

Employer's Termination Handbook: A Guide to Letting Employees Go

RMI

Resource Management, Inc.





Employee termination is often an unpleasant, yet inevitable part of running nearly any business.

Whether it's due to inadequate work performance, improper behavior, a policy violation or any other factor, it puts employers in a difficult position where they must make the decision to fire an employee. Because of the numerous legalities involved with termination, it's critical for employers to understand their responsibilities, employee rights and what constitutes wrongful termination.

While this guide can be useful for companies both large and small across a variety of industries, it's primarily geared toward businesses without a strong internal HR department who might lack the know-how of the termination process.

Here's what you need to know about firing employees along with some tips for streamlining the process.



Creating a Termination Policy

It's important that employees clearly understand which behaviors are and are not tolerated in your workplace, what your company's overall expectations are and what's considered grounds for termination. Composing a termination policy ensures that there are no misunderstandings and that employees are accountable for their actions.

How to Develop a Policy

A termination policy should clearly state the reasons why an employee can expect to be fired. Some common reasons include:

- Consistently below average performance
- Insubordination
- Excessive absenteeism or tardiness
- Showing up for work under the influence of non-prescription drugs or alcohol
- Harassing other employees or making threats
- Theft

When it comes to minor misconduct that doesn't warrant immediate termination, be specific in terms of how many instances are allowed. For example, you might have a three strikes and you're out policy where being late by more than 10 minutes three times is grounds for termination.

Immediately provide existing employees with a copy of your company's termination policy, and include it with other documents for new hires.



Documenting Performance/ Behavioral issues

Avoid potential backlash, such as a lawsuit, by maintaining thorough documentation of all performance and/or behavioral issues leading up to a firing.

Accordingly, maintain a log of all instances of poor performance, unacceptable behavior, etc., leading up to the point of termination. Proper documentation accomplishes two things:

First, it allows you to pinpoint specific instances that you can highlight for employees when explaining why they're being fired. For instance, rather than simply saying, "You're being fired because your work hasn't been up to par," you can provide concrete examples and say, "You showed up late for work on (these dates), or you failed to miss your sales quotas during (these months)." In turn, this should minimize any disputes from employees and create less overall conflict.

Second, thorough documentation should keep you protected from wrongful termination lawsuits. According to the Larson, Kuper, Wenninghoff & Carney law firm, "Employment lawsuits often focus on the reasons for an employee's termination. The employer's records can constitute important evidence in its defense of a termination decision. Documentation of the termination decision should normally begin well before the employee is discharged and should include the following:"

1. The employer's disciplinary policies and performance standards
2. Any eyewitness accounts of employee misconduct
3. The supervisor's memos in which performance deficiencies are recorded in objective terms
4. Performance evaluations

Accurate records should reduce friction during the firing process, and you can avoid lawsuits or complaints of discrimination.



Ensuring Fair Treatment

It's important to avoid partiality when making the decision to terminate employees.

For example, it wouldn't be fair to fire one employee for poor performance and merely reprimand another employee for demonstrating the same performance. In other words, there should never be a double standard when making termination decisions. Not only is it unethical, but it could potentially get you in some hot water from a legal standpoint.



Understanding the Legalities Involved with Termination

There are several laws in place that employers must abide by when firing employees. Failure to comply with these and similar laws could put you at risk for a lawsuit.

Knowing and understanding key legal issues are a critical piece of running a company. They include:

- The Equal Pay Act of 1963
- Title VII of the Civil Rights Act of 1964
- The Civil Rights Act of 1966
- The Americans with Disabilities Act of 1990
- The Age Discrimination in Employment Act



Firing On an At-Will Basis

According to the SBA, “Every state (except Montana) gives employers the option of adopting an “at-will” employment policy, meaning that an employer may terminate any employee at any time, for any reason, or for no reason at all.” In most cases, the law presumes that workers are employed at-will. The only instance that employment wouldn’t be on an at-will basis is if you clearly indicate that you will only fire employees for good cause.

The bottom line is that you have the right to terminate an employee at any time as long as it’s within the confines of the law, and it’s not discriminatory. However, there are certain limitations you need to understand before going through with a termination.

Reasons You Cannot Use for Firing an Employee

Generally speaking, there are four main instances where it’s illegal to fire an employee. These include:

- Discrimination based on race, gender, age, religion, disability, etc.
- An employee exercising his or her legal rights
- Whistleblowing
- Retaliation



Potential Backlash of Wrongful Termination

If an employee feels that they've been a victim of wrongful termination or suffered damages such as lost benefits, lost pay, emotional distress, etc., they can file a complaint with the EEOC or their state counterpart. From there, they can file a lawsuit against you, which is guaranteed to open a can of worms.

While settlement amounts will vary (assuming they win their case), the average wrongful termination lawsuit ends up costing employers anywhere between \$175,000 to \$250,000. Even if an employer wins the case, it can still be costly because of all the legal fees involved. Furthermore, the litigation process can last for several months, or even a few years, which is a hindrance to productivity. Undergoing a lawsuit can also hurt a company's reputation.

Regardless of the outcome, a wrongful termination lawsuit is something that you never want to deal with. It can have catastrophic consequences and potentially ruin your company. It makes sense to be proactive and do everything within your power to prevent this type of issue from ever arising in the first place.





Protecting your Business from Lawsuits

Written policies that clearly outline reasons for termination and thorough documentation of employee performance and/or behavioral issues are a great first step for protecting your company. Here are some other techniques that can help:

- Train hiring managers on how to avoid employee discrimination.
- Offer in-depth training on acceptable performance and behavior during onboarding.
- Educate employees on what constitutes harassment.
- Clearly explain what you expect of your employees, and provide them with materials highlighting what is and what isn't acceptable.
- Consider outsourcing this area of HR administration. Human resources outsourcing firms are skilled at employee termination guidance/ planning and will ensure that your business is compliant with relevant laws.

Employment Practices Liability Insurance (EPLI)

If you're looking for even more comprehensive protection, consider EPLI. According to the Insurance Information Institute, "EPLI covers businesses against claims by workers that their legal rights as employees of the company have been violated." Some specific examples of lawsuits this type of insurance can protect you from includes:

- Wrongful termination
- Discrimination
- Mismanagement of employee benefits
- Negligent evaluation



Whether you win or lose your case, the insurance company will reimburse you for the money spent defending against a lawsuit (e.g. attorney fees). If you end up losing your case, EPLI will also cover the judgment or settlement as well.

The cost depends upon a few factors such as the industry you're in, the number of employees you have and whether or not your company has been sued in the past for a similar incident. However, the Insurance Information Institute states "Policies typically do not pay for punitive damages or civil or criminal fines. Liabilities covered by other insurance policies such as workers compensation are excluded from EPLI policies."

Even though this is an added expense, it's relatively small when you consider the money you would save long-term if you happen to find yourself being sued by a disgruntled former employee. In many cases, insurance can save your business as well as your overall financial future.

Employee Rights and Benefits

After an individual is fired, they are still entitled to certain rights.

For instance, they must receive a paycheck for the money they had earned prior to termination. In some states, this will also include vacation time they have accrued but not yet used. Employees also have the right to severance pay if they previously signed a contractual agreement and it's part of your company policy.

In some cases, employees will be eligible to receive unemployment compensation while they search for another job if they meet the qualifications. Each state has its own unemployment benefits eligibility requirements. Find links to each state at About.com. According to Find Law, "An unemployed worker can receive benefits for 26 weeks, and if qualified, the worker may receive up to an additional 20 weeks of unemployment benefits."

Workers also have the right to continued healthcare coverage after being terminated if their employer has 20 or more employees. The Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1986 mandates that larger companies must continue to offer employees the option of continued coverage for up to 18 months. If you're a small business with only a handful of workers, then COBRA doesn't apply to you.



Knowing when it's Time to Fire an Employee

Terminating an employee can be a difficult decision.

In some cases, it will be abundantly clear that a staff member needs to go. Other times, you may be unsure about your decision and compelled to give an employee another chance. To make this decision easier, consider a logical breakdown of potential issues.

1. Less Serious Issues

- Continual poor performance where an employee is not meeting expectations
- Continual low productivity
- Consistent absenteeism or tardiness
- Poor attitude toward work
- Poor work ethic
- Poor fit with other workers and overall company culture
- Insubordination

2. Serious Issues

- Making threats toward coworkers or customers
- Harassing coworkers or customers
- Starting a fight
- Showing up under the influence of non-prescription drugs or alcohol
- Deliberately endangering the lives of others
- Theft or fraud

Termination due to a less serious issue typically means the employee exhibited consistently poor performance or continually unacceptable behavior. Generally speaking, you won't fire a person for making a mistake here and there.

The decision to terminate typically comes after reflecting upon a reasonable body of data.

More serious issues typically warrant immediate termination and essentially a one-strike policy. Unless there's a special circumstance, you'll probably want to fire an employee right away if they engage in serious types of misconduct.



Advice for Streamlining Termination

Getting fired is obviously an unpleasant experience for an employee, and everyone will respond to it differently. Use a certain degree of etiquette when letting employees go, implementing a few practices to make it easier on everyone involved.



How to Make it Less Painful for Employees

Meet with an employee in a private setting that's out of earshot of other staff members. This should eliminate or at least reduce any embarrassment a person may feel after hearing the news. It's also ideal to have a neutral, third-party manager present who can take notes and possibly diffuse the situation if it becomes volatile.

When going over why an employee is being fired, make reference to the documentation that was previously recorded to provide tangible evidence of what behavior or lack of performance has led to your decision. This also shows that you're being objective in your decision-making, and it's not based on discrimination or anything else that could be considered illegal.

Being terminated is often a bitter pill to swallow. Give employees private time to collect their thoughts before returning to face other coworkers. In terms of timing, it's recommended to complete the firing during the workweek because it gives a person time to contact an unemployment office and get other matters in line as quickly as possible.



Choosing Your Words Carefully

It's easy for an employee to feel threatened and potentially victimized in this type of situation. **Soften the blow by maintaining objectivity and focusing on the behavior and not the person.** At the same time, you should be clear about why a person is being terminated without trying to sugarcoat it. Provide specific examples that led to your decision, and discuss any warnings that were previously given. Make it clear that your decision is final and there's nothing to debate.

Finally, go over an employee's rights and discuss any benefits they're eligible to receive such as continued healthcare coverage, unemployment compensation, etc. If you agreed on a severance package prior to their employment, you'll need to explain the essential details.





Post Firing

When an employer-employee relationship comes to an end, it's necessary to tie up any loose ends. Ideally, both parties will part ways amicably without any major conflicts. Here are some final issues to address:

Exit Interviews

If you've given an employee advance notice of your decision, **then schedule an exit interview on their final day**. This is the time to collect any company property that was previously issued, discuss COBRA information if necessary and address any concerns an employee may have. For instance, they may ask if they can use you as a reference when applying for future jobs, perhaps they want to take the chance to explain their actions, or they might just ask about benefits.

In the past, exit interviews were usually conducted in person. Today you have the option of conducting it over the phone or through video chat (e.g. Skype). You could also ask ex-employees if they are interested in filling out a survey with questions regarding their level of job satisfaction, company culture, frustrations and so on. This can be beneficial on your end because it should help you fine-tune operations and address any problem areas.

Final Paycheck

Finally, you'll need to provide an ex-employee with their final paycheck, which includes payment for hours accrued - and in some cases, this will include unused vacation days. While most states don't require employers to immediately give ex-employees a final paycheck, some do. You can find out what the requirements are in your state by contacting your state labor office.



Conclusion

Although the concept of terminating an employee may seem simple at first glance, there's actually a lot involved. That's why it's important for employers to understand the major points as well as the subtle details of the process. Because of the litigation-happy society we live in, it's critical to abide by all applicable laws and regulations. By following the advice in this guide, you should be able to develop the right policies for your business and create an effective termination process.





Helpful Resources

1. [Sample Termination Policies](#)
2. [Equal Employment Opportunity Links](#)
3. [A Quick Test To Assess The Legality Of Firing An At-Will Employee](#)
4. [Five Signs It's Time to Fire Your Problem Employee](#)
5. [Employment Ending Checklist](#)
6. [Exit Interview Checklist](#)
7. [State Labor Office List](#)

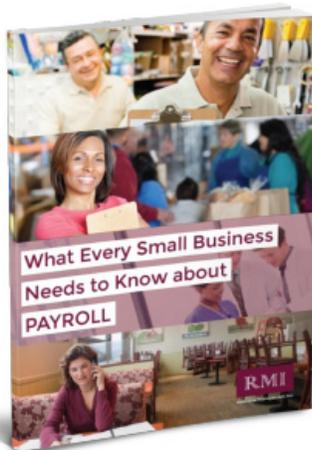
Resource Management Inc (RMI)

is an HRO solution that helps businesses simplify and save time. With RMI to handle the necessary Human Resources and compliance programs for your company, you and your staff can concentrate on what you do best.

The experts at RMI include certified professionals in HR, Risk Management, IT, Accounting and Payroll. Our breadth of experience in multiple areas of HR business helps us create customized suites of benefits and services to meet your unique needs.

Toll Free Number for All Offices: 800-508-0048

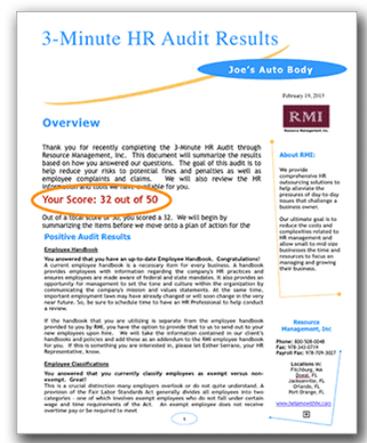
Visit RMI's resource library for additional HR guidance.



Payroll Guide: What Every Business Needs to Know



New Business Owner's Guide to Human Resources



Gain Insight and Direction with our FREE 3-minute HR Audit



Resource Management Inc.