

## MANAGING EMPLOYEE TERMINATIONS

Employee terminations cause more lawsuits against businesses than any other employer action. Despite the general rule that the employment relationship is “at-will” and can be terminated at any time, with or without notice, reason or cause, employers sooner or later learn that the many exceptions to the at-will rule make each termination perilous. This edition of the *Employment Law Advisor* focuses on employment terminations and the steps employers can take to reduce the risk of legal claims and liability.

### THE LEGAL LANDSCAPE

There are three categories of restrictions on employers’ ability to discharge employees: statutory, contractual and common law. Each restriction is a source of potential liability for employers. Statutory restrictions are those imposed by federal, state and local laws, such as laws prohibiting employment discrimination and retaliation. For example, it is unlawful under federal law to make a termination decision based upon an employee’s age, race, national origin, sex, religion or disability. In addition, Massachusetts also prohibits termination decisions based upon sexual orientation, ancestry, genetics or military service. Unlawful retaliation includes discharging an employee because the employee (i) participated in an activity protected by an employment statute (*e.g.*, filing a complaint, testifying, assisting or participating in an investigation, proceeding or hearing) or (ii) opposed an employment practice prohibited by the statute (*e.g.*, objecting to discriminatory hiring practices).

Contractual restrictions are those agreed to (or imposed) by the employer, including restrictions contained in employment agreements (*e.g.*, employment for a one-year term). Contractual restrictions may also arise from statements made in offer letters or through other written or oral promises of continued employment for a specified period of time or unless discharged for “cause.” In some instances, an employee handbook or particular personnel policies may create explicit or implicit restrictions on the employer’s right to discharge employees “at-will.”

Common law restrictions are those created by the courts to protect employees from some types of employer conduct not prohibited by statutes. Such restrictions include prohibiting discharges that violate “public policy,” such as firing an employee for refusing to engage in unlawful behavior on behalf of the employer. Massachusetts courts also hold that there exists in every at-will employment relationship a “covenant of good faith and fair dealing” that is violated when an employer discharges an employee in bad faith in order to

avoid payment to the employee of earned compensation. There are also other common law claims that can arise from the manner in which a discharge is handled, including claims of defamation, false imprisonment and intentional or negligent infliction of emotional distress.

### STEPS EMPLOYERS CAN TAKE TO REDUCE THE RISK OF CLAIMS AND LIABILITY

Employers should recognize that an employee termination may some day be judged by a third party (*e.g.*, a jury) who will evaluate the “fairness” of the employer’s actions. Although legal challenges are sometimes unavoidable, there are steps employers can take to reduce their risks and to ensure that the termination process itself does not lead to additional employee claims.

1. **Determine/clarify the precise reason(s) why the employee is being discharged.** When a termination decision is challenged as discriminatory or retaliatory the claim often turns on the employee’s ability to show that the reason given by the employer is untrue. When an employer says one thing at the time of termination (sometimes to spare the employee’s feelings) and something else later to the court or investigating agency, the employer’s ability to defend the case may be severely impaired.
2. **If discharging for misconduct, be certain that there was a thorough and objective investigation of the employee’s conduct.** Was the employee given an opportunity to explain his or her side of the story? Have any admissions by the employee been documented? If discharging for poor performance, determine whether the performance problem is well-documented and demonstrable.
3. **Avoid surprise.** Determine whether the employee was given prior notice that his or her misconduct or continuing poor performance would result in discharge. While not legally required, notice is expected by courts and investigating agencies, and the failure to provide notice is viewed with great suspicion (except in those situations involving egregious employee misconduct).
4. **Consider the appearance of unfairness, given the potential that the employer’s actions will be judged by a third party.** Is discharge clearly warranted for the employee’s misconduct or poor performance? Are there any mitigating circumstances? How have other employees been treated in similar situations? These considerations are of particular importance when a potential discrimination or retaliation claim exists.

5. **Review the employee's personnel records and any documentation relating to the discharge:** (i) to get an accurate picture of his or her work record; (ii) to make certain the documentation is complete; and (iii) to remove any materials that do not belong in the file.
6. **Review any employment agreements, offer letters, and pertinent personnel policies** to determine whether the employer has complied with all requirements, including any notice prerequisites.
7. **Assess whether there is any particular vulnerability to legal challenge.** Is the employee a member of a protected group (*e.g.*, age 40 or older)? Has he or she exercised a legally protected right recently (*e.g.*, taken Family and Medical Act leave, requested reasonable accommodation of a disability, filed a complaint of discrimination or harassment)? Are there any contractual restrictions to discharge? Are any public policy issues involved (*e.g.*, the employee objected to doing something because of legal or ethical concerns)? Will the employer arguably be in any way unjustly enriched by the discharge (*e.g.*, the employee loses a bonus or commission due to the timing of the discharge)?
8. **Plan the termination meeting carefully, taking into consideration the dynamics of the situation.** Who will be present? (More than one employer representative should attend.) Where and when will it be conducted? Be discreet. Avoid a "termination march" past co-workers. Avoid causing unnecessary embarrassment or emotional distress to the employee.
9. **Be truthful and accurate in telling the employee the reason(s) for the discharge.** Present the decision as definite and final (assuming it is). Offer support, but not in terms of reversing the discharge decision. Be knowledgeable and prepared to discuss the employee's termination benefits, including any severance pay, any accrued vacation pay, group insurance continuation, the form of reference the employee will receive, and the employer's position on unemployment benefits. Also be prepared to discuss any transition matters and any continuing employee obligations (*e.g.*, non-disclosure and/or non-competition restrictions). Prepare a memorandum documenting what was said in the meeting.
10. **Provide the employee with a final paycheck.** The Massachusetts Payment of Wages Act, M.G.L. c.149, §148, requires that discharged employees be paid their full and final wages on the date of discharge, and the Act provides substantial remedies to employees for violations. Final wages include pay for all accrued and unused vacation time. Employers should not make any irregular deductions (*e.g.*, for equipment not returned, property damage or outstanding loans) without careful consideration of the potential legal ramifications.
11. **Provide notice of the employee's (and other beneficiaries') rights** regarding health insurance continuation.
12. **Massachusetts law requires that employers provide terminated employees with a notice from the Division of Unemployment Assistance ("DUA") concerning how to file for unemployment benefits.** The DUA's notification pamphlet can be printed from: [http://www.detma.org/pdf/0590A\\_0504.pdf](http://www.detma.org/pdf/0590A_0504.pdf)
13. **Take all appropriate security measures to protect co-workers (if there are safety concerns) and to protect the employer's business interests** (*e.g.*, obtain employee's keys, pass cards, employer credit cards, terminate access to computer system, prevent the removal of confidential documents and materials).
14. **Take appropriate steps to keep confidential matters surrounding the discharge** (including any investigation leading up to it). Generally, when the discharge is for misconduct, a strict "need-to-know" rule should be followed to reduce the risk of a defamation claim.
15. **In appropriate circumstances, consider presenting the employee with the option of receiving additional termination benefits** in exchange for a legal release of all claims the employee may have against the employer.

## CONCLUSION

Our experience in defending hundreds of claims by discharged employees tells us that what is said at the time of termination, and how the termination process is handled by the employer, often determines whether an employee will subsequently file a legal claim. When an employee does file a claim, an employer's contradictory statements, insensitive conduct or other missteps at the time of termination almost always adversely impact the employer's defense of the claim and increase its exposure to damages. We believe that taking the steps outlined above will help employers manage employee terminations more effectively and avoid the mistakes that so often lead to employee claims.

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