

Firing an employee without triggering a lawsuit

Firing an employee is never pleasant for anyone involved. But there's a right way and a wrong way. You don't want to spur a wrongful termination lawsuit – or worse. Whether you're firing an employee without warning or drafting a termination letter after progressive discipline hasn't helped, get it right. There are no magic phrases for firing an employee, though you should make every effort to let her walk away with dignity. The key is to avoid creating an angry ex-employee while looking out for your company's best interests.

Your right to fire

Absent a union contract or a specific written employment contract, firing an employee is the employer's prerogative. Of course, you can't fire someone for an illegal reason like race, national origin, disability and so on. But there's no prohibition against otherwise firing an employee if he or she is at-will. You don't need a reason. The key is to let workers know that you retain the right to fire at will.

Common (legitimate) reasons to fire employees include:

- Reorganization that eliminates or restructures jobs, assigning new functions to some jobs or eliminating others. The end result is that some workers are no longer needed.
- Across the board budget reductions due to economic downturns or cuts to maximize profits.
- Worker wrongdoing necessitating discipline – commonly after either egregious misbehavior/error or pursuant to progressive discipline or no-fault discipline.

Your application, your handbook, and your policies should clearly state employment is at-will. Clarify that only the head of the company can change at-will status and then only in writing. You should also make sure all managers understand they can't offer an employment contract. Any deviation from at-will status must be written and approved by counsel and upper management. Guarding at-will status helps protect your organization from wrongful termination claims.

Progressive discipline and firing an employee

At-will status allows you to retain the right to fire an employee with or without cause. Still, employers usually prefer to work with employees before firing them. After all, your company has invested time and resources in recruiting and training employees. You can have a progressive discipline program and still retain the right to fire an employee.

Here's how you can structure your progressive disciplinary program to avoid wrongful discharge claims:

- Create clear rules with built-in deviations for exceptional circumstances
- Always document each step of the way with as much objective information as possible. Avoid subjective assessments such as "she's not a team player." Instead, use specific examples showing the employee isn't working with others or contributing her fair share.
- Always look for ways to distinguish discipline. You may need this later. Firing an employee often leads to

discrimination allegations. If you can show one employee deserved more severe discipline, chances are the charges won't stick. For example, comparing two employees, is the fired worker:

- A repeat offender?
- Responsible for a larger dollar amount loss or damage?
- Tardy more often or for longer periods?
- Showing less improvement since the last incident?

You should also conduct an independent review before any final firing decision. Look for potential claims like retaliation for filing past discrimination complaints. Don't just take a supervisor's word for the underlying reason. That's especially true if he's suggesting firing an employee without warning.

Warning: There's an exception to at-will status for a few, select employees. Firing an employee returning from active-duty military service without cause violates the Uniformed Services Employment and Reemployment Rights Act (USERRA). For 12 months following return, USERRA protected workers can only be fired for cause. That means you need to show a legitimate business reason and cannot rely on at-will status.

Firing an employee at a meeting

Once you have decided you will be firing an employee, sooner is almost always better than later. Employees usually know they're in trouble. If you use a progressive disciplinary system, they know where they stand. Even if you don't, chances are they've heard rumors or read tell-tale signs like being left off a future meeting.

Giving employees time to worry or stew is never a good idea. They may contact an attorney and try to set up a wrongful discharge claim. Or download files for a lawsuit. Some may even seek revenge by sabotaging files or your computer system. Instead, once you have made the decision, schedule the meeting as soon as practical. Here's how firing an employee should happen if you choose to do so in person:

- Choose a private setting, away from prying eyes. This should be away from other employees and behind closed doors. Always include at least one additional neutral witness. He or she should not have had a part in the decision to fire and should keep notes.
- Include any pay due even if it's not pay day. Many states require this. Plus, it eliminates having the fired worker return to get his paycheck later.
- There should be no shouting, no recriminations, no lengthy explanations or re-litigation of the firing decision. Explain to the employee that he's being terminated and that he can't change the decision. Make it quick – fifteen minutes max. There is no need to include specific reasons – chances are employee knows and doing so may be used against you later.
- Consider including an offer of severance if not discharging for gross misconduct. Severance should be pre-approved by counsel and conditional on signing a lawsuit waiver. If worker is over 40 – special rules apply, including time to think it over
- Remind employee of any arbitration agreement he may have signed and include copy in the discharge packet. If you include a termination letter, have it reviewed by counsel first. In most circumstances, it should be brief, simply stating that the employee is no longer employed.
- Escort the employee out and arrange to have any office items delivered via FedEx or another package delivery service.

Sample termination letter

If you choose to provide a termination letter, it should include the following information:

- Effective date of discharge
- The terms of any severance agreement
- Information about the continuation of benefits

- A statement indicating whether the employee is eligible for rehire, can apply for other open positions or any outsourcing services available
- A statement reminding the employee of any arbitration agreement he's signed

Violence and firing an employee without warning

On February 15, 2019, an Aurora, Illinois worker walked into his termination meeting and opened fire. He killed the three employees who called the meeting and two others nearby. A year earlier, a disgruntled Detroit area ex-employee used an AK-47 to kill employees at two places he previously worked. He was stopped at a third ex-employer. Though rare, firing an employee can lead to violence. Of the [500 worker homicides](#) OSHA reported in 2016 (latest available year), 66 were committed by a co-worker or ex-employees.

Clearly, employers must plan for the unthinkable. Fortunately, there are practical steps you can take to avoid turning a routine employee termination into a tragedy.

- Be aware of weapons laws in your jurisdiction. Some states allow weapons in cars in company lots. If so, make sure that a terminated employee cannot re-enter your workplace after being fired.
- Be attuned to any threats – especially if they underlie discharge decision. If you are firing an employee who's made threats or engaged in aggressive behavior, beef up security. Consider terminating the employee off-site or in an area that's isolated and allows for private escorting off the premises. In some cases, you may even want to send a termination letter instead of holding a meeting.
- Conduct regular workplace violence hazard assessment and security analysis. Do you have a plan for sheltering in place? Awareness of exits?
- Train employees on the company's workplace violence program. They need to know exactly what to do and how to do it. Assign roles as you would for any other emergency.
- Develop a response team to provide immediate emergency care for victims and re-establish safe work areas. Work with local law enforcement and emergency personnel so that they know your layout. They may want to know when you're firing an employee without warning if there's hints of trouble.