

GROWERTALKS

Features

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The Fine Art of Firing

Jean L. Seawright

Every termination carries risk. That's right, every termination. From simple unemployment claims to costly allegations of illegal discrimination, unpaid wages, wrongful termination or retaliation, liabilities abound.

Unfortunately, many owners and managers inadvertently dismiss these risks by acting under the mistaken belief that their "employment-at-will" right trumps all other employment laws and regulations. Not so! When it comes to state and federal employment regulations, government agencies that enforce these regulations operate under the "burden of proof" principle. This means you must be able to prove that your employment decisions (including all types of separations) are compliant, nondiscriminatory and job-related. In the absence of this proof, a government agency will assume a violation.

How do you meet this burden of proof? Indisputable documentation. Depending on the reason for the termination, this can include carefully worded disciplinary warnings and performance evaluations, a comprehensive and compliant employee handbook with a signed receipt, relevant financial or other company records, written customer complaints, job descriptions, payroll records showing pay rates and changes, documentation to establish consistent treatment of workers and others.

Regardless of the reason for termination or when it occurs (within the 90-day trial period or outside of it), effective documentation is essential. Consider these examples:

- **Misconduct** Perhaps the easiest type of termination, misconduct occurs when an employee willfully violates a company policy or practice. (Insubordination is a form of misconduct and occurs when an employee willfully refuses to follow a directive.) In order to willfully violate a company policy, an employee must first have knowledge of the policy or directive. To establish this knowledge, a written policy (such as those found in comprehensive employee handbooks) and a signed employee receipt are essential.

- **Poor performance** By far the most common type, a poor performance termination carries the most risk. Why? Because of a lack of communication and documentation. From managers who feel sorry for poor performers and don't want to "write them up" to those with nonassertive personalities that cause them to avoid conflict like the plague, the result is the same—inaction. Eventually, even these managers reach the point where they have "had enough" and, when they do, oftentimes they terminate the worker without the necessary documentation.

Shocked and dismayed, the terminated employee is convinced that race, gender, sexual orientation, religion, age, disability, military status, national origin or some other protected class played a role in the termination. Without documentation to establish there was a pattern of performance problems that the employee was unwilling (or unable) to correct, meeting the burden of proof is very difficult.

- **Layoff** Contrary to popular belief, sugar-coating a performance termination by calling it a “layoff” doesn’t minimize risk! To meet the burden of proof in a claim alleging that a layoff was discriminatory, you must be able to establish a job-related, nondiscriminatory basis for why the particular individual in the given function or department was selected over others for layoff.

If you regularly hire and layoff seasonal workers, meeting this burden of proof is easier, assuming you have documentation that the workers were, in fact, hired for a seasonal position that was expected to last a limited number of weeks or months.

Outside of seasonal scenarios, to reduce liability when laying off an employee, always be sure you can answer the “why me?” question posed by the employee who was selected over others by providing a legitimate job-related reason for the selection.

- **Constructive discharge** Also referred to as a “forced resignation,” this type of termination occurs when an employer confronts an employee with termination and gives the employee the option of resigning. In these situations, a resignation letter will not change the fact that the employer was the moving party in the separation. The constructively discharged employee can allege that he or she was forced to resign based on a protected class, in retaliation for lodging a complaint or for any other illegal reason. Should this occur, once again, the burden of proof rests with the employer.

- **Misfit** Sometimes, it’s necessary to part ways because an employee is simply unable to do the job or because it’s time to end the pain caused by placing a “square peg in a round hole.” By far, these are the most difficult terminations; however, the same burden of proof principle applies. As undignified as it may seem, documentation to establish that the employee is unqualified or incapable of achieving the required results is essential. Of course, if a medical condition is involved, to meet the burden of proof associated with a disability discrimination claim, before terminating the employee, it may be necessary to consider reasonable accommodations that don’t create an undue hardship.

As unpleasant and risky as most terminations are, failing to act is not without consequence. When poor performers, non-contributors and employees who violate norms that strike at the core of the culture are allowed to remain on the team, it sends a strong, less-than-positive message to customers and coworkers that you tolerate substandard performance. In these situations, a failure to act can negatively impact the morale of current workers, your company image and your culture. Even worse, inaction can harm your credibility as a leader when star performers lose trust in your ability to solve problems.

At times like this, seek advice from a trusted advisor who’s neutral, wise and knowledgeable about employment regulations and risks. Oftentimes, when we’re in the middle of a challenging situation, it’s difficult to see the forest for the trees. A trusted advisor with a different perspective can balance the risks with the

rewards and provide insight and information that's fundamental to the termination strategy.

Sound tough? It is. Perhaps that's why the number one problem with terminations is—quite simply—they don't happen often enough.

Note: The information in this article is not legal advice. For legal advice, readers should consult with an attorney.

Documentation is the Name of the Game

To help meet the burden of proof, follow these tips when preparing disciplinary documentation:

- State the expectation. If the expectation is outlined in a handbook or job description, reference it. Remind the employee that he or she is personally responsible for meeting the expectation.
- Document only the facts. Include observable conduct and tangible results of the employee's behavior. Note the date, time and details of the event (who, what, where and when).
- Reference previous discussions, commitments or written reminders/warnings. If the employee made a previous commitment to improve and hasn't done so, discuss his or her failure to live up to the agreement. Cite all previous warnings and their dates on your documentation.
- Determine ways you can assist the employee. If necessary, state how you'll assist the employee in meeting the expectation. This could include additional training or follow-up meetings.
- Gain agreement from the employee. The ultimate goal in any coaching session is to bring about positive change in the employee's behavior. For this to occur, the employee must agree that a change is necessary. That takes more than an employee's signature on the form! If you really want the employee to improve, ensure the employee agrees to improve before he or she signs the form.
- Leave future disciplinary action open-ended. If you state that the next infraction WILL result in termination, be prepared to follow through. In most cases, it's much better to leave yourself some wiggle room by stating: "If conduct and/or performance problems continue, or should other performance problems arise, you may be subject to further disciplinary action, up to and including termination."
- Sign and date the document. Managers should always sign and date disciplinary documentation.
- Provide a copy of the document to the employee. If the documentation is properly prepared, there's no reason to withhold it from the employee. Keep the original, of course. **GT**

Jean L. Seawright is president of Seawright & Associates, an HR management-consulting firm located in Winter Park, Florida. Since 1987, she has provided human resource management and compliance advice to employers across the country. She can be contacted at (407) 645-2433 or jseawright@seawright.com. Jean is also one of the session speakers at NextLevel, which is going to

be in Ft. Lauderdale, Florida, January 18-20. To register, visit yournextlevel.org.