

Terminating Employees: How to Fire Right

- I. Every termination decision should be based on the assumption that it will be challenged before an administrative agency, a court or both.
 - A. Step No. 1. Define the reasons for the termination.
 1. It's far better to carefully define the reasons for termination prior to the event than it is to scramble for them later on.
 2. Too many employers permit generalizations to drive a termination. E.g.:
 - a) "He's a poor performer."
 - b) "She's not a team player."
 - c) "He just doesn't have it any more."
 3. The generalizations may be correct, but they don't persuade the employee this is a legitimate decision and they don't win cases.
 4. It's important to define the reasons behind the generalizations. E.g.:
 - a) He's a poor performer because:
 - (1) He doesn't complete work in a timely manner.
 - (2) Work has to be redone because of errors. manner.
 - (3) The work was never done, despite repeated requests.
 - b) She's not a team player because:
 - (1) She never offers to help co-workers when they are busy and she is not.
 - (2) She's always complaining about her co-workers and blaming them for problems, rather than seeking constructive solutions.
 - (3) She's recommending that our customers go to our competitors.
 - c) He just doesn't have it any more because:



- (1) He isn't willing to make cold calls.
- (2) He hasn't kept up with office technology, and can't work as efficiently as others.
- (3) He hasn't kept up with our product line, and isn't as effective as others.

5. Develop a list of specific instances to support each reason.
6. Gather documentation, to the extent possible.

B. Step No. 2. Define the triggering event that leads you to conclude that now is the appropriate time to terminate the employee.

1. A "history" of problems with the employee is important, especially if documented, but charges/complaints can be defended successfully, even in the absence of such a history.
2. Not many cases can be successfully defended in the absence of a triggering event.
 - a) Absence of a trigger makes it appear as though old problems were dredged up to justify an otherwise unjustifiable termination.
3. Although time should be taken to fully investigate the facts prior to termination, too long a period of time between the alleged triggering event and the termination may also give rise to suspicion of pretext.
4. Document the triggering event.
 - a) Statements.
 - b) Work product.

C. Step No. 3. Put it to a "smell" test.

1. Once the reason for termination have been carefully articulated, it's important to get the opinion of an uninvolved party to see if they agree with the action being taken.
 - a) Judgment of the person making the decision is always somewhat clouded by his/her role.
 - b) The Commission representative, judge and jury are "uninvolved parties." If you can't convince your associate, follow manager or counselor of the validity of the termination, how are you going to convince those who are not willing to give you the benefit of the doubt?
 - c) To protect yourself, this should be someone who has a confidential relationship with the company.



- (1) Attorney-client privilege protects most conversations in this area.
- d) Their review should include:
 - (1) Whether it's legal.
 - (2) Whether the contemplated action seems reasonable under the circumstances.
 - (3) Whether the backup (statements, causation-triggering event, etc.) is sufficient to support the decision.
 - (4) Review any of employee's past complaints to consider future whistleblower, retaliation or harassment complaints
- e) If it fails the "smell" test, don't be afraid to reexamine the decision. Chances are, the business won't collapse if the employee is fired a week from now, rather than today.

D. Step No. 4. Make the Decision.

- 1. Assuming it passes the "smell" test, the decision should be to terminate.
 - a) But, not cast in stone at that point.
 - b) Nor should it be irreversible beyond that point.

II. Setting Up the Termination Meeting

- A. Employees should be terminated in a face-to-face meeting.
 - 1. Termination by memo or email, or twitter or telephone bother judges and juries **immensely**.
 - 2. Exceptions can be made where the employees are currently incarcerated.
- B. The employer's contingent at this meeting will ideally consist of two people.
 - 1. Two witnesses are better than none, in the event a dispute develops over what was said.
 - 2. The employer should not have more than two people present, as it tends to overwhelm the employee and creates a coercive atmosphere.
 - 3. Only one representative should speak on behalf of management.
 - a) The Spokesperson should be:
 - (1) Someone in authority who:



- (i) Has the ability to convince the employee of the fact that s/he is being terminated and the reasons therefore.
 - (ii) Has the ability to be flexible in the meeting.
 - (2) Someone with intimate knowledge of the facts.
 - (i) Must be able to parry employee comments and excuses.
 - (ii) Must be able to tell if any problems arise regarding the reasons for termination.
 - (3) Someone who is articulate and precise.
 - (i) These qualifications are needed for this type of meeting.
 - (ii) This is going to be your primary witness.
 - (4) Need someone who projects empathy and warmth.
 - (i) Will make the meeting go more smoothly.
 - (ii) Will presumably project the same images to a jury.
 - b) The Note taker should be:
 - (1) Preferably, someone in management.
 - (2) Someone with a recognized long-term future with the company.
 - (3) Someone who is articulate and precise and projects warmth and empathy.
 - (i) Necessary qualities if called upon to testify.
 - (ii) Anything that person says can detract from what the primary spokesperson is saying.
- B. The meeting should take place in the spokesperson's office or a similarly formal atmosphere.
- 1. No interruptions should be permitted. If that kind of privacy can't be achieved in the spokesperson's office, do it elsewhere.
 - 2. The discussion should not occur in the employee's office.
 - a) That will permit the employee to psychologically control the meeting.
 - 3. The discussion should not occur where other people will overhear.



- C. The meeting should take place at an appropriate time.
- D. If there are concern about the employee reacting violently, take appropriate security measures

III. The Termination Meeting

- A. The management representative should:
 - 1. Explain that the meeting was called to deal with a serious problem.
 - a) Do not mention termination at this time. Hear the employee's side first.
 - 2. Give the employee the reasons why it is necessary for the company to make a decision at this time.
 - a) All of the generalizations and reasons -- not just some of them -- should be given at this time.
 - (1) If you don't bring them up now, raising them at a later time may be perceived a pretextual.
 - b) Don't give specific instances unless asked.
 - (1) Most employees know the reasons.
 - (2) Tends to bog down the meeting.
 - (3) If asked give them.
 - 3. Give the employee an opportunity to talk and to respond.
 - a) It is cathartic experience for the employee.
 - b) It gives the employer the opportunity to learn the employee's defenses.
 - c) **NOTE:** The employee may raise a point not considered by the employer, and further investigation may be warranted.
 - d) Eventually, however, the spokesperson should cut off further discussion if it's just going around in circles.
 - 4. Act civilly at all times.
 - 5. Remain firm on your facts -- don't hedge.
 - a) Employees hear what they want to hear.



- b) If the employer representative hedges, or if the two representatives do not present a united front, the employee will get the impression that s/he shouldn't be terminated.
 - c) Don't try to make it easier on the employee by "softening the blow."
- B. After hearing what the employee has to say, the employer can exercise one of two options.
- 1. If new questions have been raised that call the termination decision into question,
 - a) Tell the employee you're going to investigate the situation further.
 - (1) The employee need never now how close s/he came to termination.
 - b) Send the employee home, pending further investigation.
 - c) Conduct the investigation promptly, retracing former steps and following new leads provided by the employee.
 - d) If the decision to terminate remains the same, notify the employee and say:
 - (1) We have investigated your allegations and:
 - (i) Our investigation does not support your side of the story.
 - or-
 - (ii) We believe you, but we have decided that your allegations do not sufficiently counteract the reasons supporting your termination.
- C. Once you've informed the employee of his/her termination, s/he can continue to argue.
- 1. Permit it to go on for while, for the reasons set forth above.
 - 2. Do not reverse your decision in this meeting, no matter what new facts may come to light at this point.
 - a) The employer can always reinvestigate and reverse the decision later.

Mark J. Neuberger
Foley & Lardner LLP
One Biscayne Tower
2 South Biscayne Boulevard, Suite 1900
Miami, FL 33131
(305) 482.8408
mneuberger@foley.com

