
How to Fire Employees Without Getting Burned

How to Fire Employees Without Getting Burned

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M. LEE SMITH PUBLISHERS LLC
Brentwood, Tennessee

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5201 Virginia Way
P.O. Box 5094
Brentwood, Tennessee 37024-5094

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Library of Congress Cataloging-in-Publication Data

Athey, Julie.

How to fire employees without getting burned/Julie Athey.

p. cm.

ISBN 0-925773-61-1 (tape binding)

1. Employees — Dismissal of. — Employees — Dismissal of —

Law and legislation. I. Title.

HF5549.5.D55 A84 2000

658.3'13 — dc21

00-058782

Printed in the United States of America

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Introduction

Ask people to name their top 10 nightmares and chances are good that being fired will be high on the list. But for employers, human resources directors, and supervisors, the bigger nightmare is probably being the one doing the firing. You may justifiably dread not only the *act* of firing but also the potential consequences. What if it doesn't go well? What if she goes ballistic? What if he sues? All you have to do is go to your local paper to find ample examples of employers facing such nightmare situations — and others.

The list of dangers you face in firing employees is seemingly endless. How can you safely fire a poor performer who's pregnant, or on medical leave, or who just filed a workers' compensation claim? Or the employee with the perpetually bad attitude who also happens to be trying to organize your workforce or complaining about discrimination? The answer is you can't — no amount of education, training, or preparation can completely protect you and your company in these and other difficult situations.

But there *are* a number of steps you can take to minimize the risks of firing employees. This special report will help you do just that. It is geared primarily to the non-lawyer who is responsible for firing decisions, including business owners, human resources personnel and, to a lesser degree, supervisors.¹ Whenever possible, it illustrates the principles discussed using specific examples that are based (somewhat loosely) on actual cases. And scattered throughout are a number of "Practical Pointers" designed to alert you to other issues you need to think about that may or may not be directly related to the subject of firing.

The first section of this report discusses the five types of employees that present the greatest challenges to employers — if you do it wrong, firing them could dramatically increase the chance that you'll be sued. The second section explains many of the protective measures you should take *before* firing employees. Section 3 tells you *how* to fire someone, covering everything from what to say to state and federal requirements that you need to follow. Section 4 covers other special firing concerns such as wrongful discharge, labor relations, and reductions in force. Finally, Section 5 concludes with some practical advice on the things you need to know in the event that you're sued.

A few final preliminary notes: Most federal employment laws don't prevent the states from enacting their own laws on the subject. For example,

There are steps you can take to minimize the risks of firing employees.

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most states have their own employment discrimination laws that may cover more employers or prohibit more types of discrimination than federal law. Since you must comply with the more stringent of the state or federal provision, we strongly recommend that you review your state's law before reaching any final decision on how to proceed in a given firing situation.

In addition, many of the laws discussed in the following sections contain requirements that simply aren't relevant to the subject of firing employees. Rather than trying to provide exhaustive information about every possible requirement of those laws, this report discusses them only in the firing context.

And finally, keep in mind that it is impossible to anticipate every possible scenario and answer all potential questions about firing an employee. You may need to seek the advice of an experienced and competent attorney about particularly difficult firing decisions.

Top Five Firing Fears

1

Sometimes it seems that there are some people you just can't fire, no matter how incompetent or obnoxious they are. Unfortunately, many employers are so paralyzed by the fear of being sued that they indefinitely delay certain high-risk firings long past the point when they would fire other workers. That can be costly in terms of lost productivity and reduced morale of other employees. It can also be potentially dangerous if, for example, the problem employee shows signs of a violent temper or is harassing other employees.

So who are these fireproof employees? The ones that employers fear are most likely to sue, of course. That typically means employees who have heightened legal protections, such as federal or state laws saying you can't discriminate or retaliate against them for asserting their legal rights. The following subsections discuss the top five firing fears faced by most employers (in our experience). And they are:

- Members of a *protected class*
- Employees who've *complained* or filed some sort of *claim*
- Employees on medical, military, or other *protected leave*
- Employees who have *contractual rights*
- Employees who show *violent tendencies*

Keep in mind that we're talking about employees who really *should* be fired for legitimate, nondiscriminatory reasons but who often keep their jobs because their employer is too afraid of being sued or other negative consequences.

MEMBERS OF A PROTECTED CLASS

Federal law prohibits employment discrimination based on race, color, religion, national origin, sex, pregnancy,² age,³ disability,⁴ citizenship,⁵ and military service.⁶ Anyone who falls in one of these categories is generally considered to be a member of a "protected class." In addition, states and local governments may prohibit discrimination on these and other grounds, such as marital status or sexual orientation. Some states even prohibit *all* discrimination that's based on age — even if it's because the employee is too *young*.

So what possible reason do you have to fear that an employee who's in a protected class will sue you? And if they do, what are the chances that any real harm will actually come of it? To help you assess the risks, let's take a look at some recent statistics.

The number of employment discrimination charges filed with the U.S. Equal Employment Opportunity Commission (EEOC) skyrocketed in 1992 shortly after the Clarence Thomas - Anita Hill hearings. Although the number of charges filed is still high compared to 1991, they peaked in 1994 at 91,000 and have leveled off a bit since then.⁷ In 1998, the EEOC received almost 80,000 charges of discrimination.⁸

Comparatively, the number of employees who actually sue their employers for discrimination seems surprisingly low. In 1998, there were only 21,540 discrimination lawsuits filed by employees against private employers in the federal courts.⁹ Although that's three times the number of lawsuits filed in 1990, it's also less than 30 percent of the number of charges filed with the EEOC in 1998.

And the number of lawsuits that actually make it to trial is even smaller; most are settled or dismissed before trial. In 1998, there were only 1,083 employment discrimination trials in the federal courts. That's just a little more than one percent of the number of charges filed with the EEOC that year. And since the employer *won* in 36 percent of those trials, only about 700 verdicts were entered against employers in federal discrimination trials.

At this point, you may be asking yourself, "What was I so worried about?" After all, the odds that you'll ever be sued and, if so, that the case will ever make it to trial and, if so, that a jury will rule against you are pretty slim. The answer is that every time an employee who's a member of a protected class complains about discrimination, you *will* be out a substantial amount of time, money, and resources in investigating and otherwise responding to that claim. This is true even if the employee never sues.

Oh, and one other thing. The risks may be fairly low, but the stakes are high. In 1998, the median jury award against employers in employment discrimination lawsuits was \$137,000, and there were about 100 awards of \$1 million or more. The employee's attorney is entitled by statute to an additional award of attorney's fees. Often, attorney's fee awards are as high or even higher than the amount of the verdict itself. And don't forget most lawsuits that don't make it to trial are settled, which can mean forking out big bucks just to make the problem go away.



PRACTICAL POINTER

Too often, employers are so afraid of being sued that they simply grant informal tenure to all members of a protected class — especially if the employee has a reputation for being difficult. But the best way to avoid being sued by one of these employees is to *fire them as soon as you know*

for sure that they're not going to work out. It's harder for them to argue that you fired them because of their race, age, etc. if you just hired them. Of course, there are all sorts of possible exceptions to this general rule. For example, if you regularly provide training or job counseling for employees with poor skills or performance, you should do that regardless of whether they're in a protected class. Another vital method of preventing lawsuits is to *always give all employees honest and accurate evaluations — especially if they're poor performers.* More on this in Section 2 (*Before You Say, "You're Fired"*).

EMPLOYEES WHO'VE COMPLAINED OR FILED A CLAIM

Many of the same laws that prohibit employment discrimination — plus some others — also prohibit retaliation against employees who exercise their rights under those laws. Retaliation includes any adverse action taken against an employee for filing a complaint or supporting another employee's complaint. For example, Title VII of the Civil Rights Act of 1964 prohibits retaliation against an employee who complains about sexual harassment, religious discrimination, and so on.¹⁰ In 1998, the EEOC received almost 20,000 charges alleging retaliation, most of which were companions to other allegations such as race or sex discrimination.¹¹

Although the most visible retaliation cases arise under the discrimination laws (including Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Equal Pay Act), many other federal laws prohibit retaliation for asserting rights under them. They include:

- Family and Medical Leave Act
- Fair Labor Standards Act
- Occupational Safety and Health Act
- Employee Retirement Income Security Act
- National Labor Relations Act
- Immigration Reform and Control Act of 1986
- Uniformed Services Employment and Reemployment Rights Act of 1994
- Employee Polygraph Protection Act



PRACTICAL POINTER

Forty-seven states have laws prohibiting employers from retaliating against employees for filing a claim for workers' compensation benefits. The three states that haven't yet specifically adopted such a prohibition are Georgia, Mississippi, and Alabama. But just because there's

no law on the books in those states doesn't mean you should just go ahead and fire employees for filing a workers' compensation claim. The law changes all the time; the judge in a lawsuit filed against you might take it as her opportunity to recognize a type of retaliation that so many other states recognize and that just makes common sense.

You can be sued for retaliation even if what the employee complained about wasn't illegal — as long as she reasonably thought it was illegal.

Two of the most dangerous aspects of retaliation claims are:

- (1) You can be sued for retaliation even if what the employee complained about wasn't illegal — as long as she *reasonably thought* it was illegal.
- (2) When you decide to take some action to prevent future discrimination or harassment against the complaining employee, she may perceive it as punishment for her complaint.

The following example illustrates both of these dangers.

Example

Annette Majors is the only female employee in the machine shop at Industrial Shelving Company. Her supervisor, James Sokolofsky, thinks women have no place in the machine shop because it takes a big strong man to lift the materials used in making shelving. Although he usually manages to conceal his prejudice, he sometimes teases Annette with comments like “You better be careful, I don't want you to break a fingernail,” or “Are you sure you can keep up? I know how tired you get when it's that time of the month.” Annette complains to the shop manager about James' comments. To prevent any future problems between the two employees during his investigation, the manager temporarily transfers Annette to a receptionist position. That's easier than transferring James because there are plenty of other shop workers to cover her hours but no other supervisors to cover his hours. Even though the pay's the same, Annette is insulted by the receptionist job and considers it a demotion. She files a complaint with the EEOC alleging both sexual harassment and retaliation. The EEOC says the company illegally retaliated against Annette for complaining about James' remarks even though they were not severe enough to create a sexually hostile work environment.¹²

Note: The company in this example could have protected itself from a retaliation claim by simply talking to Annette about its plans to transfer her before doing so. If it explained its reasons for transferring her instead of James, chances are she would have agreed that the transfer was a reasonable temporary solution.

EMPLOYEES ON LEAVE



Employees may be entitled to leave (usually unpaid) under a variety of federal and state laws. The two main federal laws requiring employers to give unpaid leave are the Family and Medical Leave Act (FMLA)¹³ and the Uniformed Services Employment and Reemployment Rights Act (USERRA).¹⁴ In addition, leave may be required under the Americans with Disabilities Act (ADA)¹⁵ or under state workers' compensation statutes.

Let's take a look at the main leave requirements of the FMLA, USERRA, and ADA.

FMLA Leave

The FMLA is almost universally considered to be a complicated and deceptively technical statute that is just waiting to ensnare unwary employers. The FMLA generally applies to employers that have *at least 50 employees*. But only employees who have a certain amount of tenure are entitled to FMLA leave. In order to qualify for leave, an employee must:

- 1) have worked for you for at least 12 months,
- 2) have worked at least 1,250 hours in the past year, and
- 3) work at a work site with at least 50 employees (or one that has 50 employees within 75 miles).

Employees who meet these requirements are called "eligible employees."

If you're covered by the FMLA, you must allow eligible employees to take 12 weeks of unpaid medical leave per year. When they return from FMLA leave, you have to restore employees to their original job or one that has virtually identical pay, benefits, and other terms and conditions of employment.

Eligible employees can take FMLA leave for:

- childbirth and care of the newborn child (for which both parents are entitled to leave),
- the employee's adoption of a child (again, for both parents),
- the employee's serious health condition that makes him unable to do his job, and
- the serious health condition of the employee's spouse, child, or parent.

Exceptions. There are three basic exceptions to the requirement that you provide FMLA leave to eligible employees. You can fire employees who qualify for or are on FMLA leave if:

- An employee who's on leave tells you unequivocally that she's not coming back.
- The employee would have been fired anyway if she wasn't on

leave. An example of this is laying employees off in a legitimate reduction in force.

- The employee is a *key employee*, defined as a salaried employee who is among the highest paid 10 percent of employees working within 75 miles of the work site. The rationale is that being required to hold a key employee's job open instead of replacing her can do you substantial economic harm. **Note:** The regulations provide a specific procedure for taking advantage of this exception.¹⁶

Military Leave

The USERRA generally requires employers to grant up to five years of unpaid leave to employees who are members of or join the military. The USERRA is similar to the FMLA, but provides far broader protections. In addition to providing five years of unpaid leave (compared to only 12 weeks of annual leave under the FMLA), all employers must comply with the USERRA regardless of how many employees you have. (Remember that the FMLA applies only to companies that have at least 50 employees.)

Simply put, when an employee returns from military duty and asks for his job back, you have to take him back if he:

- reapplies for employment within certain deadlines specified in the USERRA, and
- has taken less than five years of total military leave (but there are exceptions to this limit — for example, regular National Guard and military reserve training cannot be counted toward the five-year limit).

You may even have to give the returning employee the job he *would have had* if he hadn't been gone on military leave — even if that means placing him in a better job than the one he had when he left. Whether you have to do that depends on how long the employee was on leave and whether he is still or can become capable of doing the job.

Unless you have “good cause” to do so, you're prohibited from firing employees who take military leave for up to a year after they return to work. Let's call this the “no-fire zone.” How long the no-fire zone lasts depends on how long the employee was on leave (generally, whether it was more or less than 180 days).

Exceptions. Before the end of an employee's “no-fire zone,” you can fire or refuse to rehire him only if:¹⁷

- A change in your circumstances makes it impossible or unreasonable to give the employee his (or another) job back. **Note:** This is a vague standard, but considering how protective the USERRA is of employees who join the military, we would assume that it is a difficult standard to meet.

- The expense or difficulty of rehiring a now disabled employee or one who is no longer qualified to do the job would cause you an undue hardship.
- The employee was hired on a temporary basis and he had no reasonable expectation that the job would last for a significant period of time.



PRACTICAL POINTER

You can't retaliate against employees for taking USERRA leave. Obviously, one form of retaliation could be firing them, even after the no-fire zone has ended. Face it, if you fire an employee as soon as his no-fire zone ends, it could look pretty suspicious. To prevent this kind of negative inference, make sure you document the employee's performance or other problems and follow the other pre-firing precautions discussed in Section 2 (*Before You Say "You're Fired"*).

Leave Under the ADA

The ADA generally applies to private employers that have 15 or more employees. Disabled employees and job applicants who are qualified to perform the job with or without reasonable accommodation are entitled to the protections of the ADA. They're often referred to as "qualified individuals with a disability."

If you have an employee who is a qualified individual with a disability, you must make reasonable accommodations for that disability. One form of reasonable accommodation is allowing the employee to take leave. For example, let's say you have an employee who needs surgery for a severe back injury. You might have to allow her to take leave as an accommodation under the ADA even though you don't have enough employees or she hasn't worked for you long enough to be protected by the FMLA. Or, if she is entitled to FMLA leave, the ADA might entitle her to even *more* leave so that she can fully recover before returning to work.

Employees who take leave as an accommodation under the ADA are generally entitled to return *to the same job*. This is different than either the FMLA, which only requires you to return the employee to an *equivalent* position, or the USERRA, which may actually require you to return the employee to a *better* position.

Exceptions. You don't have to accommodate disabled employees if the requested accommodation is unreasonable or would cause you an undue hardship. There can be significant overlap between these two standards. The term "undue hardship" is defined as an action requiring *significant* difficulty or expense — a very hard standard to meet. The factors courts will look at in deciding whether an accommodation would cause an undue hardship include:

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- the nature and cost of the accommodation;
- the number, type, and location of the company's facilities;
- the financial resources of the company and facility;
- the number of employees at the company and facility;
- the type of operations you have, including the composition, structure, and functions of your workforce; and
- other factors.¹⁸

No one factor will determine whether an accommodation creates an undue hardship. Instead, it's a balancing test to determine whether the cost or inconvenience of the accommodation is significant enough to let you off the hook.

Few courts have let employers off the hook because accommodating an employee would cause them an undue hardship. Here's an example of one that did:

Example

Macy Morrow was a delivery truck driver for Sunny Cola, a soft drink distributor. For four years running, she missed anywhere from 20 to 50 days of work due to depression. In the fourth year, she was hospitalized and requested an unpaid leave of absence. Sunny agreed to the leave, but asked her to tell them how long she expected it to last. Macy responded that she would return to work within a couple of months. She didn't show up as promised and later informed Sunny that she would not be back for another couple of months. At that point, Sunny fired her. The court in this case found both that continued leave would have created an undue hardship for Sunny and that it was not a reasonable accommodation in light of the amount of unpaid leave already provided.¹⁹

Some Final Thoughts on Leave

Any time you fire an employee who's on or recently returned from some type of protected leave, there's a danger that the employee (and the rest of your staff) will think that's why you fired him. The suspicion is unavoidable. But there are plenty of techniques to prevent a retaliation lawsuit or, at the very least, justify your decision to a jury. We'll talk about those techniques in more detail in Section 2 (*Before You Say "You're Fired"*).

Finally, remember that many states have laws similar to the FMLA, USERRA, and ADA that may apply in circumstances that are not covered by federal law. For example, state laws might say that companies with fewer than 50 employees have to provide family and medical leave or that those

with fewer than 15 employees are prohibited from discriminating on the basis of disability. Make sure you know your state's laws before you make any final decision on granting or denying an employee's request for leave or firing an employee who qualifies for or has taken leave.

EMPLOYEES WHO HAVE CONTRACTUAL RIGHTS

One of your first considerations in firing someone should be whether they have an employment contract. You don't have any contractual employees? Are you *sure*? In most states, all employees are "at will" unless they have an employment contract or collective bargaining agreement. But courts have adopted a variety of legal theories granting employees contractual rights in spite of the fact that they don't have a written contract. In other words, your employees may have contractual rights even when you're certain they don't.

You may already have bound yourself to an employment contract if:

- Your initial letter offering the employee a job could be construed as an employment contract.
- You or a supervisor assured an employee that his job was secure. This and other similar statements could create an oral employment contract or give rise to a claim for promissory estoppel.
- Your handbook or policies promise employees that you'll follow certain procedures before firing them. These assurances may create an implied contract with employees to do what you said you would do. In effect, that turns an at-will employee into a contractual one.


Before we jump into these other types of contractual rights, let's talk a little about the circumstances in which you can fire an employee who has a *written* employment contract.

Written Employment Contracts

Written contracts aren't exactly rare, but most rank-and-file employees don't have them. They've traditionally been reserved for upper-level executives, doctors, lawyers, and sales representatives.

The circumstances in which you can end an employee's contract (in other words, fire him) are limited. One way is if the employee breached the contract first — for example, by failing to meet sales expectations. Or the contract may provide that it will end if a particular event happens, such as the sale of the business.

Finally, you may be able to fire a contract employee for misconduct — often called "good cause." Good cause is generally defined as willful or criminal misconduct, such as embezzlement, dishonesty, gross negligence in the



Your employees may have contractual rights even when you're certain they don't.

performance of duties, and other actions that are contrary to your best interests. Many contracts specifically state that the employee can only be fired for cause. But even with contracts that don't have such a provision, courts may read one into the contract.



PRACTICAL POINTER

There are several ways to provide yourself with an “out” even if you have a written contract. First, go ahead and say in the contract itself what you mean by “good cause.” Give yourself as much discretion as possible in deciding whether you have a good enough reason to fire an employee. Otherwise, it will be up to a judge or jury to decide whether the employee has done something bad enough to justify your premature termination of the contract. And if you want to be able to fire a contractual employee for a particular reason, all you have to do is say so in the contract. For example, some contracts allow either the employer or the employee to get out of the contract by giving a certain amount of notice — often, 30 days.

An offer letter may amount to a written employment contract.

Offer Letters. A fair number of courts around the country have found that offer letters may amount to a written employment contract. For an offer letter to be a contract, it probably has to do more than just offer the employee a job and describe his salary and benefits. For example, it could contain language indicating that the employee has a job for a certain period of time. Other dangerous language includes anything that can be interpreted as stating that the employee can only be fired for cause. In most, but not all cases, an offer letter won't be construed as a contract unless it's signed.

Example

Steve Mariachi worked as a Senior Marketing Executive for Solid Bedding Corporation for 8 1/2 months before he was fired for failing to meet sales expectations. Before he accepted the position with Solid, Mariachi asked for and received a written proposal for employment on Solid's letterhead. The document was called a “Compensation Proposal,” and said that it was for a “Three Year Term, (renewable).” The proposal set forth a salary for each of the three years and numerous other benefits including medical insurance, sales bonuses, and retirement plans. Mariachi accepted the job offer and went to work for Solid under the terms listed in that proposal. The court held that Mariachi had an enforceable three-year employment contract with Solid even though the proposal wasn't signed by either

Solid or Mariachi. The fact that the offer was on company letterhead was the equivalent of being signed by the company.²⁰



PRACTICAL POINTER

The primary purposes of written employment contracts are to keep desirable or hard to replace employees for a definite period of time and to prevent them from disclosing your confidential information to others. For obvious reasons, employment contracts are becoming increasingly common in the labor-scarce high-tech industry. Many of these businesses are run by very young entrepreneurs with little knowledge of employment laws — and little time to worry about it. Because these companies are particularly vulnerable, they should *seriously consider* consulting an attorney before entering into contracts with or firing employees.

Implied Contracts

Not that long ago, firing an employee was fairly simple. Unless you were bound by an employment contract or collective bargaining agreement, you could fire any employee at any time for any reason or no reason at all. This doctrine — called “employment at will” — still exists (sort of) in most states today. But it’s been steadily eroded over the years. Now, there are so many “exceptions” that employment at will has practically disappeared. In particular, most states recognize one of three “wrongful discharge” exceptions to employment at will: (1) implied contract, (2) public policy, and (3) implied covenant of good faith and fair dealing. We’ll talk about the implied contract exception here. The public policy and implied covenant of good faith and fair dealing exceptions are discussed in Section 4 (Other Special Firing Concerns).

In most states, courts have held that employers can enter into an *implied contract* with employees by making certain commitments to them — usually in the employee handbook. Many employers promise in their employee handbooks to follow certain disciplinary procedures before firing employees. That’s not a problem unless you fail to follow those procedures in firing a *particular* employee. Then, the question is whether the handbook is an implied contract with employees to follow the procedures it promises. If it is, then employees can sue you. If it’s not, they can’t.

An implied contract is just as binding as a written contract. Fortunately, there are a number of ways you can preempt an argument that your employee handbook creates an implied contract binding you to comply with its every provision:

- Carefully write and periodically review your employee handbook. Don't include any language suggesting that disciplinary procedures included in the handbook are mandatory.
- Make sure your job applications, employee handbooks, and any other personnel documents you can think of contain disclaimers saying that the employment relationship is at-will and that either you or the employee may end it at any time. In order to be effective, this language has to be formatted in such a way that a reasonable person would notice it. It can't just blend in — it should be set off with bold lettering, capitalization, or anything else that will separate it from the rest of the text.
- Say in your handbook that you have the discretion to immediately fire employees without following the disciplinary procedures you've outlined. If you list possible reasons for firing employees, indicate that the list is not exclusive and that there may be other reasons.
- Make your supervisors understand that the handbook isn't the Bible. If they treat the procedures as mandatory, that can overcome all the protection provided by your carefully crafted disclaimers.
- Make sure employees sign something acknowledging that they received the handbook, that they understand it, that you can change it unilaterally and without notice, and that their employment is at will.

Note: Of course, if you do have mandatory disciplinary procedures, simply make sure you follow them and apply them fairly and consistently to all employees. That's a good idea even if the handbook gives you discretion on whether to follow disciplinary procedures on a case-by-case basis. Consistency is better for employee morale and retention and reduces the chances of being sued.

Oral Contracts/Promissory Estoppel

This area of the law is so different from state to state that it's difficult to summarize it or make generalizations about how the law works. What follows is a very basic explanation. Whether any of it applies to you depends on the law in your state.

Contracts 101. In general, contrary to popular belief, most contracts are binding on both parties regardless of whether they are put in writing. The elements of a contract are offer, acceptance, and consideration. An offer, for example, is when you offer your neighbor Fred \$2,000 for his vintage stamp collection. Acceptance is when he says he'll sell it to you. Consideration is something of value that you agree to give in return for the stamps — usually money. Once Fred agrees to sell you the stamps and you agree to pay him for them, you have a contract regardless of whether you put the agreement in writing or not.

By contrast, promises to do something for nothing are not binding contracts even if they *are* in writing. For example, if you and Fred signed a document in which he promised to give you the stamp collection, no strings attached, you'd have no way of enforcing that promise because there's no consideration to back it up. Consideration could be something obvious (like your agreeing to pay him for the stamps), or something less obvious (like your agreeing to support his mayoral bid).

Employment Contracts 101. It's a little more complicated in an employment setting, but the same basic principles apply. Like other contracts, employment contracts don't necessarily have to be in writing to be enforceable. And, as we've already explained, most states say that all employment relationships are at will — meaning you don't have an employment contract — unless you and the employee agree otherwise.

To overcome the presumption that all employment is at will you and the employee have to agree, at the very least, on how long the contract is for. If you don't do that, there isn't a contract. You may agree to the length of the contract specifically — such as by saying that the employee will work for you for a year. Or you may say something like “You can only be fired for cause.” That will satisfy the requirement that you and the employee agree on the duration of the contract to overcome the presumption that employment is at will.

Note: If the contract is for more than a year, it probably *does* have to be in writing. Most states have a “statute of frauds” that requires certain types of contracts to be in writing, including contracts that cannot be performed within one year. If it's even remotely possible that a contract can be completed before the year's up, then the statute of frauds probably doesn't apply. For example, what if you promise to keep an employee until he retires unless you have good cause to fire him? Well, you could find out in 11 months that the employee is stealing from you and fire him. That means the contract is *capable* of being performed in a year and doesn't have to be in writing to be enforceable (although this could vary from state to state).

Promissory Estoppel. A closely related concept is called *promissory estoppel*. In fact, what some states call promissory estoppel, others call an oral contract. Under this theory, the court will basically hold you to the promises you've made to employees even though there wasn't any consideration for them. The rationale is that it would be unfair to let you out of a promise once the employee has reasonably relied on it to his detriment.

Both oral contracts and promissory estoppel claims typically arise out of statements made by management, supervisory, and human resources personnel during the recruiting process.

Employment contracts don't necessarily have to be in writing to be enforceable.

Example

Dogs Unlimited aggressively recruited Marigold Lewis to be its Vice President of Marketing. During her final interview, the company president told Marigold she could only be fired “for cause.” She took him at his word and left the company where she’d worked happily for 10 years. At her own expense, she moved her family from Houston to Los Angeles. The house she bought in Los Angeles was much smaller and much more expensive than her house in Houston. A few weeks into the job, the company’s president fired her for bringing her pet cat to work for a couple of hours while her new house was being fumigated. In some states, Marigold could sue for breach of an oral contract, and a jury would be allowed to decide whether bringing a cat to work was a good enough reason to fire her. In other states, she might be able to sue under a promissory estoppel theory, in which case the jury would have to decide whether she had reasonably relied on the president’s promise to her detriment (for example, by moving her family across the country and buying an expensive house).



PRACTICAL POINTER

Train everyone in a position to hire or fire employees not to make promises like “You’ll have a job here as long as you do a good job” or “We’ll only fire you if you give us a reason to.” That means both while you’re recruiting and interviewing the employee and after she’s been hired.

VIOLENT OR MENTALLY UNSTABLE EMPLOYEES

An average of 20 workers are murdered at work each week, making it the second leading cause of workplace deaths after car accidents. In addition, a million or so employees are assaulted at work each year. If there is any good news, we suppose it would be that workplace violence is rarely committed by people where they work — most attacks occur during robbery attempts. Co-worker rampages just get the most attention in the media because they’re so sensational.

Yet in spite of the relatively low risks, you’re justified if you feel like you’re stuck between a rock and a hard place. On the one hand, you could be liable if an employee kills someone at work and you could have prevented it by firing him. On the other hand, firing a troubled employee may be all he

needs to push him off the edge. And consider this: It's a fine line to walk between protecting your employees from a violent co-worker and discriminating against a nonviolent one. If you incorrectly conclude that an employee may be violent when in fact he's simply suffering from a mental disability such as depression, you could be guilty of disability discrimination under the ADA.

It's bad enough to face the horror of having one of your employees go on a rampage — it's worse yet that you might be held responsible for it. What can you do to prevent such a tragedy? How do you safely fire an employee who may be on the edge without pushing him off? Nothing can completely eliminate the dangers, but there are a number of steps you can take to reduce the chances that an employee will take his rage out at the office.

Potential Liabilities

First, let's look at the potential liabilities you may face if an employee intentionally injures someone at work. In general, you may be liable to the employee's victims for your own negligence in contributing to their injuries. The three main types of negligence in this context are:

- *Negligent hiring* — If you could have found out about an applicant's violent past by checking his references or doing a criminal background check, you may be liable to the dead or injured because they wouldn't have been harmed if you hadn't hired the employee.
- *Negligent supervision* — No one would have been hurt if you had monitored the employee more closely to prevent him from hurting anyone.
- *Negligent retention* — No one would have been hurt if you had fired the employee once you found out he was dangerous.

In other words, you must be constantly vigilant at all stages of the employment relationship — from deciding who to hire to deciding who to fire — to avoid liability.

Identifying Potentially Violent Employees

Preventing workplace violence is a process that starts long before you suspect an employee has a problem. The first step is learning to detect potentially violent employees. You're probably neither a psychologist nor a psychic, so how are you supposed to figure out who's going to go off the deep end in time to prevent a tragedy? Although there is no single profile of a likely candidate to commit workplace violence, some possible warning signs include:

- Intimidating, harassing, or threatening behavior
- A history of violence
- Fascination or preoccupation with weapons, violence, or terrorism
- Moral or political intolerance

How to Fire Employees Without Getting Burned

- Inability to accept criticism
- Pathological blaming of others
- Chronic disputes with co-workers or supervisors
- Paranoia or belief that the system is unfair
- Obsessive behavior
- Notable decline in workplace performance, attendance, and productivity
- Severe stress or depression caused by work, finances, or family
- Social isolation or low self-esteem
- Chemical dependence

Be very careful applying these warning signs to particular employees. As mentioned above, the danger is that employees who exhibit these characteristics could have a nonviolent mental disability rather than a deadly one. If you fire such an employee without trying to find a way to accommodate his disability, you could be sued for disability discrimination under the ADA.

Preventing Workplace Violence

The most important thing you can do to minimize the risk of workplace violence is to treat employees fairly and with respect. Most employees who become violent say that their complaints fell on deaf or indifferent ears. It may seem obvious, but listen to employees with an open mind. Don't dismiss or diminish the nature of their complaints. Establish clear standards for behavior and performance, including progressive discipline procedures, and then *follow them*. For more on the benefits of progressive discipline, see Section 2 (*Before You Say, "You're Fired"*). Don't let performance or behavioral problems go unaddressed and then suddenly, once you've had enough, come down hard on problem employees. That's just inviting them to feel persecuted and explode in anger.

Also, consider offering a free, confidential Employee Assistance Program to employees and their families. These programs can help employees deal with stress, drug or alcohol issues, personal problems, and other factors that can contribute to workplace violence.

In addition to these general principles, there are a number of other things you can do to prevent and address violence:

First, Establish a Workplace Violence Policy. One of your top goals should be to create a work environment in which employees feel free to raise their concerns about potential violence. Take a big step in that direction by creating a workplace violence policy that provides clear procedures for supervisors and employees to report and respond to threatening or violent behavior. Some suggested contents include:

- A “zero tolerance” policy on violence, threats, intimidation, and other disruptive behavior in the workplace
- Specific examples of behavior that will be viewed as violence, including but not limited to physically threatening statements, gestures, and expressions
- A statement that employees who commit such acts may be removed from the premises and subjected to disciplinary action, criminal penalties, or both
- Guidelines encouraging employees to report violent behavior
- Assurances that reports of workplace violence will be investigated promptly and thoroughly

Second, Train Your Supervisors! Unlike business owners, senior management, and HR directors, supervisors observe and deal with your employees on a daily basis. So it’s very important that they have adequate training in how to identify and address the potential for workplace violence. Make sure they know:

- How to identify potentially violent employees and what to do about it.
- To be reasonable and evenhanded in their dealings with employees. This includes addressing performance and disciplinary problems promptly and consistently following your progressive discipline procedures.
- How to sensitively handle terminations, layoffs, and demotions, avoid provoking employees, and defuse a potentially violent situation.

Investigate the Matter Fairly and Thoroughly. You can’t just fire an employee on the unsupported word of another employee — who, after all, may have misinterpreted or overreacted to a stray comment, have a grudge against the accused, or have emotional problems himself. For more information on how to conduct such an investigation, see “Investigate If Necessary” at page 23.

Fire at Will. OK, OK, that’s a *really* bad pun. But an appropriate one, nonetheless. When an employee’s violent behavior is so bad that you have to fire him, it’s best to get it over with as soon as possible. The longer you wait, the more chances the employee will have to perceive that he’s being treated unfairly at work — and to stew over it and potentially boil over. For more on how to fire a potentially violent employee, see page 31.

Before You Say “You’re Fired”

2

More often than not, the most important part of firing an employee happens long before you actually tell him that he’s fired. If you want to fire someone, it is absolutely essential that you lay the proper groundwork first. That means evaluating the employee’s performance at regular intervals, conducting fair and thorough investigations before firing employees for misconduct, following your company’s progressive discipline procedures, and documenting every decision you make, every step of the way. Let’s look at each of these in turn.

GIVE FREQUENT, HONEST EVALUATIONS

Conducting regular performance evaluations offers a lot of benefits. Apart from the obvious goals of providing employees with guidance and feedback, improving their performance, and increasing productivity overall, evaluations can be an effective means of preventing lawsuits. And if an employee does sue, evaluations can serve as valuable evidence that you fired him for legitimate business reasons rather than because of his race, age, disability, and so on.

But evaluations are only as valuable as they are accurate. One of the biggest (and most dangerous) mistakes employers make is giving good evaluations to problem employees. There is so much wrong with this that it’s hard to know where to begin. From a legal standpoint, the biggest problem is that when you finally reach the point where you can no longer put off firing an employee, he has no reason to believe you’re firing him because of poor performance. Why should he believe you? Hasn’t he always received favorable evaluations? If he was such a poor employee, then you would have told him, right?

The only conclusion such an employee can reasonably draw is that you had some other, more nefarious reason for firing him. Maybe his new supervisor is a feminist and wants to replace him with a woman. Maybe you’re mad because he filed a workers’ compensation claim or took time off when his wife had a baby. Someone who thinks he’s doing a good job (and

***Evaluations
are only
as valuable
as they are
accurate.***

has no reason to think otherwise) will not have a hard time coming up with some illegal reason for why he was fired.

Worse yet, why would a *jury* believe you? When an employee sues, the “smoking gun” will be all of those performance evaluations showing what a good employee he was. By this time, any defense you might have — no matter how valid — is dramatically weakened if not dead. You might as well fork over some big bucks to make the lawsuit go away as quickly and painlessly as possible.

What can you do to correct the situation? Not much, possibly. In severe cases, the employee may be completely insulated from *ever* being fired. But once you realize the predicament you’re in, there are a few things you can try. First, don’t take shortcuts. For example, don’t suddenly fire a problem employee for a relatively minor mistake after giving him years of good evaluations — juries pick up on that real quickly. Instead, start accurately documenting the employee’s performance problems *from this day forward*. One bad evaluation won’t provide enough of a basis for firing someone who’s apparently been a valued employee for years. In other words, you’ll have to be very careful and very patient to overcome the damage that’s already been done by giving good performance reviews to undeserving employees.

Train Your Supervisors

If overly glowing evaluations are a problem in your company, then chances are it’s your fault — not your supervisors’. Many companies provide supervisors with little to no training on how to evaluate employees or exactly how important honest evaluations are. The irony is that the reason most supervisors give good evaluations to bad employees is that they’re afraid employees will sue if they get a bad evaluation. They don’t understand that their strategy (or lack of one, depending on how you look at it) has the exact opposite effect from what they intend. Rather than reducing the risk that an employee will sue, giving good evaluations to employees who don’t deserve them can only turn out poorly in the end — and that often means ending up in litigation.

Another common problem is that, in evaluating employees, some supervisors start with the subconscious assumption that all employees are entitled to the highest rating (such as “excellent”) unless they are truly incompetent. Ratings for incompetent employees only drop a notch or two to “average” or “acceptable.” Train supervisors to start with the assumption that most employees are entitled to an *average* rating. If a particular employee is truly wonderful or truly subpar, then his rating can be adjusted from there.

Similarly, some supervisors routinely give the same ratings to virtually all employees regardless of ability or attitude. Explain why giving good evaluations to bad employees not only encourages them to sue, but also deprives the company of its best defense at trial.

Giving good evaluations to bad employees deprives the company of its best defense at trial.



PRACTICAL POINTER

It’s enough to make you pull your hair out — employees who are obviously incompetent but don’t seem bothered by it. Why don’t they try harder? They’re probably so inept that they honestly can’t recognize how bad they are.

We’re not kidding. In a recent study, a psychologist tested people in skills such as grammar and logic, then asked them to compare themselves to their peers. In test after test, the worst performers rated themselves as above average. Their ignorance prevented them from recognizing their own mistakes. Nor could they recognize the fact that their peers were a lot better than they were.²¹

The point? You can’t just assume that employees will learn from their own mistakes or by following the good examples set by their supervisors and co-workers. The only way poor performers will recognize their shortcomings and improve their performance is if you tell them what they’re doing wrong and teach them to do better. In the end, both your company and the employee will benefit.

INVESTIGATE IF NECESSARY

Before firing an employee for doing something illegal, unethical, or just plain wrong, you have to decide whether he actually did what he’s accused of. To do that, you have to investigate the allegations, somehow weeding through contradictory statements from different witnesses and deciding who’s telling the truth. It’s a difficult and thankless task, but a necessary one nonetheless.

Any number of employee misdeeds, from theft to drug use, violence, or safety violations, can give rise to an investigation. But by far the investigations that get the most attention are sexual harassment investigations. These are nothing new, but they *have* gained added importance in the last couple of years. The main reason for this is the U.S. Supreme Court’s 1998 decisions setting new standards of employer liability for sexual harassment that’s committed by supervisory employees.²² In short, you may be able to avoid liability for *some* sexual harassment if you promptly investigate and remedy the problem.

And since courts (and the EEOC) regularly apply the same standards to other types of harassment, such as race, religion, and disability, it’s even more important for you to have an adequate system in place to investigate all allegations of employee misconduct thoroughly and fairly. How to investigate employees is a huge subject, so let’s just stick to the basics. For a more

comprehensive discussion, check out our HR Executive Special Report entitled *How to Conduct Internal Investigations*.

Choosing an Investigator

In any investigation into workplace misconduct, one of your first tasks is choosing an investigator. It's up to you whether to hire someone to do it (like an investigator or lawyer) or assign the task to someone within your company. But in any event, the investigator should have certain traits, including:

- a reputation for fairness and honesty
- good listening skills
- interviewing experience
- the ability to write clearly and concisely
- the ability to be a good, credible witness at trial
- a good understanding of the legal ramifications of the employee's allegations and your response
- the ability to maintain confidentiality
- the ability to make difficult decisions, particularly the type that could affect a co-worker's career

Whether to go with an outside investigator or use an employee can be argued in either direction. But the Federal Trade Commission (FTC) may have inadvertently tilted the balance in favor of doing your own investigations when it concluded that investigations by outside investigators (including attorneys) may be subject to the federal Fair Credit Reporting Act (FCRA). The FCRA requires employers to notify employees and job applicants — and get their consent — before running a credit or background check on them. Additional disclosures are required if you use the information against an employee or applicant.

According to the FTC, these same requirements apply to sexual harassment and other types of workplace investigations. That means when you use an outside investigator to assist you in an investigation, you have to comply with the FCRA's requirements for consumer reports — including telling the alleged harasser about the investigation up front.

Although the FTC's opinion isn't legally binding, it may cause problems for unwary employers until and unless the courts or Congress do something about it. In the meantime, since the FCRA doesn't apply to investigations conducted solely by employees, you might want to consider going that route. And if you do choose to go with an outside investigator, make sure you comply with the FCRA's requirements.

Conducting the Investigation

The next step is defining the scope of the investigation. Who should you interview? What questions should you ask? How long should you take?

It’s usually impractical to interview all your employees, so the best place to start is with the employee who complained and the one who’s being investigated. They can point you to other employees or witnesses you should interview.

Whether to interview witnesses identified by the complaining employee *before* interviewing the accused is your call — and it can be a close one. We tend to favor getting the story from both the complaining employee and the accused first, before proceeding to other witnesses. That way, you have a better idea of the issues involved and the questions to focus on when interviewing other witnesses.

Here are some other basic rules to follow in all employee investigations:

- Assure all witnesses that they will not be retaliated against for information they provide and that you will maintain confidentiality to the extent possible.
- Be sure you conduct similar investigations into similar incidents of misconduct. Otherwise, you’re looking for a discrimination claim.
- If you’re tempted to ask employees to take lie detector tests, hold on! Federal law prohibits most employers from requiring lie detectors in most instances (the one big exception is when you reasonably suspect an employee of stealing).
- You may not want the investigator to be the one who decides what actually happened or what to do about it. In that case, a separate decisionmaker has to be chosen. In order for that person to decide what to do, he will need a detailed report of the investigator’s findings. This report will also be valuable evidence at trial. Even if the investigator will be acting as a decisionmaker, he should keep detailed notes of his interviews and the investigation in general. And a final report summarizing the investigation couldn’t hurt either.
- Investigations should be prompt, but should also be thorough. If you don’t spend much time or energy on an investigation, a jury may think you had already made up your mind before you even started. If the employee being investigated is a member of a protected class, maybe your mind was already made up because of your unlawful bias against him.

**Conduct
similar
investigations
into similar
incidents
of misconduct.**

PROGRESSIVE DISCIPLINE

Progressive discipline can be used for all types of problem employees — if you think they’re worth salvaging. It can address everything from performance problems to discrimination and harassment to ethical violations. Employees who are accused of misconduct typically are subjected to progressive discipline after an investigation has been concluded, while employees who have a bad attitude or poor attendance need to be counseled and disciplined — not investigated.

Typical progressive discipline policies consist of a graduated series of written warnings, reprimands, and suspensions that lead up to firing the employee if he doesn't straighten up his act. Progressive discipline serves many purposes, including:

- Ensuring that the appropriate discipline is applied (the punishment fits the crime)
- Ensuring that discipline is consistent for all employees
- Giving employees fair warning that they have violated company policies
- Giving employees a chance to improve
- Creating a paper trail of evidence to show what the employee did and how you responded

If you don't currently have a formal discipline policy, get one. What it says is not as important as whether you consistently follow it. Disciplining some employees but not others for the same types of problems is just asking for a discrimination claim. And if you haven't taken all the necessary precautions to ensure that your employee handbook isn't construed as an implied contract — or if the courts in your state are prone to finding that handbooks create an implied contract — you may end up embroiled in a wrongful discharge lawsuit as well. For a more complete discussion of progressive discipline policies, see our HR Executive Special Report entitled *How to Manage Problem Employees*.

MAKE YOUR CALL

When you're trying to decide whether to fire an employee, you can pretty much boil your analysis down to one question: Is the company better off with or without the employee? It sounds simple, but of course it's not. Firing employees is costly in terms of workplace morale, recruitment and training of a replacement, and sheer inconvenience from starting over with someone new.

So how *do* you make your decision? Witnesses rarely agree on what happened, and employees even more rarely admit the allegations against them, so that usually means that someone is lying. Your decision about who's lying and who's telling the truth will determine, often, which employees go and which ones stay. Of course, the answer is that you can't know for sure. All you can do is look at the same types of things that a jury looks at, including whether there's any physical evidence on either side, the credibility of the witnesses, whether their stories are reasonable or just seem too off the wall, and so on.

What if you make the wrong decision? A growing number of courts say that when an employee claims he was wrongfully discharged for misconduct, the issue is not whether he's guilty but whether you *reasonably believed* he was

guilty. As long as your investigation was fair and your conclusion reasonable, you’ll be protected from liability even if you were wrong.

One of the most important factors in deciding whether you reasonably believed an employee did something wrong is how you conducted your investigation into the alleged misconduct. Keep these questions in mind in all investigations: Was your investigation prompt? Fair? Thorough? Was it conducted in a manner that’s consistent with investigations into similar allegations against other employees? Was there anyone you didn’t interview or investigate that you should have? It all boils down to this: Was your conclusion that the employee was guilty reasonable and made in good faith?

DON’T FORGET TO DOCUMENT EVERYTHING

No matter how diligently you follow your progressive discipline policy, how honest and fair your evaluations are, or how justified you are in firing an employee, it does you absolutely no good if you don’t have any evidence to support your decision. That means you have to document what happened, who did it, what you did about it, and why. If you have a progressive discipline policy in place — and follow it — that will take care of a big portion of the documentation necessary to support your ultimate decision to fire an employee. The same can be said if you thoroughly investigate employee misconduct and memorialize it through diligent notes or a final report (as discussed above).

As we’ve suggested many times in this report, the biggest danger may be having supervisors who don’t know to (or how to) document their decisions. Make sure you train them well and often. Then follow up to make sure they’re documenting things as they’re supposed to. One way to do that is to regularly review employees’ personnel files to see if they contain necessary documentation — everything from evaluations to disciplinary warnings. This also gives you a chance to make sure your supervisors are supplying sufficient detail in those documents to support their decisions and that they’re not writing anything that could be interpreted as discriminatory.



Regularly review employees’ personnel files to see if they contain necessary documentation.

How to Say “You’re Fired”

3

Getting to the point where you actually fire an employee can be a long and arduous process. Once you finally make the difficult decision to fire someone, you want to make sure you do it right. When should you do it? And where? Who should do the firing? What should you say? What topics need to be covered? What other things should you be concerned about?

First, let’s talk a little about what your goals should be in firing an employee. Obviously, you want to do what’s best for the bottom line. But if you go about firing someone the wrong way, your bottom line may suffer more than if you just kept him. One of your top priorities should be helping the employee maintain his dignity. Why? Because the sooner he gets a job, the sooner he’ll stop thinking about all the reasons he thinks he has to sue you — not to mention that your unemployment taxes will be reduced. If he leaves your company feeling worthless, then he’s not likely to go out looking for a new job any time soon. If he isn’t looking for a job, he may be looking for a lawyer. And if he does look for a job, how likely is it that he’ll do well in an interview if you’ve totally wrecked his self-esteem?

On a related note, the conventional wisdom has long been that employees should be fired on Friday afternoons — presumably so that they can slip away unnoticed. If that’s been your practice, you may want to reconsider. If your boss waited until Friday afternoon to fire *you*, wouldn’t you feel like you were being used to the very end? Employees fired early in the week — for example, Monday morning — have a whole week to look for a new job rather than a long weekend to stew over the reasons why they were fired (and why they should call an attorney first thing Monday morning).

One of your top priorities should be helping the employee maintain his dignity.

TELLING THE EMPLOYEE

It’s usually not a good idea to tell an employee he’s fired on the same day you make the decision to fire him. You may have second thoughts, or become aware of additional facts that affect your decision. Although there may be exceptions — for example, if an employee is violent — it’s usually best just to send him home with instructions to report to you the next morning.

That also gives you a chance to plan what you will say to the employee. You may even want to practice it out loud. You probably have a good idea of how the employee will react, so try to be ready with your answers. This will help you keep control of the conversation and hopefully avoid a nasty confrontation.

At least two members of management should be present when an employee is fired. This will often be the employee's supervisor and someone from HR. So what should you say to the employee? The first thing is simply that she's fired. Next, briefly explain your reasons as objectively and unemotionally as possible. Be nice, but not so nice that she's confused about why she's being fired. For example, if she was insubordinate to her supervisor on several occasions, say just that. Don't try to avoid confrontation by citing something vague like a "personality conflict."

On the other hand, this is not a time to provoke a confrontation either. Employees often want to challenge your reasons for firing them. It's OK to let them blow off steam, but don't let it turn into a lengthy diatribe. If the meeting appears to be getting out of hand, end it by simply stating, "We're sorry you feel that way, but that is our decision."



PRACTICAL POINTER

Don't lie to employees about why they're being fired! Nothing engenders suspicion in an employee quicker than a lack of candor in your reasons for firing her. You can use euphemisms like "We have to let you go" if you want, but we think that kind of vague cliché promotes misunderstandings. For example, if you try to soften the blow by telling an employee she's being "laid off," she may think there's a chance of getting her job back when business picks back up. Worse yet, if you try to avoid confrontation by citing "economic reasons" or "lack of work," no jury will believe you when you come back later and claim your real reason for firing the employee was that he embezzled money or was a belligerent jerk.

Letting the Employee Resign

When firing an employee, should you give him a choice between being fired and resigning? It's usually better if you do. If you're offering a severance package, it's a given that the employee will be allowed to resign (we'll have more on severance packages below). If you don't offer severance, you may still want to offer employees the chance to resign. This serves several purposes. First, the employee will be more likely to find work elsewhere if his employment record is clean. And by making the firing easier on him, you reduce the risk that he'll dream up some reason to sue you. You may also reduce the chance that the employee will file for unemployment compensation.

But keep in mind that just because an employee chooses to resign doesn’t mean you’re protected either from being sued or from an unemployment compensation claim. A forced resignation is sometimes called a “constructive discharge.” In the eyes of the law, that’s the same thing as an out-right firing. Still, as a practical matter, the fact that you allowed the employee to resign may dissuade him from suing you or seeking unemployment compensation, so it’s worth a shot.

Dealing with Danger

What if an employee has shown signs of violence before you fire him? What do you do then? In severe cases, you may want to avoid provoking a volatile employee in a face-to-face confrontation. A written letter of termination may be a better option. Since this letter will undoubtedly be a critical piece of evidence if you’re ever sued, it should be drafted very carefully with the assistance of an attorney (and maybe even a psychologist).

If you do meet with an employee to tell him he’s fired, there are several methods of defusing a potential confrontation. First, it is particularly important that someone from human resources participate as a neutral third party. If you must be critical in order to explain your decision, criticize the employee’s *behavior* rather than the employee. All those involved on the part of management should maintain a calm demeanor, especially if the employee starts shouting or otherwise becomes hostile. Acknowledge hostility but don’t become hostile yourself. That can only escalate the rhetoric *and* the potential for violence.

When the meeting is over, some companies have security waiting to escort the employee out. This may be appropriate on some occasions — such as when you fear the employee may turn violent, sabotage company property, or steal trade secrets. But in most cases, it’s better to simply have someone accompany the employee while he cleans out his desk and to have him do so at a time that won’t create a spectacle.

Other Guidelines

Also keep in mind the following guidelines about what to say and not say when you’re firing an employee:

- Avoid overly negative or defamatory comments about the employee. One way to do this is to talk about the facts rather than drawing conclusions from them. For example, instead of saying an employee is a drug addict, just say that he had a positive drug screen.
- Don’t disclose information about other employees, such as who your “source” is or who else is being fired.
- Remember that the decision to fire the employee was the company’s, not any particular individual’s. For example, instead of saying

“I’m sorry, Grace, but John has decided to let you go,” just say “The company has decided to let you go.”

- Talk about severance, if you’re offering it. Severance pay is discussed in more detail below at page 35.
- Other topics that may be covered: collecting company property from the employee, benefits issues, and final pay. For more on this, see “Comply with COBRA” and “Comply with State Laws,” below at pages 36–38.

THE EXIT INTERVIEW

Many employers routinely conduct exit interviews of fired employees (as well as those who quit or resign). These interviews offer many benefits. First, they are a good method of finding out what employees think about the company. Even embittered employees (as fired employees are likely to be) can offer insights that your current employees won’t dare tell you. Among other things, you may learn about such things as:

- poor management practices (this is the runaway favorite of most employees),
- problematic office romances or other sexual harassment concerns,
- unsafe working conditions, and
- inequities in pay and benefits.

By asking all departing employees about these matters, you stand a good chance of identifying problems while there’s still time to correct them. And you can use the information acquired during exit interviews to make changes for the benefit of remaining employees.

Second, exit interviews can be useful in future litigation. Many employees will tell you whether they intend to sue. This can alert you to the need to be as thorough as possible in documenting the reasons for and circumstances surrounding the firing. The employee might also make admissions that can serve as a defense if he sues. It’s not uncommon, for example, for employees to admit that their performance was not up to your standards. That kind of admission, if properly documented, can be very valuable evidence in a lawsuit.

Finally, employees may be less likely to feel they’ve been treated unfairly if you give them a chance to tell their side of the story. This is true even if there’s no chance that the employee will change your mind. Giving employees a chance to vent *to you* may reduce their need to spout off *about you* in the community or to others in your industry. It may also reduce their desire to get revenge by suing you.

***Exit
interviews
can be
useful in
future
litigation.***

How to Conduct an Exit Interview

Exit interviews for fired employees should be conducted by someone other than their supervisor. Usually, this is the HR director. Develop a list of standard questions to ask all fired employees. This list may be different from (in other words, shorter than) the questions you ask employees who leave voluntarily. But you should ask the same questions of all fired employees who agree to an exit interview. If you ask different questions during different interviews, the information’s usefulness may be questionable. Not to mention that it could be evidence of discrimination.

Here’s a list of typical questions you may want to ask in an exit interview:

- What did you like about your job and why?
- What did you dislike about your job and why?
- What policies did you like and why?
- What policies did you dislike and why?
- Do you believe that you were treated fairly by management?
- Do you believe that your workload was reasonable?
- What suggestions do you have to improve our practices and procedures?
- What suggestions do you have for improving workplace safety?
- What suggestions do you have to improve pay and/or benefits?
- What other suggestions do you have?

You may want to vary your procedures if the employee had access to confidential information or you fear a violent reaction, either by having an additional member of management participate or by not having an exit interview at all. But if you don’t expect the firing to be controversial or confrontational, the presence of a second person might stifle the employee’s candor.

COMPLY WITH THE OWBPA

Any time you fire an employee who’s 40 or older, you need to think about the Older Workers Benefit Protection Act (OWBPA).²³ The OWBPA, which is part of the ADEA, prohibits employers from denying benefits to older employees. The OWBPA provision that gets the most attention in employment law and HR circles is one detailing the circumstances under which you can require an employee who is 40 or older to release any claims she might have against you.²⁴

The law says you can require older employees to sign such a release as long as you offer them valuable consideration in return and follow excruciatingly detailed procedural requirements intended to make sure the release is both *knowing* and *voluntary*.

What Are the Requirements for “Knowing and Voluntary” Releases?

The mere fact that the employee understands what he’s signing and does so of his own free will doesn’t cut it under the OWBPA. Here’s a *very* simplified list of the minimum requirements that releases must follow to be considered “knowing and voluntary”:

- The release must be in writing.
- It must be drafted in plain language geared to the level of understanding of the individual signing it. This typically means limiting or eliminating technical jargon and long, complex sentences.
- It must not mislead, misinform, or fail to inform the person signing it.
- It must specifically state that it is a waiver of ADEA rights and claims.
- You must advise the employee in writing to consult with an attorney prior to executing the release.
- You must give the employee something of value that he wasn’t already entitled to (consideration) in exchange for signing it. This is typically a severance package, a subject that’s discussed in more detail in the next subsection of this report.
- You must give the employee at least 21 days to consider the release (45 days for reductions in force). But the employee can choose to sign it before this time frame is up.
- The employee must be allowed to revoke the release for at least seven days after signing it. This period cannot be shortened even if the employee agrees.

This is just a summary of the OWBPA’s requirements, which are even more complicated than this list reflects. Make sure you consult an attorney before you ask an employee who’s over 40 years old to sign *any* release of claims against you. This includes firings in which you have no reason to suspect there might be any age discrimination concerns.

Note: The “knowing and voluntary” requirements are even *more* detailed if the release is for older employees involved in the termination of a group or class of employees — such as an early retirement offer or mass layoff. For more information on OWBPA releases in workforce reductions, see our HR Executive Special Report entitled *How to Avoid Legal Traps in Workforce Reduction*.

What If the Release Doesn’t Follow These Requirements?

The most obvious consequence of a release that doesn’t follow the OWBPA’s requirements is that the employee will be allowed to sue you in spite of the fact that you and he clearly understood and agreed that he was giving up that right. But what if you gave the employee generous severance benefits in return for the defective release? You should at least be able to get your money back if he’s not going to be held to his end of the bargain, right?

Wrong. If a release is invalid under the OWBPA, the employee can sue you for age discrimination *and* keep the severance benefits.

Example

Henry worked for Armand Cosmetics for 30 years. His job was eliminated in a reduction in force, and he signed a release of all claims he might have against Armand in exchange for severance pay. Unfortunately, the release didn’t comply with all the requirements of the OWBPA. Henry later sued for age discrimination, claiming that he was targeted for the reduction in force because of his age. Armand claimed Henry could not sue because he had ratified the defective release by failing to return the severance benefits he had been paid. The court allowed him to keep the severance benefits *and* continue with his age discrimination lawsuit against Armand.²⁵

SEVERANCE PAY

If you don’t have a severance policy (and many companies don’t), you might want to consider offering severance to some employees, depending on the circumstances. According to a 1995 survey by the Society for Human Resource Management, 83 percent of employers offer severance pay to some employees. Of those, nearly 92 percent said employees were eligible for severance pay if their positions were eliminated. Nearly 23 percent gave severance to employees even if they were fired for poor performance.

If you *do* have an established plan or policy awarding severance to fired employees, there’s not much to do but follow it. The Employee Retirement Income Security Act (ERISA) governs employee benefit plans, including severance pay plans or policies. The absence of a written policy doesn’t prevent employees from proving a severance plan exists and making a claim for benefits. Generally, unless a severance benefit is individualized and offered on a truly ad hoc basis, it risks being covered by ERISA.

ERISA contains different requirements for severance plans depending on whether they’re classified as a retirement plan or as a welfare benefit plan. Consult a competent benefits attorney if you have any doubt about whether your severance plan is covered by ERISA.

What Severance Should You Give?

Assuming you don’t have a severance policy, a typical method of calculating severance benefits is to give a certain amount of pay for each year

the employee was with the company. According to a 1998 survey, senior executives get an average of two weeks pay for each year they worked for the company.²⁶ Average pay for middle managers and non-exempt employees was 1.6 and 1.4 weeks pay for each year with the company, respectively.

In addition, you might be able to offer severance in some form other than a cash payment. What about paying the employee's health insurance premiums for a few months? Or forgiving his loans? Does your company really need that outmoded laptop? Can you afford to offer outplacement services? The possibilities are endless.

Consider a Written Agreement

There is no such thing as a "one size fits all" severance agreement.

Although many employers bypass a written severance agreement, you need one to adequately protect yourself if an employee decides to sue. While some matters should be covered in *every* severance agreement, there is no such thing as a "one size fits all" agreement. Firing a highly compensated executive, for example, might raise different issues than firing a lower-level employee who has no stock options or ownership interest in the company.

With that said, some standard clauses include:

- A general release of all potential claims against you
- A statement that the agreement is not an admission of any fault or liability on your part
- An agreement that the employee will not seek reemployment with you and that you are entitled to reject any such application without cause
- An agreement to keep the severance terms confidential
- An agreement from the employee not to take trade secrets or raid customers and other employees
- A full description of the amount of wages, overtime, and accrued vacation pay owed to the employee
- If applicable, an OWBPA release
- A clause prohibiting you and the employee from disparaging each other

You can have an agreement already drawn up when you fire the employee, but it may be better to remain flexible on its terms. Employees are less likely to feel they've been treated unfairly if you give them an opportunity to bargain with you over the specific terms of the agreement. As we've said many times before in this report, the fairer that they think you're being, the less likely they are to sue.

COMPLY WITH COBRA

When you fire an employee, you may have to offer him the chance to keep his health insurance for a while — at his own cost, of course — under

the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA).²⁷ With a few exceptions, COBRA applies to employers that sponsor a group health plan for their employees if they had 20 or more employees (including part-time and leased employees, and the owner) in the calendar year before they fired a particular employee. So if your workforce hovers around 20 employees from year to year, you might have to comply with COBRA when you fire some employees but not when you fire others.

Example 1

Griffin Hawks was a chef at the Eagle Street Cafe until he was fired in May 1999. In 1998, in addition to Griffin and the owner, the cafe employed six cooks, three hostesses, and 10 part-time waiters. Griffin, the cooks and hostesses, and the owner were covered by the cafe’s health plan, but the part-time waiters weren’t. In March 1999, the cafe changed its format to “nouveau” cuisine and replaced Griffin with a chef who specialized in that type of cuisine. Because the cafe had at least 20 employees in 1998, it was required to offer COBRA continuation coverage to Griffin. **Note:** The fact that less than 20 employees (including the owner) are enrolled in the plan makes no difference in whether the cafe is subject to COBRA.

Example 2

The Eagle Street Cafe’s new format was a total flop, and it ended up laying off one hostess and three part-time waiters for the rest of 1999 in an effort to make ends meet. That left it with a total of 17 employees for most of 1999. Then in January 2000, it fired the nouveau guy and hired Griffin back. The cafe does not have to offer COBRA continuation coverage to the nouveau guy because it had fewer than 20 employees for most of 1999.

For employers that are covered by COBRA, the two main requirements are:

- (1) offering continued health coverage to employees and their dependents who were covered under your health plan on the day before you fired the employee (commonly called continuation coverage); and
- (2) notifying employees and their dependents of their COBRA rights (commonly called COBRA notice requirements).

In general, fired employees must be allowed to keep continuation coverage for at least 18 months, but it can be longer in certain circumstances.²⁸

Note: Although it sounds simple enough, COBRA's requirements are *extremely* complicated and technical. If you have any concerns about COBRA compliance, you should consult an experienced benefits attorney.



COMPLY WITH STATE LAWS

A number of states require employers to give fired employees their final paychecks within a certain period of time after they're fired. The time allowed might be anywhere from the last day the employee works to the next regular payday, which could be several weeks. In addition, some states have laws that treat accrued fringe benefits such as vacation, sick leave, and other benefits as wages that must be paid when the employee is fired. A few states also require employers to pay severance or give employees a written statement of the reasons why they're being fired. It is important to review your state's requirements since many states impose stiff penalties for failure to comply.

Other Special Firing Concerns

4

This report started out with a list of the top five firing concerns faced by employers today. Needless to say, they aren't the only ones. Other hot spots to keep an eye out for include wrongful discharge lawsuits, being sued by an employee who's been accused of harassment, reductions in force, complying with labor relations laws, and handling unemployment claims. Let's take a brief look at the dangers posed in each of these areas and what you can do to protect yourself from them.

WRONGFUL DISCHARGE



Too often, employers are so focused on avoiding discrimination claims of one kind or another that they overlook the danger of wrongful discharge claims. As mentioned earlier, “wrongful discharge” is a term that refers generally to the three most common exceptions to employment at will. These three exceptions are the *implied contract* exception, *public policy*, and the *implied covenant of good faith and fair dealing*.

We've already identified the implied contract exception as one of the top firing concerns faced by most employers (under “Employees Who Have Contractual Rights,” page 11). Let's take a brief look at the two remaining exceptions — public policy and the implied covenant of good faith and fair dealing.

Public Policy

In states that recognize the public policy exception, you can't fire employees for reasons that violate an established public policy of the state. Adopted by courts in over 40 states, this is the most widely adopted employment-at-will exception.

But the exception is not applied the same in all states that recognize it. Some states recognize it in very limited situations — such as when an employee is fired in retaliation for firing a workers' compensation claim. Others let employees sue if they're fired for doing something they're allowed or legally required to do under state law — such as for complying with safety regulations in violation of the employer's instructions.

Example

Gabrielle Smith was the sales manager at a new car dealership. Her boss, the owner of the dealership, told her that when customers had problems with their credit history, she should doctor their loan applications so that they could qualify for a car loan anyway. When she refused, Gabrielle's boss called her a goody-goody. A few weeks later, he fired her and replaced her with a manager trainee who was willing to falsify customers' credit applications. Gabrielle sued for wrongful discharge in violation of public policy. The jury found that she was fired for refusing to break the law by falsifying customers' credit applications.

Implied Covenant of Good Faith and Fair Dealing

In a few states — fewer than 15 — employers have a duty to act fairly and in good faith in all dealings with their employees. This is the least defined of the three employment-at-will exceptions. Its scope varies from state to state. Some states, for example, have a list of the specific types of actions that violate the duty of good faith and fair dealing. Others say the duty applies only in rare and exceptional situations when there is a special relationship of trust and reliance between the employee and the employer.

Some examples of actions that might breach the implied covenant of good faith and fair dealing include:

- promising to make an employee an equity partner after working for the company for five years and then firing her a month before the five years is up to get out of your promise.
- firing an employee to avoid paying him promised bonuses, commissions, or benefits.

THE ACCUSED HARASSER

Ever since a Wisconsin jury awarded over \$26 million to an accused harasser in the now-famous “Seinfeld” case, the hottest topic in HR and employment law circles has been the danger of being sued by employees who've been accused of harassment. As you will recall, the employee in that case was fired after recounting a tacky (but hilarious) *Seinfeld* episode to a female co-worker. Jerry couldn't remember the name of a girl he was dating, but he knew that her name rhymed with a female body part. After several unsuccessful and somewhat raunchy guesses, she walked out on him, and then he remembered her name was Dolores.

What's ironic is that the huge verdict in this case wasn't even based on the fact that the harasser was fired for talking about the *Seinfeld* episode. Instead, it was based primarily on the mundane legal theory that the company had misrepresented his salary grade level. The jury awarded him a staggering \$6.5 million in compensatory damages and \$18 million in punitive damages on that claim. (What's even more ironic is the fact that a Wisconsin appeals court recently threw out the entire verdict.)

In spite of the fact that the "Seinfeld" case has been blown way out of proportion, it can be credited with alerting employers to the dangers they face when firing someone for sexual harassment (or any other form of harassment, for that matter). If you don't fire an accused harasser, the alleged victim will probably sue. If you do, the harasser will probably sue. Theoretically, either *or both* could win.

The Harasser's Handbook of Claims

In the cases brought by accused harassers, a recurring theme is that the employer became so panicked by the sexual harassment allegations that it did a shoddy investigation and fired the accused harasser with little or no evidence that he actually did anything wrong. That's exactly the type of knee-jerk reaction you need to resist in order to avoid getting sued by an accused harasser.

And think about this: In most cases, the harasser is a man. By automatically assuming that the woman who's complaining is telling the truth and that the accused harasser is lying, you may be discriminating against the harasser because of his sex. Also, what if the woman also engaged in similar conduct to that which she's complaining about, such as sexually explicit language or jokingly grabbing men's buttocks? In that case, you may unlawfully discriminate against the harasser if you investigate him but not her.

Example

Janet Freelove and Manny Gonzales worked for Fountainhead Brewing Company. Janet filed a complaint alleging that Manny sexually harassed and assaulted her over a number of years. Manny admitted that "horsing around" was commonplace among the mostly male workers and that Janet was "like one of the guys you could say anything to." But he denied assaulting or sexually harassing her or anyone else. In spite of his spotless record of 24 years with the company, the company fired Manny and paid Janet \$200,000 to settle her sexual harassment claims. When Manny sued Fountainhead, it came out that Janet openly talked about her sexual exploits and had a reputation for groping and propositioning male workers. Almost any conversation

with her turned into a conversation about sex. And there was absolutely no evidence to support her allegations that Manny had harassed or assaulted her. The company's human resources, operations, security, and legal departments, and two private investigators failed to uncover any of this information in their lengthy investigation. Nor did they investigate Janet for engaging in behavior at least as egregious as what Manny was accused of. A jury awarded Manny \$730,000 against Fountainhead and nearly as much against Janet.²⁹

You don't have to discipline an employee just because a complaint has been lodged against him.

Other dangers include doling out harsher punishment to accused harassers in a protected class than to those who aren't in a protected class. For example, a female employee accused of harassing a man could claim sex discrimination if you punish her more harshly than a male employee accused of equivalent conduct.

Or an accused harasser could claim that the investigator, witnesses, or the company in general defamed him by revealing the allegations against him to other people. To avoid this, whoever investigates the harassment allegations should warn witnesses both to tell the truth and to keep the investigation confidential. Of course, the investigator, and anyone else in the circle of those who "need to know" about the allegations also need to keep them confidential. For more about investigations, see Section 2 (*Before You Say, "You're Fired"*).

Your Best Defense

The best way to protect yourself against claims by accused harassers is the same way you protect yourself from sexual harassment claims: conduct a thorough and fair investigation. Treat both the alleged victim and the alleged harasser with dignity. Remember that you don't have to discipline an employee just because a complaint has been lodged against him. And remember, the trend is not to hold you liable for firing an employee — even if he was totally innocent of the harassment allegations — as long as your belief that he committed the harassment was reasonable and reached in good faith.

REDUCTIONS IN FORCE

Any time a company undertakes a reduction in force (RIF), it's going to engender strong reactions from employees. It's extremely difficult to structure a RIF in such a way that *someone* doesn't feel his rights have been violated. Usually, the problem arises with older employees who think you're getting rid of them just because they're old and have higher salaries and better benefits. Obviously, you're downsizing because you need to cut costs.

And that can mean cutting not only jobs but also wages, benefits, and so on. Who makes the most money and gets the highest benefits? Usually, employees who've been with the company the longest. And, usually, that means the oldest employees in the company. So the easiest way to cut costs is to single out your older workers for downsizing.

Obviously, that's not a good idea. Targeting your oldest workers for a reduction in force is clearly unlawful age discrimination under the ADEA, and probably under many state laws as well. And although laying off employees because of factors that are usually *associated with age* (such as higher salary and benefits) is not necessarily proof of age discrimination, it *is* circumstantial evidence of it.³⁰

OK, you say, so I'll keep the workers who have the most seniority. That should do away with any possible claim of age discrimination because the older workers are the most likely to have the most seniority. The problem with that approach is that it might look like you're discriminating against women and minorities because, in some industries, they're less likely to have been with the company as long as white men.

With that in mind, how is it ever possible to downsize without making it appear you're picking on employees in a protected class? First, adopt clear, written guidelines explaining the factors you will take into consideration in deciding which employees will be let go. These guidelines should be crafted to help you keep your best employees and let go of your worst ones. Your best employees are the ones who do the best and the most work. To determine who those employees are, you can look at performance evaluations, hours worked, attendance records, and so on. You can also weed out employees who have violated company rules or had other disciplinary problems.

Once you choose your guidelines, apply them fairly and consistently to all employees regardless of age, race, gender, and so on. It might also be advisable to create a diverse committee with representatives of all races, genders, and ages to make and/or review all final layoff decisions. That reduces both the actual risk that people will be inappropriately targeted and the risk that it will *appear* they were.

ERISA Interference

For reasons that are quite similar to age discrimination, another RIF complaint to watch out for is that you chose to lay off employees to prevent them from getting benefits under an employee benefit plan. That's illegal under ERISA § 510.³¹ Of course, the issue is raised most often when the employees you let go happen to be the ones with the highest benefit costs.

It's pretty clear that ERISA is violated when you choose to terminate employees in order to prevent them from becoming vested in an ERISA plan. But other improper motivations under ERISA are not so clearly defined. The whole point of downsizing is to reduce costs, including benefit

costs. The question is — at what point does the desire to reduce benefit costs turn into an improper motivation under ERISA?

Most courts say that ERISA is violated only if it can be proved that depriving employees of their benefits is your *principal motivation*. Although courts differ in their approaches, you'll generally be in the clear if you avoid making layoff decisions that appear to be based *primarily* on benefit costs. Make sure that your analysis of reduced benefit costs is merely one part of your overall analysis of costs that can be reduced with a RIF.



PRACTICAL POINTER

Sound familiar? *ERISA interference* sounds an awful lot like one of the examples we gave of a firing that violates public policy — one of the exceptions to the employment-at-will doctrine. The point is that there's an awful lot of overlap among the different types of claims that can be asserted by employees under the federal and state statutes and cases. So just because you're not covered by ERISA (and some employers aren't) doesn't necessarily mean it's okay to interfere with employees' benefits.

The WARN Act

After the shades of gray involved in age discrimination and ERISA interference claims, the Worker Adjustment and Retraining Notification Act (WARN Act) provides some comfortingly black and white requirements. Generally, the WARN Act requires many employers to give advance notice of significant workforce reductions to their employees and others.³² This requirement is intended to protect employees, their families, and communities by giving employees a transition period in which they can adjust to losing their jobs, obtain other work, or pursue training for other work.

Although the basic idea behind the WARN Act is fairly straightforward, the law is filled with technical requirements that can trip you up. In a nutshell, the WARN Act requires businesses that have at least 100 employees to give 60 days advance notice of any mass layoff or plant closing to affected employees, unions, and local and state governments. To determine how many employees you “have” under the WARN Act, you must count all employees at every location, not just the location where employees are to be laid off.

Notice is required when you experience a “plant closing” or “mass layoff” in which at least 50 employees lose their jobs during a 30-day period. Although part-time employees are not counted in determining whether a workforce reduction affects enough employees to trigger the WARN Act, they *are* entitled to WARN Act notice if they're being laid off.

Several different groups of people are entitled to WARN Act notice, including:

- employees affected by the workforce reduction *or* representatives of the affected employees (such as a union if unionized),
- the state's dislocated worker unit, which responds on-site to assist workers facing job losses, and
- the local government in which the facility is located.

The DOL's regulations prescribe what must be included in the WARN Act notices. Although the specific content differs depending on who it is directed to, notices generally have to include the following information:

- the date of the plant closing or layoff,
- the name and address of the facilities that will be affected, as well as the name and telephone number of a company representative to contact for additional information,
- a statement regarding whether the reduction in force is temporary or permanent, and whether the entire plant or just parts of it will be affected,
- the expected date of the first layoff and an anticipated schedule for any future layoffs,
- the positions that will be affected and the names of the employees who currently hold those positions, and
- the expected date when the layoff or closing will begin, as well as the date when the individual employee receiving the notice will be affected.

Exceptions. Several exceptions to providing WARN Act notice are available in situations that might make giving such notice next to impossible. Some of these exceptions *reduce* the advance notice time period, such as when a company is “faltering,” suffers unforeseeable business circumstances, or experiences a natural disaster. Others *eliminate* the need for notice altogether; for example, no notice is required to temporary employees, or in the event of a strike or lockout.

LABOR RELATIONS (EVEN IF YOU'RE NOT UNIONIZED)

The National Labor Relations Act (NLRA) regulates how employers interact with their employees in both unionized *and* union-free workplaces. In general, the NLRA prohibits “unfair labor practices” and protects certain “concerted activities” by employees. With a few exceptions (such as airlines and the government), the NLRA applies to all employers involved in interstate commerce. That probably includes you.

Lots of things are considered unfair labor practices that have nothing to do with firing employees. Those that do include firing them in an attempt

to discourage union membership and retaliating against them for asserting rights that are protected by the NLRA or guaranteed by a collective bargaining agreement. Needless to say, that makes it real hard to fire a union supporter or member due to such legitimate concerns as poor performance, misconduct, or lack of work. As with so many of the dangers discussed in this report, the problem is that the employee (and possibly a jury) will think he was fired in retaliation for his union activities. And as with those other dangers, the way to protect yourself is to give accurate evaluations, follow your progressive discipline policy, conduct a fair investigation into alleged misconduct, and document every step you take.

Although a comprehensive discussion of labor relations is *way* beyond the scope of this report, we do have a few special words of warning for non-union employers. Too many of you have no idea that the NLRA applies to you, too. First, you can't engage in unfair labor practices in an effort to defeat a union organizing campaign. That one's pretty obvious. But even if you're not facing a union campaign, you're still prohibited from retaliating against employees for undertaking a "protected concerted activity." That includes an employee who stands up for other employees (as opposed to standing up for himself) in such matters as safety, compensation, and scheduling. In addition, you can't limit employees' freedom to discuss workplace issues among themselves, such as their pay rate and job evaluations.

Example

Abe Monahan drove a truck for a large over-the-road trucking company. He refused to drive a particular truck because he thought it was unsafe. Based on his warning, a second driver also refused to drive the truck. Abe was fired and sued under the NLRA. The trucking company prevailed because his complaints were to protect his own safety and not the safety of other employees. The court said the fact that he briefly mentioned his safety concerns to the second driver didn't establish that he was engaged in a "concerted activity" that would be protected under the NLRA.³³

HANDLING UNEMPLOYMENT CLAIMS

Any time you fire an employee, no matter what the reason, chances are she'll file a claim for unemployment benefits. And if you fired her for lack of work or mere unsuitability for the job, she'll probably get them. But what if you fired her for a good reason, like never showing up for work or showing up drunk?

In that case, you may have grounds to contest her claim. Generally, employees aren't entitled to unemployment benefits when they're fired for work-related misconduct. Theoretically, that means things like chronic tardiness, insubordination, and other more obvious wrongdoing such as harassment or theft. But in practice, getting the state unemployment board or agency to deny an employee's claim because of misconduct is a rare achievement in many states.

For this and other reasons, the decision to fight an employee's claim for unemployment benefits is not a slam dunk. In some circumstances, it may be better to simply let her collect benefits. In fact, many employers adopt an informal policy of not contesting unemployment claims other than in truly exceptional circumstances. Other reasons for such a policy include a desire not to pit your employees (as witnesses) against a former co-worker or to goad a troublesome employee into finding some trumped-up charge to sue you over.

Not to mention that the stance you take now may come back to haunt you later. Although there's no clear consensus, many courts across the country have considered the issue of whether employers can be held to statements they make in unemployment proceedings when they're later sued for such things as harassment or discrimination. Some courts have said they can and others have said they can't. Some even say that either the employer or the employee may be bound by the *conclusion reached* in the unemployment proceedings. In any event, what you say now will almost certainly be used as evidence in later litigation even if you're not completely bound by it. It may be better not to say anything at all.

The decision to fight an employee's claim for unemployment benefits is not a slam dunk.

Documentation

Once again, documentation is the key if you do decide to fight an employee's claim for benefits. The following records are either required by law or essential to proving that you fired the employee for cause:

- employment agreements
- performance evaluations
- warnings, disciplinary measures, and work refusals
- policies the worker violated that led to his termination (and anything she signed indicating that she received or reviewed those documents)
- exit interview forms

In addition, you should consider collecting sworn statements from supervisors, managers, and any employees familiar with the situation immediately after firing an employee. This will be the bulk of your evidence at the hearing. (But in some states, they'll have to testify in person anyway.)

Most states also require some form of separation notice be provided either to the employee or directly to the state agency that administers the unemployment benefits program. This is your opportunity to state your reasons for firing

How to Fire Employees Without Getting Burned

the employee. Just remember that it's not necessary to specify every last thing the employee did that made you fire her. In particularly contentious cases, it's probably even best to describe the type of offense (unsatisfactory job performance, insubordination, or job-related misconduct) instead of getting into the gory details.



PRACTICAL POINTER

The last thing you should do is give a reason for firing the employee and then change your mind later after you're sued for discrimination, wrongful discharge, and so on. Therefore, give careful thought to the reasons you offer. Don't lie, even if you're doing it to spare the employee's feelings. You won't be so concerned about her feelings after she sues you for discrimination because you told her you didn't have enough work for her but quickly replaced her with a younger, or male, or white employee.

Things You Need to Know If You're Sued

5

There are a lot of legal issues that we could talk about that could only be considered exciting (or even interesting) by lawyers. We figure that if you're sued, you'll get a lawyer and you can safely let him worry about the intricacies of civil procedure and pre-trial discovery and admissibility of evidence and legal strategies and maneuverings and so on. But a few of these issues are important enough to discuss in this report. And in our experience, it's not all that unusual for defense counsel to overlook them.

CHECK YOUR INSURANCE COVERAGE

Although Employment Practices Liability Insurance (EPLI) has seen a rise in popularity in the past few years, surprisingly few companies have it. Although exact coverage varies among policies, EPLI typically covers a wide range of employment litigation, such as wrongful discharge, sexual, racial, and other types of discrimination or harassment, breach of contract, defamation, and retaliation.

If your company has EPLI coverage, you probably already know about it. When you first suspect that an employee might be having litigious thoughts, pull out your policy and familiarize yourself with its provisions. What types of claims does it cover? When are you required to provide notice to the insurance company of potential claims? What is the procedure for notifying the insurer that you've been sued? Will the insurer provide you with defense counsel? And so on.

If you don't have EPLI, pull out your traditional insurance policies. It's possible that they will provide some level of coverage for employment litigation. For example, commercial general liability (CGL), directors and officers liability (D&O), professional liability, homeowner's insurance, and workers' compensation policies have historically provided some limited protection against employment claims. Notify your carrier that an employee has filed a claim or complaint within the deadlines provided in the policy (for example, when you first learn about a potential loss or when the employee sues). At the very least, the insurer may have a duty to provide defense counsel to you



Insurance policies have historically provided some limited protection against employment claims.

even if they argue that the policy doesn't cover employment litigation. It's certainly worth checking out.

INVESTIGATE THE EMPLOYEE'S BACKGROUND

Let's say your company has just been sued by a former employee who says she was fired for refusing to go out with her supervisor. This is the first you've heard of it, but when you ask the supervisor about it, he basically *admits* it! Holy harassment, Batman! What can you do now?

Even though the supervisor admits what he did, something just doesn't feel right about this employee. Rather than just writing her a blank check, you decide to stick it out through a little pre-trial discovery to make sure there's nothing you're missing. In investigating her claims, your lawyer calls the college she listed on her resume, only to learn that she never attended school there. She just worked there in the admissions department.

So what do you think? Can you use this evidence against the employee? After all, you never would have hired her if she hadn't lied on her resume. And if you had found out about the lie while she still worked for you, you would have fired her on the spot. Shouldn't the fact that you had a legitimate reason to fire her preclude her from suing you?

This issue is commonly known as the doctrine of "after-acquired evidence." The U.S. Supreme Court says that even if you had a legitimate reason to fire an employee, that doesn't prevent her from suing you if the actual reason you fired her was discriminatory. But you may be able to use the evidence of her lie against her at trial — it may reduce the dollar amount of any verdict the jury may award her. Perhaps more importantly, it may prevent the court from ordering you to give her job back if she's asking for that.³⁴



PRACTICAL POINTER

This doctrine gives you an incentive to dig into the backgrounds of employees who sue you to see if there are any skeletons in their closets. But you can also look at it from another angle — if you had done an adequate background check before hiring the employee, you never would have had the problem.

DON'T THROW AWAY RELEVANT RECORDS

Numerous federal and state laws require employers to keep employment records for a certain period of time. The federal employment laws typically

require you to keep certain employment records for anywhere from one to three years. (The big exception is ERISA, which requires you to keep certain benefits documents for as long as six years.)

But stricter recordkeeping requirements apply after an employee has accused you of violating one of these laws. Once that happens, you're required to keep all records relevant to the employee's claims until they're resolved — even if you're no longer required to keep those records under the laws' general recordkeeping requirements. That includes such items as personnel records, records concerning the employee filing the charge (including current and former employees and job applicants), and records of other employees holding similar positions.

The consequences of failing to keep employment records are threefold. First, if you're ever audited or investigated by the EEOC, DOL, or any other agency responsible for enforcing employment laws, you could be in for a hefty fine for recordkeeping violations.

Second, the fact that you threw away records relevant to an ongoing investigation can be used against you at trial. The court may instruct the jury that it can infer that you threw the records away because they were damaging to your case. Or it could refuse to allow you to assert a defense to the employee's claims. Finally, if your destruction of documents appears intentional or particularly egregious, the court might order you to pay substantial sanctions or even summarily enter a judgment against you in the lawsuit.

The moral of the story is this: It's a good idea to have a regular records retention policy in which you periodically destroy documents that you're no longer required to keep under federal or state employment laws. But as soon as you learn about an employee's claim, assign a point person to gather and preserve all relevant evidence. As a backup, make sure the people responsible for disposing of records know when an employee has filed a claim against you. Tell all employees not to discard any records that may be evidence — whether it would be favorable to you or to the employee. Explain what types of records you're talking about. That way, they won't inadvertently destroy records that are relevant to the employee's allegations and get you in a heap of trouble with the court.

You're required to keep all records relevant to the employee's claims until they're resolved.



PRACTICAL POINTER

Don't forget electronic evidence! A common practice is to keep backup tapes (containing such things as deleted e-mails, old versions of relevant documents, and so on) for a year and then overwrite them with new material. If you overwrite a backup tape after an employee sues, a court could treat that the same as destroying paper documents.

■ **DON'T RETALIATE**

Finally, don't assume you're safe venting against employees who no longer work for you. You can be liable for retaliating against employees long after they're gone, such as by giving them bad references, refusing to rehire them, withholding their benefits, or criticizing them to other employees. And make sure others in your organization understand the dangers as well.

Conclusion

A number of themes run throughout this report. First, safely firing employees is a process that starts long before you actually tell them they're fired. That process includes being honest in all of your dealings with employees, from evaluations to firing them, even if it hurts. It also includes treating all employees fairly and consistently — from the investigation and progressive discipline stages to the firing itself. And all the honesty and fairness in the world won't help you one bit if you don't train your supervisors to be honest and fair in their dealings with employees as well.

Not to mention, of course, that both you and your supervisors need to be conversant enough in the great morass of federal and state employment laws to, at the very least, recognize a potential problem and call your lawyer for help. Accomplish that, and you should be able to prevent most lawsuits. Hopefully, this report has helped you along in reaching that goal.

Notes

- 1 Except as otherwise noted, this report addresses the legal requirements imposed on private employers who do not receive any federal funds.
- 2 Race, color, religion, national origin, sex, and pregnancy discrimination are prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. Title VII only applies to employers that have at least 15 employees. National origin discrimination is also prohibited by the Immigration Reform and Control Act (IRCA), 8 U.S.C. § 1324a, 1324b. This part of the IRCA applies to all employers that have at least four employees. Discrimination in pay based on sex is also prohibited by the Equal Pay Act, 29 U.S.C. § 206(d), which applies to almost all employers.
- 3 Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* The ADEA applies to employers that have at least 20 employees.
- 4 Americans with Disabilities Act (ADA), 29 U.S.C. § 12101 *et seq.*; Rehabilitation Act, 29 U.S.C. § 791. The ADA applies to employers that have at least 15 employees. The Rehabilitation Act applies to federal government contractors and recipients of federal grants.
- 5 IRCA, 8 U.S.C. § 1324a, 1324b. This part of the IRCA applies to *all* employers.
- 6 Uniformed Services Employment and Reemployment Act, 38 U.S.C. § 4301 *et seq.*
- 7 U.S. Equal Employment Opportunity Commission Charge Statistics, FY 1992-99 (available at <http://www.eeoc.gov/stats/charges.html>).
- 8 That includes charges claiming discrimination on the basis of on race, color, religion, national origin, sex, pregnancy, age, and disability. Citizenship status discrimination falls under the jurisdiction of the Justice Department.
- 9 U.S. Department of Justice's Bureau of Justice Statistics.
- 10 42 U.S.C. §2000e-3.
- 11 U.S. Equal Employment Opportunity Commission Charge Statistics, FY 1992-99.
- 12 For more information about how to respond to an employee's sexual harassment complaint, see the EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (dated June 21, 1999) and "Questions & Answers for Small Employers on Employer Liability for Harassment by Supervisors" (both of which are available at <http://www.eeoc.gov/policy/guidance.html>).
- 13 29 U.S.C. § 2602, 2611 *et seq.*
- 14 38 U.S.C. §4301 *et seq.*
- 15 42 U.S.C. § 12111 *et seq.*
- 16 29 U.S.C. § 2614(B); 29 C.F.R. § 825.216 *et seq.*
- 17 38 U.S.C. § 4312(d)(1).
- 18 See 42 U.S.C. 12111(10)(B); 29 C.F.R. 1630.2(p)(2); EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, dated March 1, 1999 (available at <http://www.eeoc.gov/policy/guidance.html>).
- 19 *Taylor v. Pepsi-Cola Company*, 196 F.3d 1106 (10th Cir. 1999).
- 20 *Jeshiva v. U.S. Mattress Corporation*, Civil No. 93-4464 (D.N.J. 1994).
- 21 "Unskilled and unaware of it," *Journal of Personality and Social Psychology*, December 1999, p. 1121.
- 22 *Faragher City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, dated June 21, 1999 (available at <http://www.eeoc.gov/policy/guidance.html>).
- 23 29 U.S.C. § 621 *et seq.*
- 24 29 U.S.C. § 626(f); 29 C.F.R. § 1625.22.
- 25 *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998).
- 26 MPI Severance Survey, Manchester Partners International, a Philadelphia-based consulting firm.
- 27 29 U.S.C. §1161, *et seq.* You may also have to offer continuation coverage to employees and their dependents in other situations, such as when they die, quit or retire, get divorced or legally separated, become entitled to Medicare benefits, or become disabled.
- 28 29 U.S.C. § 1162.
- 29 *James v. Coors Brewing Co.*, 1999 WL 1011887 (D.Colo. 1999).
- 30 *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).
- 31 ERISA § 510, 29 U.S.C. § 1140.
- 32 29 U.S.C. § 2101 *et seq.*
- 33 *NLRB v. Portland Airport Limousine Company*, 163 F.3d 662 (1st Cir. 1998).
- 34 *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995).

About the Author

Julie Athey is an attorney in the Editorial Department of M. Lee Smith Publishers LLC. She has written and edited numerous publications for human resources professionals, including the HR Executive Special Report, “Defusing the Overtime Bomb: How to Comply with the FLSA.” She currently writes articles for monthly employment law newsletters, and is also the primary author of a number of quarterly newsletters published for law firms.

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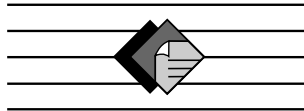
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