

Avoid a sticky situation:

A guide to firing an employee

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When it comes to managing an employee exit, it takes skill and proper procedure to ensure a satisfactory outcome and avoid a sticky situation.

Here is your guide to what you need to know when you need to let an employee go.

Despite the excitement and hope that occurs when a new employee is hired, not every employment relationship works out. A bad personality fit, poor skills or work habits, inability to meet deadlines or work with others – so many factors can cause an employer to terminate a relationship with an employee. Firing an employee is a tough situation under any circumstance.

Sometimes, the decision to terminate an employee will have nothing to do with the employee's work performance. Rather, it may have to do with economic circumstances facing the employer. Having just lost a big contract, the employer can no longer justify its labor cost, and despite performance, an employee will be terminated.

Yet, often enough, an employee does not live up to his or her resume, fails to meet expectations, fails to respond to constructive criticism, or engages in unprofessional, or worse, unlawful, behavior at work. In these cases, it becomes apparent that an employee must go.

Ohio is an at-will employment state. Therefore, absent an

enforceable promise to retain an employee for a specific period of time, employment in Ohio can be terminated by either the employer or the employee at any time. An employer's termination of an at-will employee is nevertheless subject to laws requiring that the discharge be for a lawful reason. For example, age discrimination or retaliation for seeking workers compensation benefits are not lawful reasons.

In Ohio, for good cause or no cause whatsoever, an employer can simply decide to terminate an employee's services, provided it does not otherwise violate Ohio or federal law in doing so. Of course, if a contract exists, the terms of that contract may control the circumstances under which the employer can terminate the employee. Even when a contract or enforceable promise precludes termination under the relevant circumstances, the employer can always choose to breach the contract, terminate the employee, and simply pay the individual the consideration owed under the contract.

Regardless of whether the employee is at-will or under a contract, an employer should take certain steps when making the decision to terminate an employee. While an employer's heart may be pure, without a solid documented procedure, the employer's motives are subject to attack. Thus, an employer should take into account the following when terminating an employee:

1. Documentation
2. Deliberation
3. Decisive action
4. Consideration

Documentation

Documentation should start well in advance of the termination stage. In fact, it should start at the hire stage.

Depending on the size and number of employees, an employer should have, at least, a rudimentary employee handbook, providing notice to employees of the employer's policies and expectations and containing a disclaimer regarding at-will employment. Employees should be given a copy of the handbook and required to sign for receipt of the handbook.

During the course of employment, the employer should have a meaningful evaluation system, at least annually, if not more frequently. For at-will employees, these documentary aspects are the first line of defense and protection to the employer in the termination setting.

Of course, when the employer disciplines an employee, documentation of such discipline, plans of correction, and follow-up on those plans should be placed in the employee's personnel file. Even when an employee is not disciplined, performance issues should be addressed in writing before, during, and after the evaluation process.

Although an at-will employer is not required to "progressively" discipline an employee, not every infraction will be viewed as a terminable offense by a jury, should one get the chance to opine on the matter. Documentation of any discipline provided, including the violations of company policy that result in termination, will help the employer defend against any challenge by the employee to his/her termination, even if that amounts only to a claim for unemployment benefits.

Deliberation

Before terminating an employee, an employer should ensure that termination is the proper mode of discipline. Disagreements with supervisors may occur often, tempers may run hot, and, at first glance, the employee's behavior may look egregious. But is it? Who was at fault? Was there a misunderstanding? Has the employee been disciplined before? Are there any mitigating factors? What other facts are at play?

These questions are crucial. While in most circumstances, the employer will incur no liability for terminating an employee, there are odd situations where an employee's actions are caused by other factors of which the employer either is unaware, such as sexual harassment from a supervisor or co-worker, or has chosen to ignore, such as disability.

When an employee is being fired for performance reasons, the employer should review the employee's personnel file. Check the evaluations and supervisor comments. Does the employee's performance evaluations or other documentation support or discredit the basis for termination? Even if the latter, a few good evaluations, especially after the passage of time, do not preclude termination of an employee whose performance has diminished. Documentation of performance problems while they occur can help to defeat any claim that the basis for termination is pretext for some other, unlawful motive.

When termination is based upon employee misconduct, the employer's decision-making process is more focused on whether the employee was aware that his/her actions violated the company's policies, if applicable, or the mores of a reasonable person.

Decisive Action

Once an employer has determined that an employee should be terminated, the action should occur as soon as possible, if not immediately.

While it might be practical for an employer to terminate an employee but retain him or her for a couple of weeks to finish up a project, the damage that a disgruntled employee can cause often outweighs the benefit of retaining the employee for this short period of time. It also undermines the employer's argument that the employee was so incompetent, dishonest or harmful to the employer's operations that termination was appropriate. An employee who has been terminated may have an axe to grind and, depending on

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Once an employer has made the decision to terminate an employee, he or she should take preventive steps to protect the organization even before notifying the employee. For example, the employee's access to equipment should be restricted as soon as possible after the termination, if not before. Locks should be changed, and key personnel should be informed.

After taking these initial steps of prevention, the employer should then, courteously and in a manner designed to protect the employee from embarrassment, notify the employee of the termination, ask him or her to gather personal effects, return any employer property, and leave the premises.