

Termination Tutorial:

5 Crucial Factors to Consider Before Firing

May 2021

CONSIDERATION #1: AT-WILL EMPLOYMENT

At-Will Employment

- Employment relationships generally fall into two categories: contractual and at-will
- Contractual means that termination must be handled per terms of contract
- At-will employment may be terminated by either the employee or employer at any time and for any reason ... except an illegal one

At-Will Employment (cont.)

- An employee can be terminated because of poor work performance or difficulty working with others, for example
- But a worker cannot be fired for being Asian, Jewish, a female, too old, etc.
- Firing someone because of race, color, national origin, religion, age, gender, disability, sexual orientation or other legally protected characteristics is prohibited by various federal laws

CONSIDERATION #2: FEDERAL LAWS

Federal Laws (cont.)

- **Occupational Safety and Health Act (OSH Act):** This makes it illegal to fire someone in retaliation for reporting safety/health violations in an investigation
- **Fair Labor Standards Act (FLSA):** This law prohibits retaliation against employees who complain of FLSA violations or participate in investigations
- **Whistleblower laws:** These protect employees from retaliation for reporting certain hazards on the job or accusing the employer of unlawful activity

Federal Laws (cont.)

- **Title VII of the Civil Rights Act of 1964 (Title VII):** This forbids discrimination/harassment based on race, color, religion, genetic information, national origin, sex (including sexual orientation and gender identity)
- **American with Disabilities Act (ADA):** The ADA prohibits discrimination against qualified individuals with disabilities
- **Pregnancy Discrimination Act (PDA):** This law bans discrimination against employees based on pregnancy, childbirth or related medical conditions

Federal Laws (cont.)

- **Uniformed Services Employment and Reemployment Rights Act (USERRA):** This law prohibits discrimination against employees based on membership in the uniformed services, application for membership or performance of military service
- **National Labor Relations Act (NLRA):** This protects union and non-union employees from adverse employment decisions based on “protected” activity

Federal Laws (cont.)

- **Age Discrimination in Employment Act (ADEA):** This bans discrimination against individuals 40 years of age or older
- **Family and Medical Leave Act (FMLA):** The FMLA requires covered employees (e.g., with 50 or more employees) to provide up to 12 or 26 weeks of job-related leave to eligible employees for certain kinds of absences and prohibits retaliation against employees for exercising their rights

Legitimate Reasons for Firing

- Poor performance
- Policy violation
- Failure to meet eligibility requirements
- Failure to meet job qualifications
- Layoff or elimination of position

CONSIDERATION #3: DISCIPLINE & DOCUMENTATION

Discipline and Documentation

- **Discipline process:**
 - Lays the groundwork for fair and legal firings
 - Puts the employee on notice of the problem and potential consequences
- **Documentation:**
 - Keeps record of the problem and actions taken, especially if termination is the last resort
 - Must be complete and thorough

Progressive Discipline

Most employers follow progressive discipline. For example, an employee may get:

- A verbal warning for first offense
- A written warning if the problem continues
- A final written warning
- Termination as a last step

Disciplinary Documentation

For complete and effective documentation, be sure to cover all the following elements:

- **The facts:** This includes details like the date, time and location of the problem
- **The specific rule or standard violated:** Identify whether the employee has violated a rule or standard
- **Objectives for improvement:** Indicate what you expect the employee to do to correct the problem

Disciplinary Documentation (cont.)

- **Suggestions for meeting objectives:** Communicate what you agree to do to help employee meet the objectives
- **Disciplinary action:** State the specific action you're taking because of the employee's nonperformance or violation
- **Consequences:** Clarify the action you will take later if the employee fails to meet the stated objective
- **Signatures and dates:** You and the employee should both provide acknowledgment

CONSIDERATION #4: REMOTE WORKERS

Terminating Remote Workers

- **Review state laws:** If the remote employee works in a different state than your business, different laws may come into play
- **Meet in person whenever possible:** It's a difficult conversation, and its best handled face-to-face
- **Have a witness present:** No matter how you conduct the meeting, have a witness attend

Terminating Remote Workers (cont.)

- **Bring your documentation:** This includes written warnings, performance reviews and any other pertinent records
- **Arrange for return of company property:** Never ask the remote worker to come to the office to drop off items
- **Communicate with the team immediately:** Avoid awkward and embarrassing interactions that may occur
- **Disconnect the worker from company systems:** Remember, remote workers are accessing your systems from home

CONSIDERATION #5: LAYOFFS

Layoffs

- **Consider which business functions are essential during this period:** This will depend on your industry, as well as if you are under a shutdown order or simply experiencing sales decline
- **Determine how many people you need to perform each function:** Be realistic and use objective data
- **Manage the impact on staff:** Try to minimize the number of times you make cuts. Ideally, it's better to dismiss more people at the same time vs. cutting a few each week

Layoffs (cont.)

- **Use consistent criteria for final decisions:** You may choose to look at tenure or seniority to make the determination — or relative productivity for certain positions, such as sales or production
- **Avoid discrimination:** As you make your decisions, be sure to consider any potential adverse impacts on protected classes of employees that could be considered discriminatory
- **Don't overlook state and local laws:** These often add additional protections

Layoffs (cont.)

Once you've made your final decisions, take these steps:

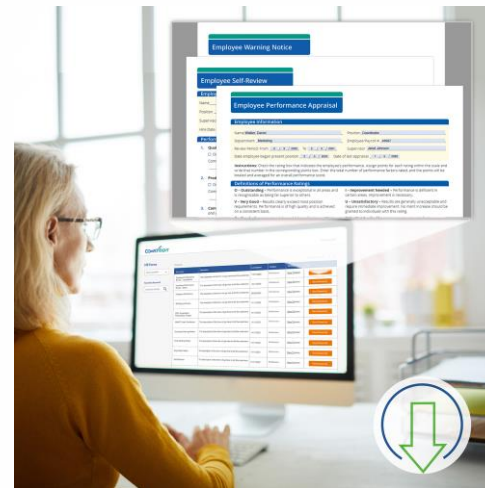
- Prepare a script or a detailed outline to follow
- Indicate if the layoff is temporary or permanent
- Be clear about future employment
- Inform the rest of your workforce
- Uphold notification laws

SOLUTIONS TO PROTECT YOUR BUSINESS

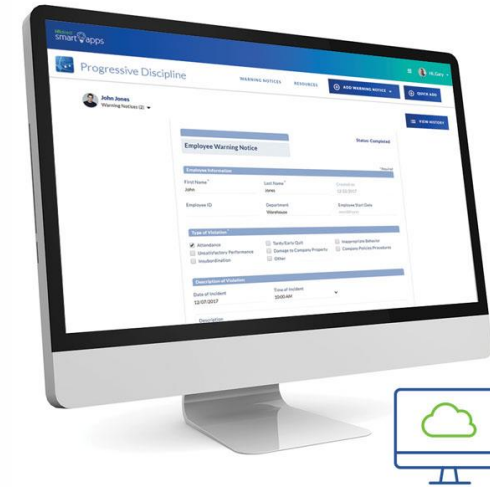
Compliance Solutions



Mandatory Employee Handout Service



Fill-and-Save HR Form Library: Performance Management



Progressive Discipline Smart App