

# EMPLOYEE LAYOFF AND TERMINATION HOW TO GUIDE

## OVERVIEW

For at-will states, *in most situations*, employees can be terminated at any time, with or without cause and with or without notice, so long as employees are not being terminated for any discriminatory reason. However, before proceeding with termination, keep in mind a couple things: **almost all states are at will states**. Also, the way the law is written, the burden of proof will **always** be on the employer to prove that they did nothing wrong. Bearing in mind that if you were challenged, you would automatically be on the defensive to show that your actions were not discriminatory, we have developed this guide for you.

There are exceptions, however, to the at-will provisions of common law, such as if there is an employment agreement (which could be individual or a collective bargaining agreement), where the termination would violate public policy (such as if it is motivated by or related to the employee exercising a legal right, or if the employee violated a company policy in order to save someone's life), or where termination is due to protected information, such as an employee's disability (unless the disability could not be reasonably accommodated), race, sex, marital status, national origin, creed, religion, being over 40, or any other protected class mandated by federal or state laws.

If the employee fits within any of the exceptions to at-will employment listed above, then the employer will need to be able to show that the termination was in accordance with company policy (such as attendance, or performance policies) and/or that the termination was not motivated by a reason that violates public policy or because of the employee's membership in a protected class.

Additionally, if the employer is planning a mass layoff or plant closing and the employer has more than 100 employees, the Worker Adjustment and Retraining Notification Act (WARN) , probably applies. Certain states have additional protections that go above and beyond federal obligations. If the employees who are being laid off or terminated work or live in another state with additional protections, the laws of the other state may impose obligations in addition to, or in place of, Federal obligations.

## PRACTICAL GUIDELINES

Not all of these practical guidelines are required by law. However, following them may make it easier to defend yourself as an employer if your decision to terminate or lay off an employee or group of employees is later challenged, and may make the process smoother. If you are a public entity, additional steps may need to be taken that are not described here.

- If there is a possibility that the employee is covered by a contract (including a verbal contract or employment contract), be sure to follow all of the agreed upon steps in and the parameters of the contract.
- If the termination is for disciplinary or performance reasons, be sure you have adequate documentation to support your decision. In general, we advise that you document all coaching and counseling conversations in writing. In the moment, or as close to it as possible, share the

information with the employee, and provide clear guidelines on what the employer's expectations are and on how to improve. All coaching and counseling conversations should be documented. Only terminate the employee after thoroughly documenting that the expectations have not been met, and *after* the employee has had an opportunity to correct the problems.

- You may consider contacting a lawyer who practices employment law or an impartial human resources professional to double-check your decision.
- In general, we never recommend summarily discharging an employee, outside of cases of violence or threats of violence. If the problem is so bad that you believe it merits immediate termination, double-check your decision with a person who was not involved with the problem, such as an attorney or impartial human resources representative.
- Be consistent – similar problems generally deserve similar treatment. For example, if one employee who strikes a co-worker is fired but another employee who engages in the same conduct is given a written reprimand, then the fired employee may claim that he or she was fired because of membership in a protected class, or in retaliation for exercising a legal rights (such as having an L&I claim, or being absent for jury duty or FMLA leave, etc.).
- If you are anticipating a layoff, after you have selected the employees to lay off, double-check your decision for possible unintentional bias. You may be subject to challenge if a disproportionate number of women, employees over 40, disabled employees, or employees who are members of some other protected class are among the employees being laid off. For assistance with this task, contact a human resources professional or lawyer who practices employment law.
- Give the termination news in person and in private – not by e-mail, telephone, or written note. Do not terminate the employee publicly (except where logistically necessary for mass layoffs).
- Give the employee time to compose themselves before having to face coworkers.
- Generally, terminating an employee during the workweek allows the employee to immediately contact the state unemployment office and to begin making contacts with career counselors or others.
- Have a neutral manager present during the termination. A team approach (two management representatives or a management representative and a human resources representative, or a management representative and a career counselor) is recommended because one person can take notes, and there is more than one witness to what is said. It may also be helpful to have another person present to lessen the chance that the employee will react abusively.
- If you anticipate that the employee will react abusively, evaluate the safest way for you to conduct the termination. If you expect the employee to react violently, contact a professional for advice prior to the termination.
- Unless the employee reacts abusively, allow the employee time to gather their things and leave in an unobtrusive way.
- Arrange for deactivation of computer passwords and access cards and other sensitive matters to coincide with giving the employee news of the termination, not before termination occurs.
- Let the employee know what you plan to tell co-workers, vendors, and customers about the termination, and what information you will provide to reference seekers. We generally recommend that you keep any personal details about the reasons for termination confidential.

- Do not make excuses or debate about the grounds for termination. Make it clear that the decision has been made and is not negotiable.
- If you are aware of any specific concerns that the employee will have about their future, try to get the answers ahead of time - such as whether there will be a severance payment, whether the employer will provide a reference, how health insurance and retirement plans will be handled, outplacement services, EAP, etc.
- Ensure you have the appropriate state and federal documentation available according to applicable laws.
- Should you suspect the employee may attempt to challenge the termination decision, prior to termination contact a lawyer who practices employment law about a reasonable severance payment in exchange for a release.
- Let the employee know they have a right to apply for unemployment benefits. Let them know eligibility will be determined by the state.
- If you have a noncompete agreement, nondisclosure agreement, nonsolicitation of employees agreement, or similar agreement that is effective after termination, be sure and review the parameters of such with your attorney and give the employee a copy to take home.
- Ensure the final paycheck is prepared in accordance with federal and state law.
- Develop a checklist ahead of time of things that need to be covered in any separation from employment (whether voluntary or involuntary), such as a list of specific equipment and keys that need to be returned; passwords and access cards that will need to be disabled; covering the employee's workload until a replacement is obtained; notification to co-workers, vendors, and customers; COBRA information; keeping a current address for W-2's; etc.
- Keep in mind that there are many other things that should be considered during the termination process. In order to make the process go as smoothly as possible, contact an attorney whose practices includes employment law before terminating the employee.