

Personnel Notebook

For Your Most Important Resource -- The Human Resource

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TERMINATING EMPLOYMENT

It's A Two-Stage Process

In a classic 1970s case, a major bus company was experiencing consistent thefts. After an investigation and several warnings, they still could not solve the mystery. So they announced that they were going to start firing employees alphabetically, A to Z until the guilty parties were caught. They were well into the alphabet when the lawsuits started.

An east coast manufacturing firm found one of their employees identified in the newspaper as the leader of a drug gang who had been arrested the night before. The plant manager ordered that the man be terminated immediately. After a week in jail, the man plea-bargained to a minor offense and was released. No longer a drug offender, he sued the employer for wrongful termination.

A manager of a computer store in Florida was caught in the middle of the night stealing computers from his own store. The company filed charges and prosecuted the manager in criminal court. Almost a year later the company was contacted by a hospital social worker saying that the man was in the hospital with AIDS and a medical bill exceeding \$100,000. The man claimed that he didn't know he had ever been fired. He further said that he had not been informed of his rights under the COBRA Act that could have provided him with medical insurance. The company eventually assumed responsibility for his medical costs.

And in one incredible example, a railroad decided to terminate their corporate attorney. He

refused to go! Today he is still there. Every other employee in the company is gone!

These are four actual cases of how companies can mishandle terminations. These are four examples of how not to do it. The results of such mishandling can be disastrous. In 1980 there were approximately 200 wrongful discharge suits in the U.S. In 1990 there were more than 25,000. In 1998 there were over 175,000 charges filed with the EEOC for wrongful discharge. Overall employment discrimination lawsuits have increased 2,200% since 1972!

The average attorney fee was over \$125,000, win or lose. The average jury award was \$602,000. In two-thirds of those cases an additional \$523,000 (on average) was awarded for punitive damages.

You don't judge success by how many cases you win or lose but by how many you avoid.

Why Do Employees Sue?

There are certainly some who sue because of the attraction to large cash awards. But the major reason for the suits are because the employee feels he/she has been treated unfairly. So the best way to avoid lawsuits is to better ensure that the employee believes that they have been treated fairly. Of course, employers and employees may have different ideas on what is fair. The concept of fairness has certainly changed over the years.

Employment At Will

Historically, the American work force developed within the doctrine of "employment at will (EAW)." EAW essentially says that the worker has the right to cease his employment with the company at any time and for any reason he chooses, and that the company has the right to cease employment with the worker at any time and for any reason it chooses.

In the last 30 years, the EAW doctrine has been eroded by new social concerns. The first major change was that the company could not use "race" as a reason to cease employment; later religion, nationality, sex, age and handicap were eliminated. More recently the concept of an employee acting in the public interest (such as "whistle blowing," serving on a jury, etc.) was also eliminated from consideration in terminating employment.

Today there is little strength left in the EAW doctrine. It remains as law in only 16 states. A Rand Corporation study found that only five states were still using EAW as basic, unencumbered law: Louisiana, Mississippi, Georgia, Florida and Delaware. For employers in any other state to depend on the original concepts of EAW would be risky.

Within and beyond these considerations are larger questions facing the employer who is about to terminate an employee. Is this termination necessary? Can you resolve this problem? Can this employee:

- Be useful in another department or job in the company?
- Does his/her background indicate other skills and abilities?
- Would a lower level job or different supervisor fit better?
- Would training or counseling be a help?
- Does the employee state a reasonable cause for the problem?
- Does the employee have a solution that works?

You need to ask yourself these questions because after the fact they may be asked of you. So we are going to separate the issue of termination into two

stages:

Stage I. Don't Do It!

Stage II. If You Have To Do It, Do It Right!

Stage I. Don't Do It!

Your primary goal is not to fire an employee but to achieve the desired performance. That means first just forget completely about terminating the individual. Ask yourself why did I want to do this? Is his/her performance below acceptable standards? Are they behaving in a way that is harmful or disruptive? Could I be viewing this as a personality, political or prejudicial issue?

Identify clearly on paper what this person is doing that they should not be doing and/or what this person is not doing that they should be. Review it, does it sound logical? Is it job related? Is this something over which the person has control? Do you see anything personal or non-job related in your reasons? If you still feel that the problem is job performance or behavior, then it is time for the three-step performance improvement process.

The Three Step Performance-Improvement Process

There are three steps to follow when you need to address performance or behavior.

1. Verbal discussion
2. Written warning
3. Written probation

These are not three steps to termination.

These are three increasingly critical steps to achieve expected job-related results. The process should never be referred to as the "termination process" but in fact is often titled in the employee handbook as the "Performance Improvement Process."

Step 1. Verbal Discussion

You begin by talking to the individual privately (praise in public, criticize in private). Bring the problem to their attention. Listen to their reasons. Your intent is to assist the employee by informing him/her of your concerns and offering whatever

help they need, such as training, information or accommodation, to achieve the desired performance. Keep it verbal. You can make notes in your diary or working records, but usually at this point you do not create any documents or warnings. (See Example No. 1 on back page.)

If the desired performance does not result, you must decide whether it is time to discuss it further or raise the issue to the next step.

Step 2. Written Warning

The next step is to prepare a written warning. In this warning you start by addressing the verbal discussion previously held. State the date and subject of the discussion. You are now documenting the verbal discussion and the written warning. You state the original issue and what progress (or lack of) has resulted. You now assertively state that you want to help the employee improve and that you expect to see the desired results. You state that failure to accomplish this may result in further steps such as discipline, transfer, suspension or termination. Offer help or support but at this stage you must bring to their attention the potential of termination. (See Example No. 2.)

If the desired outcome still has not resulted, you next measure what progress has been made. Is it sufficient for you to believe that he is trying or that he is ignoring the issue? Should you talk and work with him again or send someone to assist him or proceed to the next step?

Step 3. The Written Probation

The next step is to issue him a formal written probation. You state the original verbal discussion (date, subject, result). State the previous written warning (date, subject, result) and then state that they are being placed on probation. (This is also called either a formal, disciplinary or performance improvement probation.) The tone is more serious. You state that the desired result must be achieved within a specific time frame (30 days, 60 days, etc.). For specific performance changes or actions to occur, 30 days is a reasonable probationary period. For behavioral problems (absenteeism, tardiness, disruptive attitude) a longer period of 90, 120 or even 180 days probation is

appropriate. There are no permanent probations and rarely is there cause for six (6) months. However, in drug and alcohol problem probations, six months to a year is sometimes proper to achieve a behavioral pattern change.

You must state clearly that failure to achieve the desired result or a recurrence of the problem may result in immediate termination. (See Example No. 3.)

This process and each step are designed and intended to achieve the desired standard of performance or behavior. Only upon the failure of these steps should termination be an option. However, if at any time it is demonstrably apparent that these steps are futile, that no progress will be made (for example, the individual refuses to accept that there is a problem or refuses to cooperate), then the entire process may be sped up or ended and termination takes place. But you should be prepared to document the reasons for ending the improvement process.

Terminating employment means more turnover, recruiting, orientation, training and downtime. These are all very expensive processes and loaded with liability. So ask yourself honestly, "can I achieve the work performance I need by developing this person or is my only option to terminate him/her and start over with someone new?"

For the sake of your company's competitiveness and in fairness to all other employees, keep this fundamental fact as a guideline: regardless of a person's race, sex, age or handicapped status, no law requires you to employ someone who cannot do the job.

Next issue:

Terminating Employment Stage II: If You
Have To Do It, Do It Right!

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EXAMPLE 1 - VERBAL WARNING

Jane Doe's daily notes

DATE: January 11, 1999
TO: Supervisor's Notes
FROM: Jane Doe, Supervisor
SUBJECT: Attendance

I observed Bill Smith coming in late to work on January 7, 10 and 11, 1999. On January 11, I discussed this with him and he could give me no acceptable reason for his tardiness but he said it would not happen again.

EXAMPLE 2 - WRITTEN WARNING

ACME INDUSTRIES, INC.

DATE: January 29, 1999
TO: Bill Smith
FROM: Jane Doe, Supervisor
SUBJECT: Attendance

On January 11, 1999, I discussed with you my concerns about your tardiness and you assured me that this would not happen again. Since that date you have been late for work on three occasions. You were late to work on January 17, 22 and 29, 1999. On each occasion I questioned you as to the reasons for your tardiness. However, your reasons were not satisfactory. I informed you that the reasons were unsatisfactory on each occasion.

If there is a problem that the company or I can help you resolve, please let me know. The intent of this warning is to affirmatively bring this to your attention and to work with you on the solutions.

Since you have been unable or unwilling to report for work on time, through this memo I am formally notifying you that improvement in this matter is imperative or the result will be further disciplinary action and possible termination. A copy of this warning will be placed in your personnel file.

As you know, the nature of our work requires that all employees report on time to begin work at 7:00 a.m. Your tardiness places an unwarranted burden on your fellow workers. I hope this formal warning alerts you to the seriousness of this matter.

I, Bill Smith, acknowledge receipt of this letter. My

signature does not signify my concurrence with the contents of this letter.

cc: Personnel File-Bill Smith

EXAMPLE 3 - PROBATION

ACME INDUSTRIES, INC.

DATE: February 16, 1999
TO: Bill Smith
FROM: Jane Doe, Supervisor
SUBJECT: Attendance

On January 11, 1999, I verbally warned you and on January 29, 1999, I warned you in writing that continued tardiness would not be tolerated. Since that time, you were late for work on February 13 and 16, 1999. On each occasion your excuse for the tardiness was not acceptable. As you know, you are required to report to work at 7:00 a.m.

It is apparent that you are unwilling to make the effort to come to work on time. I am, therefore, placing you on 90 days probation beginning February 17, 1999 and continuing through May 16, 1999.

During this probation, I hope you will carefully consider the gravity of your conduct and its effect upon your job and the department. Should you fail to correct your attendance, further actions will be taken that may include termination of your employment. If at any time during this probation it becomes apparent that continuing this opportunity for you is fruitless, this probation may cease and your employment terminated.

I, Bill Smith, acknowledge receipt of this letter. My signature does not signify my concurrence with the contents of this letter.

cc: Personnel File-Bill Smith