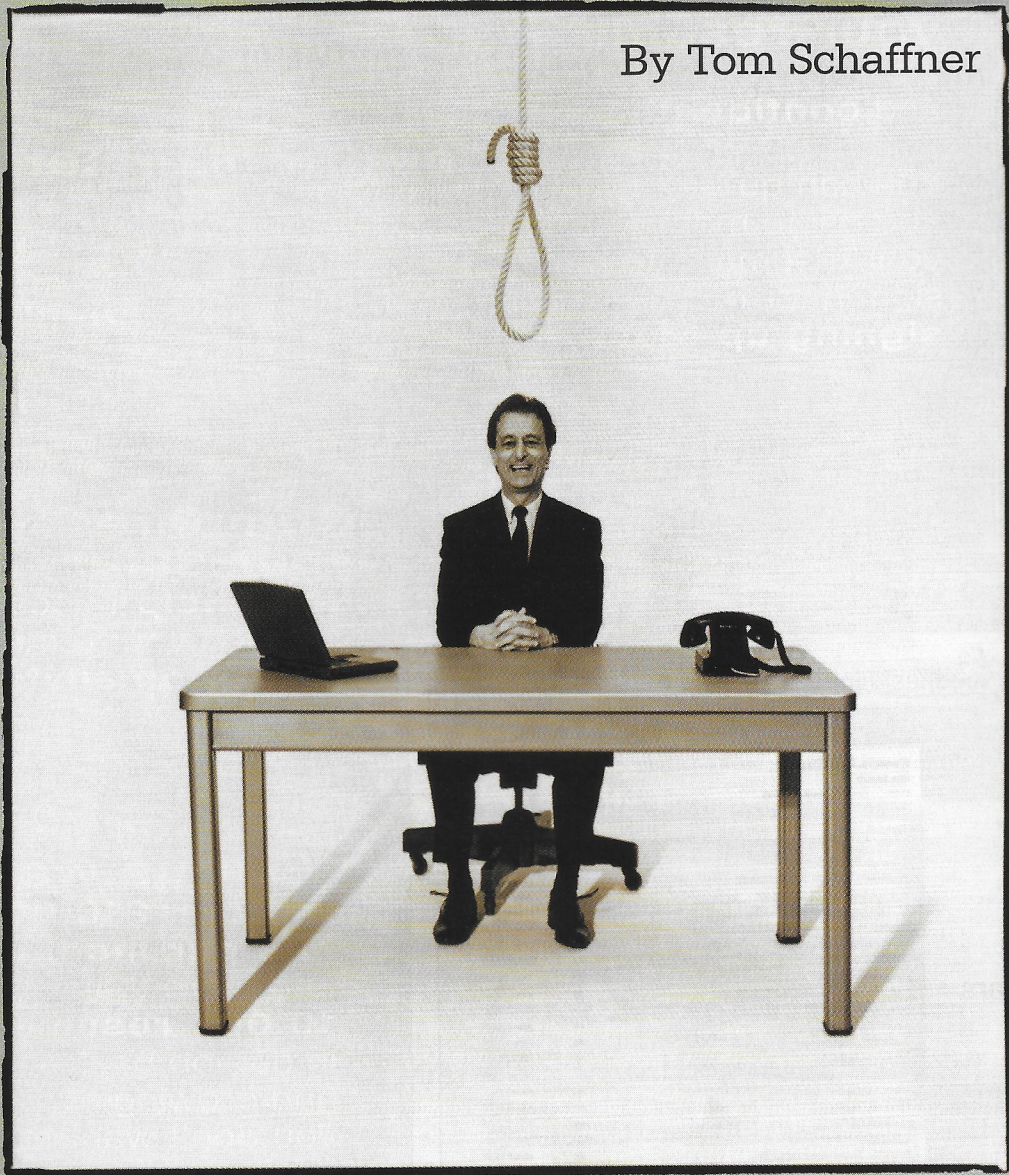


On the Firing Line

Avoiding the legal hang-ups of employee termination

By Tom Schaffner



The August 26 issue of RT Image featured a cover story on how to hire the right person for the job. In this issue, we look at the other side of the coin: employee termination. This article provides legal advice to managers and administrators who must terminate employees.

You're Fired! Hearing those words can send a chill up anyone's spine. But it's not just the employee that has to worry. Managers and employers can find themselves in hot water if they mishandle an employee termination.

With wrongful termination lawsuits on the rise, how can management effectively perform their jobs without incurring the threat of being sued?

Write It Down

Long before the idea of terminating an employee enters the picture, a responsible manager should be keeping a log of the employee's progress — both good and bad — from the first day on the job.

"Documentation should start as soon as you hire the person," says Ann Kiernan, Esq., a lawyer and trainer for New Brunswick, N.J.'s Fair Measures Corporation, a company that instructs managers in preventative law. "After your first one-on-one, have the person send you a confirming e-mail about the various things that were discussed. There's nothing like having documentation from the employee themselves showing that they were advised of management's expectations, and even better, they agree to them or commit to them."

Documentation makes or breaks your case, Kiernan says. She refers to a recent study on juror attitude, in which 91 percent of the prospective jurors surveyed said that if an employer does not have documentation of employee performance problems, the employer is negligent. "No legislature has ever said that is the law," Kiernan says. "No judge has ever ruled that is the law, but that's in nine out of the 10 heads sitting on your jury."

She notes that most jurors are comprised of the working class, not from the upper echelon of management, so jurors tend to associate better with the terminated employee when documentation is not available.

Kiernan says that managers can never have too much documentation, as long as it's the "right" documentation. "The documentation must be objective, not subjective."

"If you're a manager thinking about a

termination, put yourself in the seat of a juror in that trial," she advises. "If you're a juror in that case, what would you want to hear management say about its justification for termination? Is it a misconduct issue? Was the misconduct that the employee is accused of provided for in the company handbook as a grounds for discipline or discharge? What kind of factual evidence is there that the misconduct occurred? What kind of investigation was there?"

James Walsh, author of the best-selling book, *Rightful Termination: Defensive Strategies for Hiring and Firing in a Lawsuit-Happy Age* (Merritt Publishing, 1994), says that long before a termination enters the picture, managers need to be careful about what is in the employee handbook or other documents that are given to new employees. He says that employers should avoid making any kind of comments to new hires that contradict what is in the employee handbook, like they will always have a job with the company.

Performance Reviews

Walsh says that managers should state from the beginning how review and notification processes work, such as the first problem evokes a verbal warning, a second problem receives a verbal warning with a written notice, a third problem gets a formal written notice and a fourth problem results in termination.

Having a paper trail in place is important, Walsh says, especially if a manager believes he or she has a problem employee. "You need to make sure you followed your [company] procedure for reprimands and reviews. If your company policy calls for suspension or for seeking outside counseling in the event of repeated problems, for instance, make sure all of that paperwork is in [the employee's file]."

Walsh warns managers to use careful wording in employee evaluations. Avoid harsh criticism or glowing praise in reviews because a terminated employee can often discover what was written about them, he explains.

Avoid using "boilerplate" language like "Joe is great at his job. He is a pleasure to work with." If a manager is going to say

that in a review, Walsh says, then make sure it's true. "An employee review should cover the person's work productivity and solution-solving. All of this is to keep your paper trail clean," he says.

Deborah Weinstein, MSW, JD, an attorney practicing employment law with Eckert Seamans Cherin & Mellot, LLC, in Philadelphia, stresses the importance of having the employee sign off on all documents put in his or her personnel file. "Putting a document that an employee has not signed in their employee evaluation/personnel file is questionable in terms of being good evidence should litigation occur," she says. "The employee could say, 'I never saw this,' and the suspicion is that the employer put it in sometime later and not in the ordinary course."

In terms of the human resources (HR) process, Weinstein says everything works a lot smoother if you have written performance evaluations once a year, in which employees can give honest feedback without fear of consequence. Supervisors should sit down with each employee and go over important issues and set goals for the next year. Once performance problems are identified, that's the time to set some shorter-term goals, she says. Then after a specified period of time, go back and review the situation.

"For Cause" vs. "At-Will"

The paper trail is most important when a manager fires an employee "for cause," Walsh says. "If you are going to fire someone for tardiness, you better have your entire paper trail with the number of days tardy over the 'x' work period and how that affected shift productivity and other matters," he says. Or if an employee is terminated for employee theft, the manager should have a "smoking gun" and a paper trail containing management's reprimands and written notices.

"Even if it is going to be a layoff or restructuring where choices have to be made, it's important that the employee's personnel file be complete," Weinstein says, "and that all of the information that you eventually would need in a termination is there."

She says that the need for a complete employee file is twofold. One reason is risk

control. Managers want to be able to substantiate the reason for terminating an employee's job. The best evidence is written evidence created at the time of the problem.

The second reason involves the manager/employee relationship. "People who are not expecting to be terminated, especially for cause, are shocked when they find out," Weinstein says. Generally, the employee sees the termination coming if the employer has been giving them warnings and written evaluations over time.

Walsh warns, "Never terminate an employee in a fit of anger. If you are going to do it, wait a day, or even wait a week. Do it when you're calm and have been able to

really review the matter and consider whether it needs to be done. Managers who terminate people on the spot are really cruising for trouble."

The "at-will" rule says that an employer can terminate an employee at any time for any reason or for no reason at all. But on the other side of the desk, the employee is permitted to resign at

any time and for no reason as well.

Walsh says that whenever possible, employers should terminate an employee under the "at-will" presumption, as opposed to terminating for cause. Terminating for cause can give the former employee a target for a lawsuit against the employer, he says.

It should be noted that "for cause" and "at-will" rules may vary from state to state, and that some employee terminations depend on collective bargaining agreements, individual employee contracts or union contracts. Employers should be aware of these exceptions before terminating an individual.

The Meeting

After the decision has been made to let an employee go, the next step is to determine the logistics of the termination meeting. In addition to the employee and his or her

direct manager, everyone interviewed for this article agree that it would be wise to have a third party in attendance — usually the manager's direct supervisor or a human resources representative, who can also serve as a witness.

"It is extremely important to be respectful and nice and take time when you are terminating an employee," Weinstein says. "It is not unusual for an employee to feel so insulted at the moment of termination that they look for a cause of action to sue their employer just because they're angry.

"The last thing you want is an employee going out the door feeling that they've been treated disrespectfully," continues Weinstein. "Even if someone's performance is horrible, the employer should take time to review that and to thank the employee for whatever efforts they have made. Time spent with an employee at that moment of termination is worth its weight in gold once the person walks out the door."

Kiernan recommends that the meeting not take place in the manager's office — the manager's "power center." She suggests holding the meeting in the employee's office or a conference room that provides both confidentiality and a neutral setting for the employee. If the meeting were to take place in the manager's office and the employee refused to leave at the end of the meeting, the situation could become awkward and the manager could be stuck there. If the meeting is held elsewhere, the manager can get up and leave when the meeting is over.

Likewise, by conducting the meeting in the employee's own office, the individual is spared the embarrassment of facing coworkers at a very emotional time.

From Meeting to Door

The manager's job does not end with the termination meeting. Kiernan says the manager should immediately document all dialogue and events from the meeting. Depending on the company, HR may want to conduct a separate exit interview with the employee to discuss things such as benefits and transition information, depending on company policy.

Weinstein says to make sure that things are in place for the employee to get their belongings together and get out the door after the meeting has concluded. "You

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— James Walsh

certainly don't want the employee going back to their office or station and talking with their coworkers at length about what has happened," she says.

Much of whether or not a terminated employee is escorted out of the building is situational. "Whenever possible, it's best, from a psychological perspective, to avoid that kind of thing," Walsh says. "Oftentimes, you can accomplish just as much by having an impartial manager essentially escort the person out or at least accompany them to their car."

Walsh says that much of what occurs after the termination will have as much an effect on your surviving employees as it does on the terminated individual. The manager does not want to appear as the villain having terminated employees escorted out of the building by security. "Unless the person has been caught red-handed stealing from the company or something really dramatic, it's best to have an impartial management employee help the person out to his or her car, just to offer an extra pair of hands to help gather stuff up," he says. "And discretely, you can disconnect the workstation, change the password or whatever you need to do to secure your workspace."

Walsh also warns managers to avoid the temptation to be the "good guy" after the termination. "There's a heavy temptation after a termination to offer advice or to give somebody a hug. Don't do that. That's incredibly condescending and inappropriate to the situation." He says that a boss who has just terminated an employee should aim to be as free of emotion as possible.

"Don't show [any sad emotions] in front of the employee," he says. "All that does is send mixed signals to the terminated employee." If the manager wants to offer a letter of recommendation to the employee or job assistance, those details can be worked out later.

Kiernan notes that, depending on the state you live in, the employee may be entitled to his or her last check immediately.

Severance Issues

Whether there is a severance package offered at the time of termination will depend on company pattern and practice, usually outlined in the company handbook or as a matter of negotiation.

In some cases, a severance can serve as insurance against a possible lawsuit, Walsh says. "If you can reach a fair, affordable severance package, not only is it more likely to soften the blow, but the person is less likely to sue you," he says. "But if the person does sue you, you have proof that you weren't malicious in how you went about it. You tried to give a fair settlement to the terminated employee."

Walsh says that if severance packages are offered, make sure that they are offered equally among all employees to avoid the accusation of preferential treatment. Companies should set and follow a basic formula for severances that can be defended in case of a lawsuit.

From a manager's perspective, there should be closure when the person walks out the door, says Weinstein. Each company or facility needs to determine whether a severance should be offered, and if so, how much is fair and affordable.

Prevention

With a little planning and thought, managers can do a lot to improve the risks they may face when employees are asked to leave. "Prevention really works in this area of the workplace," Weinstein says. "Plan, document and be on top of the relationship with the employee, whether it be a supervisory employee or a staff person."

As a preventative tool, managers need to make performance evaluations a regular, routine part of employment. "My experience has been that prevention is really possible in this area and that the efforts that employers make to avoid risks do work," Weinstein says.

So far, we covered how to hire the right person and the best practices for terminating an employee. In an upcoming issue, RT Image will show you the best way to conduct an employee evaluation. Stay tuned.

— Tom Schaffner is the editor of RT Image. Comments on this article are encouraged and can be directed to tschaffner@valleyforgepress.com.



Frequently Asked Questions

Q: When is a firing illegal because it is discriminatory?

A: Discrimination is proved by showing that the employee is being treated differently from other employees. If the employee is treated consistently with other employees, if the employer's policies and procedures are followed and if the employee is allowed to give his or her side of the story, then the firing is not discriminatory. If these steps are not followed, it may be because of discrimination, or it may be due to mere incompetence, which is not illegal.

Q: What if the employee was harassed before the termination?

A: If the "harassment" was micro-managing the employee to get work done or to be on time, it is not illegal. But the employee may have a claim for discrimination if derogatory comments were made about the his or her gender, race, national origin, citizenship, age, religion, veteran status, disability, sexual orientation or other protected classification.

Q: What if the employee blew the whistle on the employer?

A: It is illegal in almost every state to fire employees for reporting violations of health and safety and other laws. However, it may be difficult — if not impossible — for the employee to prove retaliation.

Q: What if the employer listens to the employee's side, but doesn't believe it?

A: In minor situations, the employer may decide not to decide, and just remind the employee what the standards are that must be met. When an allegation of gross misconduct is made, the employer must make a decision. As long as the employer listens fairly to both sides, weighs the evidence in good faith and makes an honest decision, that decision will be upheld by the courts, even if it later turns out the employer believed the wrong person.

For more information, visit www.FairMeasures.com.

— Fair Measures Corporation