

Discipline, Documentation and Retaliation

Best Practices in Hiring and Firing Decisions

Termination Checklist

When possible, utilize termination as a last resort. A key factor in the outcome of employment or wrongful discharge litigation is whether the company's actions with respect to a terminated worker are perceived as "reasonable." When a judge or jury believes that the company treated termination as a last resort, they are much more likely to consider the company's action to be reasonable and uphold them in the face of employment litigation.

Always consider the following questions before terminating an employee:

1. Is the reason for discharge or discipline job-related?
2. Is the reason for discharge consistent with your policies and past practices?
3. Other than cases of serious misconduct warranting immediate termination, does the record show the employee was given fair notice of what was expected of him/her, and an adequate opportunity to correct the perceived problem in performance or conduct? If not, there may be good reason to give a final warning and another chance to the employee.
4. Have all the requisite preliminary steps for progressive discipline to discharge been met?
5. Are you certain of the facts behind the proposed discharge, and are they supported by hard evidence rather than hearsay and speculation?
6. Have you been procedurally fair; meaning, have you confronted the employee with the reason you are considering discharge or discipline, afforded the employee fair opportunity to respond or explain, and to give his/her side of the story, before you make and announce your decision? Is this step accurately and adequately documented?
7. Has the employee made any claim of wrongdoing by the Employer? If so, do not ignore the claim. Get the employee's story and investigate the claim. The employee may be obligated to cooperate with a reasonable investigation.
8. Is documentation proper and adequate? Will it support this termination?
9. Has the proposed decision been reviewed objectively by someone within the Company other than the immediate supervisor to assure adequacy of the basis for discharge, consistency of approach, and sufficiency of documentation (i.e., does the employee's file support the action)?
10. Is this termination retaliatory? Is there any indication that it might be considered a termination in retaliation for an employee's whistle blowing, workplace injury claim, complaining about a manager's actions, or complaints about employee safety? Even if the termination is not so motivated, are there any facts or circumstances surrounding the termination that makes it appear retaliatory?

11. Is there a pending governmental investigation or complaint? Has the employee recently filed a complaint with a federal or state agency?
12. Is there any argument that the discharge was because the employee refused to participate in an illegal act or an act which may be considered against public policy?
13. Long-term employee? Terminating long-term employees should automatically raise a red flag. Courts and juries are more likely to ask why the Employer didn't take action to terminate a long-term employee sooner if it claims that the employee was not performing adequately. The mere fact that an employee has longevity does not mean he can never be discharged; but, it does mean you should have substantial documentation to support the termination decision.
14. Has the Employer followed its own policies?
15. Bad timing? What is the timing of the termination? Is it near in time to suspicious events? For example, shortly after the employee's recovery of workers' compensation benefits?
16. Is the Employer being honest about the reasons for termination? Are you prepared to tell the employee the real reason for termination? This is no time for face-saving for the employee. S/he must be told the real reason, a reason which can be substantiated with documentation and other evidence.
17. Anything else? Is there any indication of extreme or outrageous circumstances? This is especially problematic where there was an altercation between the employee and his/her supervisor.

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