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# TOP 10 **TERMINATION TIPS**

***LOWERING RISK WHEN LETTING AN EMPLOYEE GO***



# TOP 10 TERMINATION TIPS

## LOWERING RISK WHEN LETTING AN EMPLOYEE GO

### INTRODUCTION

Terminating an employee whose conduct or performance has not met expectations is one of the duties a supervisor dreads most, but eventually everyone who manages people will likely find themselves faced with this daunting task.

What we're talking about, of course, is an involuntary termination. This isn't planning a retirement party or sharing cake in the breakroom to wish a departing employee well. This is a type of separation that occurs when an employer decides to part ways with an employee against the employee's will. We also refer to this as dismissing, letting go of, or firing an employee. While difficult, there are ways to make this type of separation less painful.

### WRONGFUL TERMINATION

For both legal and ethical reasons, employers want to avoid wrongful termination, also known as constructive dismissal. When an involuntary termination is handled poorly, the employee being let go could make a claim of wrongful termination. Typically, this type of situation occurs if an employee feels they were terminated for discriminatory reasons or in retaliation for taking legally protected action, such as being a whistleblower, requesting leave, attempting to organize a union, filing a complaint, refusing to commit an illegal act, or participating in a workplace investigation.



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## AT-WILL EMPLOYMENT

Since all the information presented here assumes that employees are working at-will, here is a quick refresher on what is meant by "at-will."

In 49 states (sorry, Montana!) and Washington D.C., employers may terminate employees at any time and for any reason, as long as that reason is not illegal, such as retaliation for protected activity or discrimination against a protected characteristic, such as gender, race, religion, age over 40, etc.

Under the at-will doctrine, an employer is technically free to terminate an employee based on any non-discriminatory factor, including the color of their shirt or the sports team they cheer for. Since those characteristics aren't legally protected, nothing is stopping an employer from using them as grounds for termination. In such cases, courts almost always side with the employer. It might sound absurd, but if an employer wants to fire an employee solely for wearing purple shoes, the law is probably on the employer's side. Most employers, however, prefer a more logical approach.

## THE WAY AN EMPLOYER TERMINATES MATTERS

Ensuring that terminations are conducted lawfully and with business needs in mind is the best way to avoid claims in cases where employees otherwise might be protected. A wrongful termination claim can be costly and time-consuming, even if the company wins the case. Although employers cannot stop employees from filing claims, employers can take steps that may prevent employees from doing so.

***A wrongful termination claim can be costly and time-consuming, even if the company wins the case.***



## TOP 10 TERMINATION TIPS:

Whatever the reason for an involuntary termination, the steps an employer takes before and during the process can help make it a smoother transition for everyone.

### BEFORE TERMINATING

#### **1 GATHER RELEVANT INFORMATION.**

If a breach of conduct or other infraction has been reported, collect the facts from all parties involved before determining if an employee should be discharged. The investigation to collect the needed information should be conducted as soon as possible. Employees' recollections of events can fade fast, and information shared between employees can taint the truth. It is particularly important to get the accused employee's version of the facts in writing at an early date.

When conducting interviews keep an open mind and use an investigative style. If the employee being investigated and interviewed is a non-supervisory union member, the employee has the right to have a union representative present during the initial investigatory interviews. This privilege is called Weingarten Rights.

#### **2 MAINTAIN EMPLOYEE FILES.**

Terminations are made easier if good records are kept throughout every employee's tenure with the company. Every employee should have a personnel file. It's important to make a note in the file whenever the employee receives a verbal or written warning. It's equally important to include observations of the employee's work habits, general attitude, and their personal interactions with coworkers.

When an observation is made, include the time, date, and activity the employee is performing. For example, if a supervisor observes a worker driving a forklift in a reckless manner, the supervisor (after stopping the employee and reprimanding him) would write down, "John Smith was observed operating a forklift in a reckless manner. Excessive speed and not sounding the horn at blind spots were observed. This occurred at 10 a.m., today, March 16. Smith was given a verbal warning and told the next time there will be a written warning issued."



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**BROWSE BY TOPIC**

Often, when an employee suspects termination is imminent, the employee will request to see their personnel file. This is another reason to keep the file current; the employee will not be surprised at the termination if their file is full of warnings and poor performance reviews.

Pay particular attention to employee evaluations. Sometimes supervisors are too generous in their evaluations. If the evaluations do not support the action taken it can cause serious problems if the employee challenges the termination in court.

### **3 REVIEW THE FACTS.**

Before making a final decision on whether to terminate, review and analyze the findings to verify that they are accurate. If a basis for discharge is found, document it and cite a specific violation of a company work policy. If more than one policy was violated, note that. This documentation must be in writing and kept in the employee's personnel file.

Companies are sometimes sued by a former employee on the basis of alleged discrimination or other reasons. Often, the suit is supported by the former employee noting there was nothing in the employee's file that supports the action taken. That's why it's so important to document the employee's behavior and alleged disregard for company policies and procedures.

### **4 CONSULT WITH HR.**

Supervisors should talk to their human resources (HR) department about a potential termination. Supervisors should also follow company policy on who has the final decision to terminate, how it should be handled, and where the termination should take place. Never allow a supervisor or HR staff member to perform a termination alone.

## **WHEN TERMINATING**

### **5 TREAT THE EMPLOYEE WITH RESPECT.**

Behave in a professional manner throughout the discipline and termination process. There is no reason to ridicule or demean an employee. Doing so will only create anger or resentment. These emotions can prompt the employee to "get back" at the employer, and the employee may file a claim (even if the claim has no grounds) just to make a point. Consider how an employer would want to be treated in the same situation if the tables were turned and an employee was giving notice and quitting.



## **6 FOLLOW COMPANY POLICIES CONSISTENTLY.**

Treating employees differently or applying various levels of discipline for similar offenses under the same or similar circumstances, can lead to feelings of unfairness and build negative emotions. An investigator or judge also may infer from such differential treatment that the employer had a discriminatory or otherwise unlawful motive.

Consistent enforcement is critical because if a termination is challenged, courts will likely require that an employer do more than point to employee misconduct. The company must show that this type of misconduct consistently warrants termination under company policy. If the policy had been ignored in the past, the company will have a greater burden in showing that the misconduct (and not some other, potentially discriminatory reason) was used to justify the termination.

## **7 HANDLE TERMINATIONS IN PRIVATE.**

A termination or disciplinary hearing should never be conducted in the presence of coworkers, customers, vendors, or anyone not directly involved. In most cases, however, a second neutral party (such as an HR representative) should be present during a discipline or termination hearing. Even when terminating a remote employee in a video call it shouldn't be handled by the supervisor alone. An HR rep should be on the call.

## **8 KNOW THE LAWS ON FINAL PAYCHECKS.**

Unless otherwise mandated by law, a company should stick to its usual pay schedule when terminating a person's employment. Employers may be subject to state employment laws about the process for issuing final pay and distributing benefits (like accrued, unused vacation time) when an employee is terminated. If employees do not receive wages on the required payday, the employee may be able to file a wage claim with a government agency to recover the unpaid amounts. For this reason, employers cannot hold a final paycheck or make unlawful wage deductions.



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**9 FOLLOW STANDARD PROCEDURE.**

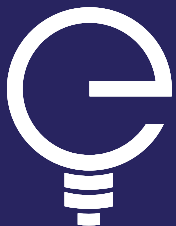
Companies should have a detailed procedure for employee terminations. The procedure should be revised as necessary to protect the dignity of the employee being terminated and to provide for the safety of coworkers and company assets. Again, during the termination, it's a good idea to have the employee's supervisor or another employee present (preferably someone from the HR department). During the meeting or immediately after, recover any company property or identification from the employee. Also, during the meeting (but not before), disable the employee's computer passwords or, lock the employee out of company emails and the computer system.

***Companies should have a detailed procedure for employee terminations.***

**10 CONSIDER THE RISK OF VIOLENCE.**

Worrying about workplace violence as a result of a termination is a concern in today's world. Supervisors and those working in HR must consider the safest ways to terminate an employee.

If an employer is concerned about an employee turning violent during the termination process, the employer should act to defuse any potential threats. This may include being proactive by contacting in-house security staff or a local law enforcement agency to have an officer present at the termination meeting. Terminating remotely is also an option. While it used to be a best practice to terminate in person, if the employee works remotely, it is fine to schedule a video meeting with the employee, supervisor, and HR representative to handle the termination virtually. This might even be a safer option if the employer anticipates an outburst or a violent reaction from the employee being terminated.



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Warning signs may indicate that an employee about to be terminated poses a threat. Be on guard when an employee:

- Expresses real (or perceived) unequal or unfair treatment,
- Has been harassed by coworkers,
- Suddenly changes into a problem employee,
- Is frustrated, lashes out, or fights with coworkers,
- Shows an obsession with weapons,
- Makes direct or implied threats,
- Has a recent decline in health or hygiene,
- Exhibits signs of drug or alcohol abuse,
- Talks about financial, legal, or marital problems, and
- Experiences mental or physical ailments.

Just because an employee exhibits one (or any) of these behaviors doesn't mean they'll become violent if they're terminated, but these are important factors to keep in mind when planning a termination meeting.

## KEY TAKEAWAYS

In today's challenging hiring and retention climate, terminating an employee is not a decision an employer should take lightly. But sometimes, an involuntary termination is inevitable, due to consistently poor performance, workplace misconduct, or other reasons. While terminating an employee is never something a supervisor or HR professional looks forward to, following these recommendations can make the process go more smoothly.



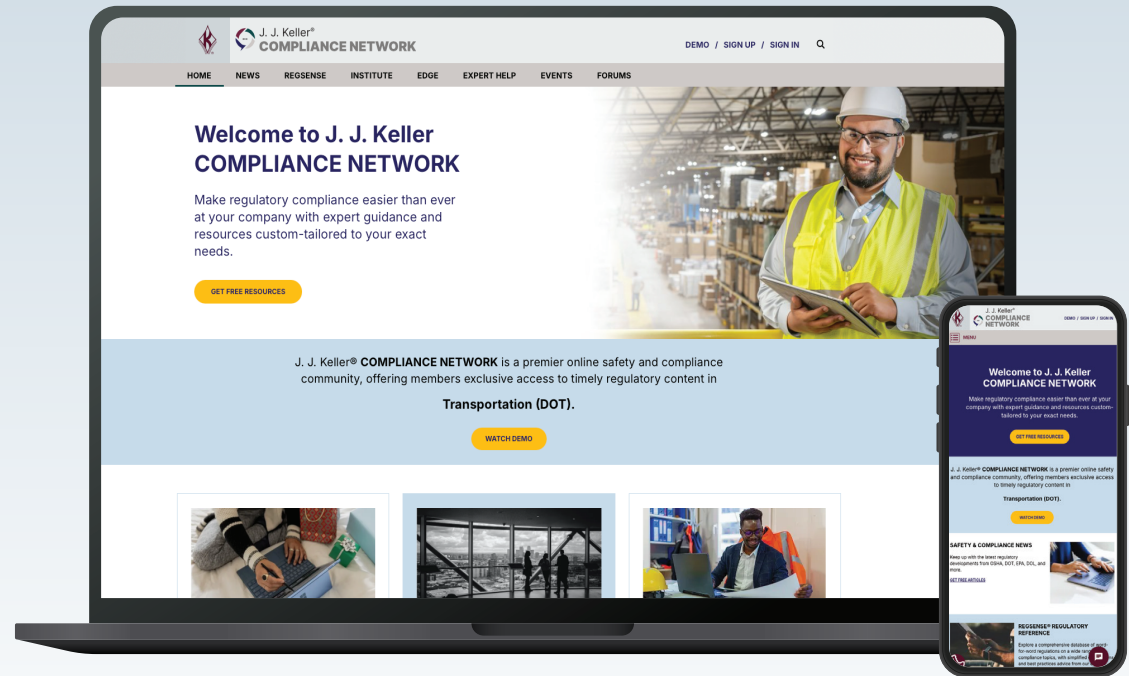
These **10 TIPS ARE BEST PRACTICES** that may reduce the risk of a wrongful termination claim for employers and help keep everyone safe:

1. Gather relevant information.
2. Maintain employee files.
3. Review the facts.
4. Consult with HR.
5. Treat the employee with respect.
6. Follow company policies consistently.
7. Handle terminations in private.
8. Know the laws on final paychecks.
9. Follow standard procedure.
10. Consider the possibility of violence.



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Judy Kneisel is an Editor on the Human Resources Publishing Team at J. J. Keller & Associates, Inc. She conducts research and creates content on a variety of HR-related topics and contributes to a number of Human Resource products including the Employment Law Regulatory Alert newsletter and the Essentials of Employee Relations manual. Judy specializes in issues such as background checks, discrimination, diversity and inclusion, policies and procedures, and sexual harassment prevention. She is a member of the national chapter of the Society for Human Resource Management (SHRM).

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