You're Fired!: 5 Rules for Terminating Employees

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Publications

Root Canals. Tax Audits. Heartburn. Many managers place Employee Discipline and Terminations as the fourth horseman of this apocalypse of discomfort and worry. No one enjoys having to correct, much less terminate, an employee. However, it is a simple fact of life and work that from time to time, employees do not meet legitimate expectations. Often an employee responds well to corrective action. Sometimes, an employee just does not work out and the employer must go in a different direction. When that happens, and discipline or termination is the result, there are Five Common Sense Rules that will help discipline be more effective and terminations less stressful.

Rule Number One- Make Expectations Known.

Before standards can be enforced, it helps if management, line supervisors, and employees all agree on what the standards are. It is management's prerogative to determine what standards of conduct are appropriate for a company. However, that is not the end of management's responsibility. Management must make sure those standards are disseminated throughout the organization. Management must ensure that supervisors are trained to consistently enforce the company standards of conduct. Finally, management, with front line supervisor support, must ensure that employees understand what is expected of them.

This process can start when the employee is hired. As part of orientation, the employer can share with the new employee the core values of the company. The employee can, and should, be provided a handbook that outlines basic expectations. More detailed training can be provided on issues of concern, such as the company's harassment policy and workplace violence policy.

After an employee starts to work, the training can continue. The employer should also provide employees with timely updates to policies that affect them. If policies are updated before the printed

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employee manual is revised, the updates can be posted online or on bulletin boards accessible to employees.

Rule Number Two- Be Fair.

Many, if not most lawsuits, have their start in an employee feeling, rightly or wrongly, that they were not dealt with in a fair manner. It is truly said that you can't please all the people all the time. Sometimes an employee's perception of events is simply out of line with reality. Other times, however, an employee may have a legitimate basis for complaint.

What does it mean then, to be fair, in an employment context? Fairness can be equated with consistency. Treating like situations in a like manner. This means not allowing favored employees to get away with actions that other employees are held accountable for. It also means not allowing difficult employees to "move the goalposts" of what is considered acceptable behavior.

Does this mean that all situations will have the same cookie-cutter solution? Of course it does not. However, it does mean that when a manager decides that even though two employees committed similar infractions, the consequences will not be similar, the manager must be prepared to articulate why the employees were treated differently. For example, does one employee have a longer, better track record than the other employee?

If there is a perception of fairness on the part of the employee, there is less chance that a claim of wrongdoing will be made. Even if the employee makes a claim, if the employer can show it treated the employee consistently with similarly situated employees, the employer has taken a big step toward successfully defending any claim by the employee.

Rule Number Three- Talk Straight.

It can be hard to tell someone their shortcomings, especially when the person is sitting across a table from you. Our natural inclination in this type of uncomfortable situation is to pull our punch and to not tell someone in a direct fashion exactly how they have failed to meet expectations. This can be a fatal error. This is because, in the

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absence of concrete reasons for an adverse employment action, employees (and their lawyers) will fill this vacuum with other reasons for the employment action. These other reasons often assume wrongful action or motive on the part of the company. Failure to articulate problems in a direct way to an employee in a timely manner will undercut the company's ability to "fill in the blanks later" without a charge that the company is merely attempting to find a legal pretext for otherwise illegally motivated action.

Direct, objective, frank assessments of an employee's conduct or performance can lead to improvement in the employee's performance. If the employee does not improve, he or she has himself or herself to blame, not the company. Being direct does not mean one has to be rude. It does mean getting to the point by directly addressing the problem and giving concrete examples. It helps neither the employee nor the company for a manager to make amorphous or ambiguous statements in a counseling or termination session. Specific concrete examples of shortcomings are to be preferred over-generalizations such as "It's just not working out." The latter begs the question of *why* it is not working out.

Rule Number 4- Document.

Straight talk can later be disputed if there is no record the conversation took place. Documentation of warnings and counseling sessions should be brief and to the point, outlining the facts of the situation, any policies that were violated and any conditions placed on continued employment (i.e. probation or "final warning"). It is advisable to require the employee to sign an acknowledgment on the face of the warning that he or she received it. The document should be retained in the employee's personnel file.

Oftentimes supervisors will retain notes or e-mails in their own working files. Care should be taken that warnings issued to employees are consistent with such notes and e-mails. A special caution on e-mails: we tend toward informality in e-mail communications. However, the writer of e-mails should always assume that, at some point, a judge or jury could be reviewing the

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e-mail. Likewise, annual reviews should reflect actual performance, or lack of performance.

Finally, having witnesses present for a counseling session, for example, a representative of the human resources department along with a supervisor, is another form of documentation. Having a witness or double-teaming a counseling session should not be a substitute for written documentation, but is a useful complement to written documentation.

Rule Number 5- Don't Forget Rules 1 through 4 at Termination.

If, after counseling, a problem employee remains a problem employee, there comes a time to terminate the employment relationship. This is not the time to forget the foregoing rules. It is not the time to tell an employee that he or she must be let go because of a slowdown or job elimination when the real reason is poor performance. Failure to clearly articulate the reason for discharge can increase the risk of a lawsuit and can make any such lawsuit harder to defend.

As part of the termination process, it is important to articulate how the employee failed to meet expectations. It is important to review how the employee's conduct and the proposed response by the employer measures against relevant company policy and similar situations within the company. It is important to clearly articulate how the employee violated company standards and why that violation (or pattern of violations) merits discharge. It is important to document the reason for termination, linking it to past warnings, as may be appropriate. Finally, management should ensure that there are no policies or contracts that apply to the employee that may affect management's ability to carry out the termination or the employee's right to appeal the decision or any severance rights the employee may possess. Consideration can be given to whether the company desires to offer a severance package in exchange for a release of liability from the employee.

When the documentation is complete, and all other ducks are in a row, it is time to meet with the employee to politely but firmly

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explain the company's decision. This meeting is not an invitation to debate the company's judgment. If the employee has appeal rights, those should be explained to him or her and a copy of the appropriate policy provided to the employee. The employee should be asked to sign an acknowledgment of the termination notice. If the employee refuses to sign, that should be noted on the document. A list of attendees of the termination meeting should be noted in the employee's record. The employee should be informed that any subsequent mailings, such as last paycheck and COBRA notices will be forwarded to the employee's address on record. If severance is involved, the employee should be provided the appropriate release for consideration. No consideration should be paid until after the release is signed and any applicable waiting periods have expired.

Discipline and terminations will never be pleasant. However, applying a few common-sense rules to the process can reduce stress and risk associated with this unfortunate, but necessary, task.

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