

Builders and the Law:

Strategies To Fire Properly

by Steven M. Sack

More than 250,000 employees are terminated illegally or unjustly each year, exposing companies to significant damages, huge legal bills and bad publicity. Most employers still do not recognize how far laws have changed to favor the worker. Until twenty years ago, employees had few legal options when they received a pink slip because the employment-at-will doctrine was generally applied throughout the United States giving employers the right to terminate at will without cause or notice.

However, there has been a gradual erosion of this doctrine, as many courts now recognize, for example, the right for employees to be treated according to statements in company handbooks and manuals. Other states now recognize the obligation of companies to deal in fairness and good faith with long time workers which prohibits them from terminating workers in retaliation who complain about safety violations, discriminatory treatment, abuses of authority, or right before the vesting of an economic benefit such as a commission, bonus or pension.

Firing an employee, especially a long time worker, can be hard. Besides the emotional difficulties involved, you must be aware of and prepare for the possibility that the terminated employee will seek legal advice and action. You must prepare properly. The following series of strategies can reduce company exposure from termination litigation, including ways to minimize legal exposure from breach of con-

tract, wrongful discharge, and discrimination lawsuits.

1. Remember the first rule of personnel relations: "No good deed out of kindness goes unpunished."

2. Before firing, establish clear written work rules which indicate that infractions can lead to discipline and/or discharge. Follow precisely your company's progressive discipline guidelines. Avoid firing longtime employees without following progressive discipline unless the employee is such a disruptive element or menace that it is imperative to fire suddenly, or the firing is based on purely economic reasons such as a business reorganization.

3. Carefully prepare periodic performance appraisals; never inflate them. Most lawsuits are commenced by angry individuals. When a company appears to have been fair—to have met with the individual over time, discussed and documented problems concerning performance and given the employee sufficient time to correct these problems—the worker will have less cause to be angry when eventually fired and will be less likely to sue.

4. Respond promptly and properly to charges of sexual harassment, age, sex, race or disability discrimination.

5. Carefully review all termination decisions before making them considering such factors as:

A. Have any oral representations been made to the employee concerning job security? If so, will the termination be consistent with those statements?

B. What does the employment contract say about firings? Were all provisions (such as to give written notice by certified mail 30 days before the firing) followed?

C. Are there any potential statutory problems such as sex, age, race, or pregnancy discrimination, or violations of any whistle blowing laws or other exceptions to the employment-at-will doctrine?

D. Are there any potential public policy concerns? For example, has the employee recently exercised a legal right to attend jury duty or serve in the military reserve? Has the employee been involved in any controversial events that may include misconduct *by the company* (such as wrongful surveillance or eavesdropping or other violations of the employee's rights of privacy)?

E. Are there any mitigating factors that may excuse or explain the employee's poor performance or misconduct?

F. What kind of overall record does the employee have? Remember that the longer and better the employee's record, the more reluctant the reviewer should be to approve the termination.

G. Are you terminating the individual to deprive an economic benefit that he/she is about to receive? If so, you are asking for a lawsuit.

H. Are you terminating the worst offenders first or based on some other reason? For example, if three employees have poor attendance records but you are considering firing a female first before two other male employees with similar or worse records, you are exposing the company to a discrimination lawsuit.

I. Most importantly, consider whether termination is appropriate under all of the circumstances. Does the punishment fit the crime?

continued on next page



J. Consider a peer review before the firing. It is always best to discuss the anticipated act with an independent reviewer who is well versed in legal principles that govern employee terminations and in the company's personnel policies and practices. Give the reviewer the authority to reject proposed terminations if they do not meet legal requirements or company standards.

6. After firing, be compassionate yet firm. The best time to fire is typically Thursday afternoon. That way, even if you decide to pay the employee through the end of the week, you will not have overpaid a significant amount of compensation (as opposed to if you fired on a Monday morning). Thursday afternoon is also preferred because the employee will probably discuss the decision with you immediately or on Friday (as opposed to thinking about the offer over the weekend). Arrangements can also be made for him to retrieve his personal belongings by the end of the week so you start off the next week without his/her prolonged presence.

7. Offer nonmonetary benefits first if appropriate. For example, by stating that you will give a favor-

able reference to prospective employers (which is not required) or that you will not contest unemployment benefits in questionable situations, the employee may be inclined not to pursue further legal options.

8. Offer severance, extended medical benefits, out placement services and other economic benefits where warranted. If you do offer such benefits (there is no legal obligation) you must then be consistent and offer the same package to all other terminated employees to avoid charges of discrimination.

9. Recover all company property before paying final severance and other voluntary benefits (as opposed to earned salary and accrued vacation which must be paid regardless) **before the terminated employee departs.**

10. Consider the signing of General Releases when appropriate. If so, prepare them properly. If you are terminating an older worker (over 40) federal law requires that you execute very formal releases which, among other things, say (a) that the employee has had the right and opportunity to consult an attorney; (b) that the

individual has been given at least 21 days to consider the content of the release, and (c) that the individual has up to 7 days to change his or her mind after signing the release. Since these releases have become quite sophisticated, it would be wise to consult an attorney knowledgeable in this area.

11. Avoid accusations in front of third parties to avoid charges of defamation.

12. Take a conservative approach with potential employers. Remember, bad references lead to expensive lawsuits! ♦

Steven Mitchell Sack maintains a private labor law practice in New York City. He has authored 12 books on labor subjects for the American public, including his new book, From Hiring to Firing: the Legal Survival Guide for Employers in the 90's, available from Home Builder Press at 1-800-223-2665. This article begins a regular column that Mr. Sack will write for BMJ. Feel free to contact Mr. Sack at his law office (212) 983-0300 for answers to any legal questions you may have concerning labor matters, or to suggest a topic for this new column.



National Association of Home Builders
Builder Business Services
1201 15th Street, N.W.
Washington, D.C. 20005

Bulk Rate
U.S. Postage
PAID
Permit No. 21
Bridgewater, VA