

Top 10 firing mistakes and how to avoid them

MANY EMPLOYERS often say, “I can terminate an employee for any reason, because they are ‘at-will’, right?”

While that may be partially true (you cannot terminate someone for a discriminatory reason), there are often ways you can plan ahead for a smoother termination and improve the subsequent discussions/actions.

Mistakes are often made, but many termination mishaps can be avoided with a little planning and knowledge.

1. Employer does not examine prior documentation.

It is crucial that an employer review any documentation that relates to the employee, including performance reviews and contracts.

While an at-will employee can be terminated for any reason that is non-discriminatory, it becomes problematic, for example, if an employee is told that poor attention to detail is the reason for termination when he or she has just received high marks in that category on a written performance review.

The employer might also discover that the employee has a contract stating that he is entitled to severance pay unless there is a termination for “cause.”

Practice pointer: Examining documentation before the termination meeting will position the employer to better articulate and possibly adjust the termination reason.

2. Employer does not properly investigate the facts upon which the termination is based.

[tips]

- 1 | Less is more when communicating why an employee is leaving.
- 2 | Tell others that the employee has left, and then focus on the logistics of how that employee’s work is being handled moving forward.
- 3 | If pressed, the employer should simply state that it is a confidential employment situation.

Even when an employer receives credible evidence that an employee exhibited poor judgment in a particular situation, it is a mistake to terminate the employee without getting the other side of the story.

The employer is not able to make a determination regarding what really happened or to assess the employee’s credibility if the employee is not questioned.

Practice pointer: Get the employee’s side of the story before terminating.

3. Employer doesn’t think through and/or provide the employee with a coherent, precise explanation for the termination.

Employers often get into trouble when they have not given thought to why a person is being terminated, and as a consequence, provide long-winded and/or easy to rebut termination reasons.

Practice pointer: Make a decision on why the employee is being terminated, keep it short and sweet, and stick to it.

4. Employer provides inconsistent explanations why the employee was ter-

minated.

It will look like the employer’s reason for the termination is false/pretext for discrimination if the reason keeps shifting.

Practice pointer: Make sure the termination reason is consistent over time from the first meeting with the employee, to any documents submitted for unemployment, to litigation.

5. Employer mishandles the termination meeting by apologizing and/or providing too much information.

An employer must plan for the termination meeting. It is not a pleasant task to terminate an employee and it is human nature to say “I’m sorry,” or to fill dead space in the conversation.

Practice pointer: Draft talking points, including the reason for the termination and related logistics, and stick to it to avoid talking too much or apologizing.

6. Employer mishandles how to communicate the employee’s departure internally and externally.

Employees often bring claims for defamation when internal or external persons are told more information than necessary.

Practice pointer: Less is more. Tell others that the employee has left, and then focus on the logistics of how that employee’s work is being handled moving forward.

7. Employer mismanages the logistics of the termination meeting and the employee’s retrieval of belongings.

Allow the employee a graceful exit to

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— Laura Pfeiffer, Winthrop & Weinstine

the extent possible or appropriate.

Practice pointer: Try to terminate someone at the end of the day (and possibly week), don't make a scene walking the employee out, and arrange for a time when the employee can retrieve personal belongings in a respectful way (or deliver the belongings to the employee).

8. Employer is penny-wise/pound-foolish in not paying severance pay.

In some cases, severance should be paid to reduce risk. Even if an employer is not required to pay severance, at times it makes sense to pay some amount of severance in exchange for a release in cases where there is risk of a claim.

Update agreements

Practice pointer: In appropriate cases, discuss with your employment lawyer whether it would make sense to pay severance. If it does, get an up-to date severance agreement and only pay severance pursuant to the terms of the severance agreement.

9. Employer mismanages responding to employee's request for the “truthful reason for termination” and/or a request for employee's personnel file pursuant to the applicable Minnesota statutes.

In Minnesota, if a personnel file is located in the state, the employer must provide it within seven working days after a written request, but what the employer needs to provide as the “personnel record” is defined by statute. An

employee is also entitled to the truthful reason for termination as long as it is requested in writing within 15 working days of the termination. The employer must then provide it within 10 working days.

Practice pointer: Provide the information on time; produce what records you have to (and ask for assistance if there are questions); provide the same termination reason you arrived on previously; and state in the letter that you are providing the reason pursuant to Minnesota Statute 181.933.

10. Employer doesn't seek assistance prior to terminating employee.

In many cases it is likely overkill to seek assistance on a termination because there isn't much risk, the employee will not be surprised, and so on. There are, however, many cases where a short conversation with an employment lawyer will be more than worth the cost.

Practice pointer: Use your judgment and call for help on higher-risk terminations.

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