permission to provide prospective employers with specified information about the person's work history.

Many firms keep a record of all reference requests and will only provide references in writing, so there's an accurate record of the information released.

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