



If you want to know the end, look at the beginning. ~African Proverb

Terminating is rarely easy, but often necessary

Few employers and managers that we have met enjoy being Donald Trump and shouting at an employee: "YOU'RE FIRED!!" It is quite the opposite, as many managers, supervisors and employers think that terminating an employee is one of the most stressful parts of their job. That might be the case, but it is often a necessary part of the job.

This issue of the Attenza Law newsletter will look at what you can do as an employer to reduce the stress and the legal liability surrounding the termination process. On page 2 we look at the concept of "at-will" employment and see how in reality, it doesn't mean that employers can, or should, terminate for any reason or for no reason. On page 2, we also present some tips at how to write discipline documentation. In case you do have to terminate an employee, it is best to CYA and have clearly-written documentation to support your decision.

On page 3, we present you with tips about performance evaluations, which are as important in employee record keeping. Performance evaluations lay the foundation for terminations and are used to defend a company's decision in a wrongful termination lawsuit.

In the end, we know that good planning, fair management, proper documentation and careful hiring will make it less likely that you have to terminate and reduce your legal liability. We are less sure whether the beginning will shed light on the end, as the African proverb tells us, but it would nonetheless be interesting to know.

As always, feel free to [contact us](#) with any questions about your specific situation.

Passion for Law. Passion for Business.



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Si parla italiano
Se habla español



At Will ≠ Absolute Freedom

The vast majority of American employees are “at-will,” meaning that they can be fired at any time and for any reason but an illegal one, such as discrimination. From the sound of it, it would appear that US employers would be worry-free when terminating an employee since the law apparently allows that. In reality, it doesn’t work that way.

Anyone who has worked with HR or with an employment-law attorney knows that it is always recommended that you have a good reason for terminating an employee and that you tell the employee the reason. In fact, Minnesota statute §181.933 allows an employee to demand the “truthful reason” for an involuntary termination within 15 days. There is nothing worse than having conflicting reasons for a termination or no reason at all, so it is best for an employer to know clearly what that reason is and to state

that to the employee at the time of termination.

All terminations and the potential disciplinary problems leading up to it should always be well documented and shared with the employee as well. Use this documentation to compare similar situations to make sure that you are treating employees equally.

Even if there are grounds for a termination, there are also certain cases where employers are urged to take special caution, such as when an employee has just returned from or is on a medical or maternity leave or has made some sort of complaint. Just because someone falls into one of these categories doesn’t mean that you can’t discipline or terminate them, only that you want to pay special attention to verify that you are treating that employee the same as others to avoid any discrimination claims.

Employment for most private employees in the US is “at-will,” meaning that an employee can be fired with no reason at all. However, that doesn’t mean that an employer shouldn’t have a reason.

Lunchtime Legal Workshops:

LAST CHANCE!

As part of our effort to educate our clients, partners and colleagues about the law, Attenza Law and HRTechies are organizing a series of lunchtime legal workshop this winter. The series is

TATTOOS, TURBANS AND TWITTER: UNDERSTANDING HR AND LEGAL ISSUES IN THE MODERN WORKPLACE

Our last two seminars are just around the corner so sign up today to reserve your space! To RSVP call 952-921-8322 or 612-414-4537 or at <http://lunchtimeworkshops.eventbrite.com> Space is limited to 24 attendees.

May 3, 2011: Defensive writing, documentation and performance evaluations

11:30am – 12:45pm
Conference Room - Lower Level
8500 Normandale Lake Blvd.
Bloomington, MN 55437

Stay tuned for news about our next exciting series of Lunch & Learns!

Disciplining Employees: Written Documentation is Key

For most managers and supervisors, disciplining an employee is never easy. Preparing thorough written documentation about the disciplinary action is important for several reasons:

1. It makes it more likely that the employee will carry through on any recommended changes to his or her performance or behavior.
2. It reduces the employee’s surprise if he or she is terminated or denied a promotion, since the workplace issues have already been discussed and documented.
3. It decreases the likelihood of litigation.
4. It makes it more likely that the employee will win, if a lawsuit should be filed.

It is clear that proper documentation is important, but what makes documentation adequate? Good documentation generally includes the following:

1. History
2. Facts
3. Expectations
4. Consequences

You want to make sure that the documentation tells the story fairly and impartially. Get both sides of the story, not just management’s. Avoid vague phrases like “poor attitude” or “not a team player.” Instead, include specific facts. For example, “on November 20, 2009, you refused to help your team complete a project that was due at the end of the workday. Instead, you chose to do your employee self-evaluation for your year-end review.”

Lay out goals and expectations. If an employee is consistently late to work, reiterate the company’s policy and the job description that includes punctuality and attendance as an essential function of the job. Finally, include consequences if the behavior doesn’t change and follow through on those consequences to show employees that discipline is something your company takes seriously and to help ensure uniform application of your company policies.



Why Performance Evaluations Are Important

Performance evaluations are extremely important in termination decisions and defending any potential lawsuits that might stem from a termination. What should you include in a performance evaluation? Here are 8 great tips from the [Business Mgmt Daily website](#).

To begin the process, create a file for each employee you supervise. Include in each file a copy of the employee's job description, job application and resume.

1. Include positive and negative behaviors. Recording only negative incidents will unfairly bias your evaluation. Make a point to note instances of satisfactory or outstanding performance, too. Update employee performance logs on a regular basis, instead of waiting for a specific incident to occur. Failing to document a positive performance can strengthen claims of discrimination. A file of all-bad comments may look like a setup.

2. Date each entry. Details such as time, date and day of the week help identify patterns that may indicate an underlying problem before it becomes more serious.

3. Write observations, not assumptions. In all log entries, be careful about the language you use. Performance logs can end up as evidence in a lawsuit. Your log comments should only focus on behavior that you directly observe. Don't make assumptions about the reasons for the behavior or make judgments about an employee's character. Avoid emotional content, including personal impressions ("I think ..."), labels ("He's a whiner ...") and adjectives ("very unproductive ...").

4. Be specific. Example of poor documentation: "Employee was late three times in the past month." *Better:* "Employee was 30 minutes late on Feb. 5; reason given: traffic. Employee was 45 minutes late on Feb. 9; reason given: overslept. Employee was an hour late on Feb. 23; reason given: car problems."

5. Keep out biased language. A good rule of thumb: Any statement that would be inappropriate in conversation is also inappropriate in an employee log. That includes references to an employee's age, sex, race, disability, marital status, religion or sexual orientation.

6. Be brief, but complete. Log entries should use specific examples, rather than general comments. Instead of saying, "Megan's work was excellent," say "Megan has reduced the number of data entry errors to fewer than one per 450 records."

7. Track trends. If you begin to see patterns, make notes in the log or flag prior incidents of the same behavior. You don't need to discuss every entry with your staff members. Bring your observations to the employees' attention only after you've defined a specific problem.

8. Be consistent. Don't include comments about a behavior in one person's performance log if you ignore the same behavior in other employees. When in doubt, check to see how similar problems have been documented in the past.



So he's no Johnnie Cochran.

We didn't hear it, but wanted to share with you some of the funny things that lawyers and witnesses have said in courtrooms around the country.

By Attorney: This Myasthenia Gavis, does it affect your memory at all?

By Witness: Yes.

Attorney: And in what ways does it affect your memory?

Witness: I forget things.

Attorney: You forget things? Can you give us an example of something you've forgotten?

By Attorney: Can you describe the individual?

By Witness: He was about medium height and had a beard.

Attorney: Was this a male or a female?

Disclaimer: This newsletter most likely contains legal advice. However, that does not mean that you should rely on it without consulting an attorney, whether us or another one, about your specific situation. That the newsletter is legal advice doesn't mean that an attorney-client relationship exists without an agreement signed by you and Attenza Law.