

HR TOOLKIT

Terminations

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Introduction

Terminating an employee can be one of the most difficult parts of an HR professional's job. Many HR professionals rush through the process in order to make it less painful; however, this is a big mistake.

Having a termination process in place is just as important as creating a comprehensive onboarding program. Employers that don't follow best practices when deciding to terminate an employee can face claims of discrimination or wrongful termination.

In 2015, the Equal Employment Opportunity Commission (EEOC) secured more than \$525 million for victims of employment discrimination in private and government workplaces. In addition, more than half of wrongful termination lawsuits are won by former employees.

Given how expensive EEOC penalties and lawsuits can be for your organization, it is essential that your termination process is as thorough and professional as possible. Having a clear termination process in place can help ensure that you part with employees on the best terms possible and protect your company from potential litigation down the road.

More than
50 PERCENT
of wrongful termination cases are
WON
by former employees
(70 percent in some areas).



This toolkit serves as an introduction to some of the best practices regarding employee terminations and offers tips on how to protect your organization from common termination mistakes. This toolkit assumes that the employment relationship is at-will—if this is not the case, please contact your legal counsel for advice. In addition, if it looks like the termination is heading toward a legal dispute (for example, due to allegations of discrimination), it is best to contact legal counsel immediately to develop the best course of action for your business.

5 Things to Consider Before Terminating an Employee

By examining the following issues prior to termination, you can better protect your business from claims of discrimination or wrongful termination.

1. Is the employee a member of a protected class?

Under laws enforced by the Equal Employment Opportunity Commission (EEOC), it is illegal for an employer to discriminate against an employee (or applicant) because of that person's race, color, religion, national origin, sex (including gender identity, sexual orientation and pregnancy), age (40 or older), disability or genetic information.

Title I of the Americans with Disabilities Act of 1990 (ADA) prohibits an employer from treating a qualified employee (or applicant) with a disability unfavorably because of his or her disability. Under the ADA, employers must prove that they provided "reasonable accommodations" (unless doing so would create an "undue hardship") to prevail in a lawsuit claiming disability discrimination. Some state and local laws also provide additional protections against discrimination. For more information on the prohibited employment practices, contact Joanna Morrow.

Since 2011, the EEOC has recovered
MORE THAN \$52 MILLION
in cases involving disability discrimination.

2. Was the employee on FMLA leave or workers' compensation?

Employers should proceed very carefully when terminating an employee who is on FMLA leave or workers' compensation. Employers must be able to prove with documentation that the employee would have been terminated regardless of whether they used or requested leave in order to avoid retaliation claims. Timing is also very critical here. If an employee violated a policy six months ago, but now is being terminated for it, it could raise a red flag and give merit to the employee's lawsuit.

3. How will the termination affect workplace morale?

Terminations can create fear in the office and concerns about how the employee's workloads will be distributed. Before terminating an employee, determine how his or her workload will be distributed and how his or her spot will be filled. Your company's image—both internally and externally—should be considered as well, since letting go of employees can damage your brand and harm employee morale. Information about termination communication strategies can be found on Page 14 of this toolkit.

4. Does the employee have any remaining vacation time?

Whether or not you are required to pay out remaining vacation time will depend upon your state. Half of U.S. states require employers to pay out accrued vacation, and some treat vacation the same as wages, and, therefore, require it to be paid out immediately upon termination in accordance with state final paycheck laws. For more information on your state's requirements, contact Joanna Morrow.

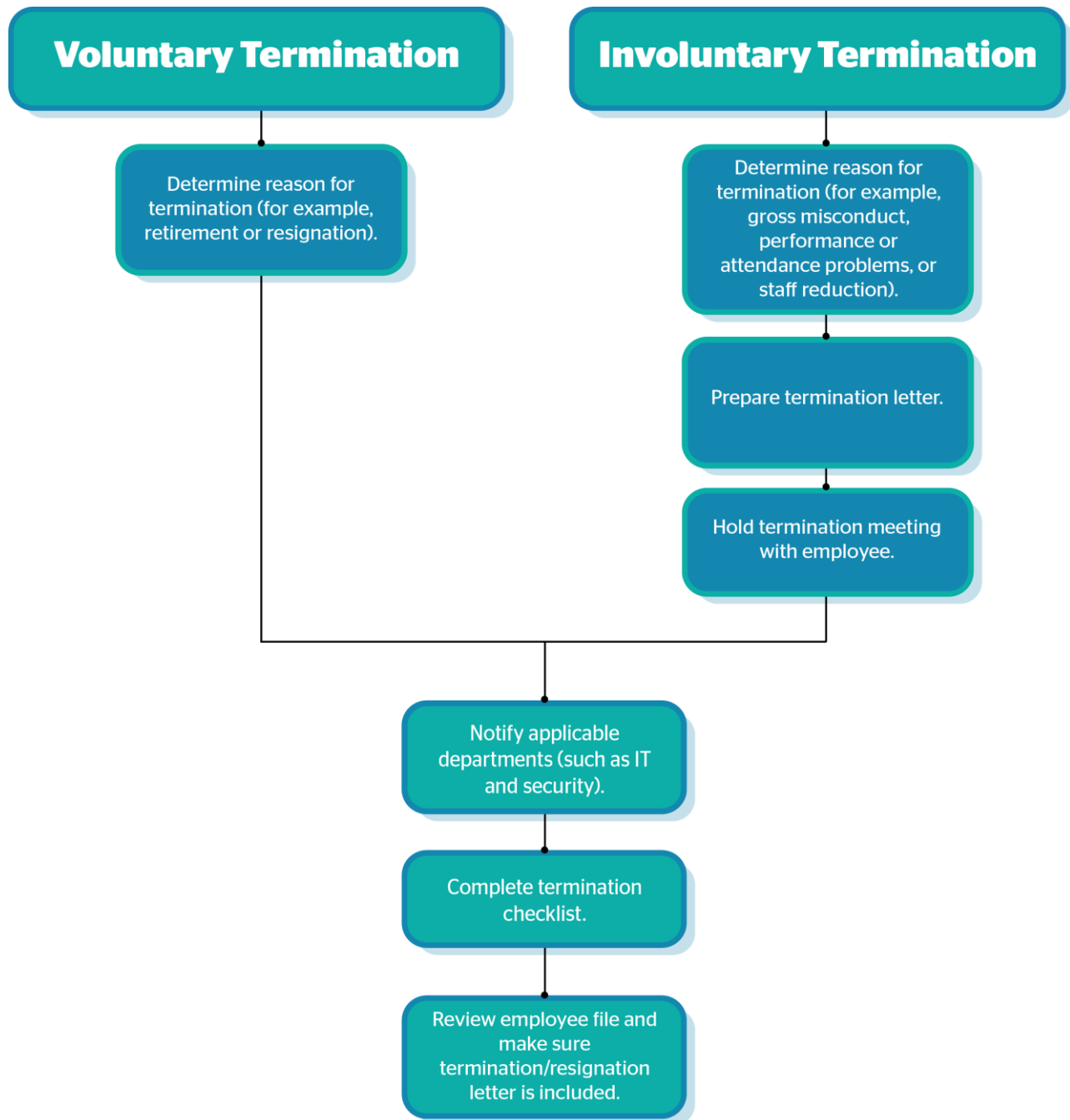
5. Is severance pay required?

Generally speaking, you are not required to offer severance pay to terminated employees. However, some states may have severance pay laws if terminations are due to a facility closing or layoffs. In addition, if you agreed to pay severance in writing or orally, failing to provide severance could be considered a breach of contract. If you maintain a severance policy, it should be applied consistently in order to avoid allegations of discrimination.

Severance can be offered in exchange for employees signing a release to any legal claims they may have. For this reason, it is a protective measure that many employers elect to take; however, it is not legally required.

Termination Flowchart

This flowchart provides a high-level overview of the termination process and should be used along with the resources in this toolkit. It assumes that the employment is at-will. Remember that state and local laws may vary, so it is important to consult with legal counsel to ensure compliance.



What should I do when I receive an unemployment claim?

Terminated employees may seek unemployment benefits. Unemployment benefits are administered at the state level, and employers contribute to this fund through taxes to the state and federal government. The federal tax is 6.2 percent of the first \$7,000 in annual wages to each employee. State taxes vary both in rate and the amount of taxable income. These taxes are typically paid quarterly.

Employers within a given state will pay different tax amounts based on how many former employees have drawn unemployment benefits—the more claims a company has, the higher tax rate it must pay. Therefore, an employer may find it appropriate to contest certain claims that may be unwarranted. Knowing which claims to contest, though, can be difficult. The following list provides some tips to guide you through the process.

1. Review the Claim

Once an employee has filed for unemployment, you should receive a notification from your state's unemployment commission. This notification will include the information provided by the employee, and a questionnaire (sometimes called a separation report) that asks for more details from the employer.

After you receive the notification, consider taking the following steps:

- ✓ Confirm that the individual filing the claim was an employee at your organization. This excludes independent contractors and temporary staffing agency employees.
- ✓ Verify all the information listed on the report—this includes the dates of employment, the termination date, wages and paid time off (PTO) payouts.
- ✓ Review the details surrounding the termination.



A typical unemployment claim increases the amount that a business pays in state premiums by

\$4,000 TO \$7,000

over a three-year period.

Source: Personnel Planners

2. Determine Whether You Should Contest the Claim

Employees have a legal right to claim unemployment if they lost their jobs through no fault of their own (for example, due to downsizing or a reduction in hours). Employees who are let go for performance issues, but fall short of misconduct, are usually eligible for unemployment benefits. In general, employees do not have a right to unemployment benefits if they quit voluntarily or engage in willful misconduct. However, exceptions do exist, so it is important to check with state and local laws when assessing an employee's eligibility for unemployment compensation.

Each state has a different definition of misconduct. Wisconsin, which has one of the oldest unemployment insurance law systems in the country, defines misconduct as shown below. Many states have come to rely on its precedents.

According to Wisconsin law, misconduct is: "One or more actions or conduct evincing such a **willful or wanton disregard of an employer's interests** as is found in **deliberate violations** or **disregard of standards of behavior** which an employer has a right to expect of his or her employees, or in carelessness or negligence of such degree or recurrence as to manifest culpability, wrongful intent, or evil design of equal severity to such disregard, or to show an intentional and substantial disregard of an employer's interests, or of an employee's duties and obligations to his or her employer."

Below are examples of two employee behaviors that a state might consider willful misconduct:

1. **Excessive, unexplained absences**—Employees that miss work without a good cause and/or fail to report absences according to company rules could be eligible for termination. It is important to remember that absences due to illness could trigger FMLA or state leave benefits, though.
2. **Violation of company policies**—Employees who steal on the job could be terminated for misconduct. Even if stealing isn't explicitly prohibited in your company's handbook, stealing is a standard that any workplace would prohibit.

Each state has its own definition of misconduct, so it is important to check with your state's laws for an exact definition. In addition, some states require employers to respond to unemployment claims (even if you don't plan to contest); otherwise, fines may be levied.

For state-specific resources, contact me or visit the Department of Labor's CareerOneStop [website](#).

3. Build Your Case

If you wish to contest the claim, the next step is to gather evidence and build your case. If you believe the individual has a right to unemployment benefits, skip this step and submit the separation report to your state's unemployment commission.

Collecting the following information may be helpful as part of the evidence-gathering process:

- Any disciplinary actions taken against the employee (for example, written warnings, infractions submitted by co-workers and managers, and suspensions)
- Attendance records detailing absences and tardiness
- A resignation letter or a letter from the employee asking for a reduction in work hours (if applicable)
- Written documentation acknowledging receipt of the company's employee handbook

Copies of this information should be sent to the officer responsible for conducting the investigation. An initial determination may be made without having a formal hearing where a representative from your company appears in front of a state agent or administrative law judge (ALJ). Some states, though, may require a hearing. Follow your state's requirements and answer all communications in a timely manner in order to avoid decisions that are made in default.

4. Be Prepared

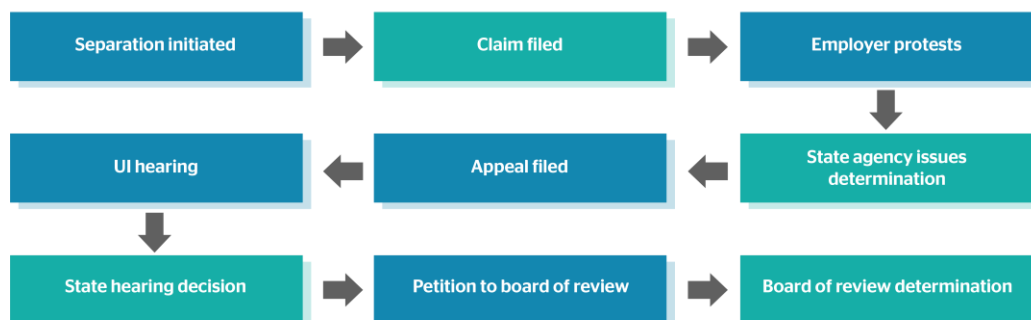
If an appearance in front a state agent or ALJ is required, make sure you prepare in advance for the hearing. A representative should be selected who has first-hand knowledge of the reasons for termination, and can speak truthfully and professionally on behalf of your organization. The representative should review the evidence, stick to the facts during the hearing and be on time, since the unemployment commission typically only reserves a few minutes for each case.

5. Review the Decision

After the investigation concludes, if the state agency rules in favor of the employee, instructions will be included on how to appeal the decision (this will vary by state). Typically, an explanation for the decision will be included, which can help employers decide whether an appeal is worthwhile.

Remember, not all unemployment cases will be won. If an employee failed to meet performance expectations, but showed no willful misconduct, you may lose the case or your appeal. This highlights the importance of hiring qualified candidates who are able to meet job expectations, so you can avoid performance issues and terminations down the road.

Example of the Unemployment Claims Process



10 Ways to Protect Your Business

While there is no guarantee that departing employees will not sue or seek unemployment benefits, there are steps you can take to reduce your risks. Being able to provide documented evidence of the decision-making process and rationale behind the decision to terminate is one of the most important ways you can protect your company. Keep a thorough record of the circumstances leading up to an employee's termination and have clear policies and procedures in place, so you can defend the decision during the contestation process from lawsuits or other claims.

The following is a list of documents that should be included in each employee's personnel file:

1. **Employee handbook acknowledgement**—Although it is not required by law, consider having your employees sign a form acknowledging that they received the handbook and understand its provisions. Keep a copy of this acknowledgment in each employee's personnel file. Depending on the language on the form, it can also demonstrate that the employee understands the employment is at-will.
2. **A progressive discipline policy**—Using a progressive discipline process in response to poor performance or rule violations can help employers combat unfair termination claims. The policy should be written in a way that will allow the employer the discretion to forego the progressive process if the situation warrants it. Disciplinary performance discussions should identify ways to correct the issue and the consequences of failing to correct it. At the end of the conversation, a corrective action form or statement should be signed by the employee and a copy should be placed in the employee's personnel file.



3. **Documentation of performance failures**—If you are terminating an employee due to performance issues, make sure you have documentation of performance failures and warnings the employee received in the employee's personnel file. Past performance reviews should mention performance issues in order to show the termination was not motivated by discrimination.
4. **Warnings and suspensions**—Make sure that all warnings and suspensions given to employees are clearly documented and placed in their personnel files. Warnings and suspensions should outline the issue at hand, outline resolution steps and clearly state what actions may result if the issue is not resolved. Employees should sign these warnings, acknowledging that they are aware of the issues and possible consequences. If an employee refuses to sign the document, make sure you have another individual in the room to witness the refusal.

5. **Statements for infractions**—Infractions that are reported by managers and co-workers should be clearly documented in an employee’s personnel file. The person reporting the infraction should complete a form detailing the issue so there is documented proof, instead of having just a few notes from HR.
6. **Record absences and tardiness**—Since employers must prove misconduct, it is important for employers to record all unapproved absences and instances of tardiness in an employee’s personnel files. Dates should be clearly marked, along with the reason for the absence or tardy and how the absence or tardy was communicated (via phone, email or text). This documentation can build the case for terminating employees who habitually miss work or fail to report on time.
7. **Termination letter**—Consider writing a termination letter to employees that confirms the details of the termination and what employees should know (such as COBRA eligibility or who to put down as a contact for future references). Employers should ask employees to sign this letter, but they cannot be forced to do so. A copy should be kept in the employee’s personnel file.
8. **Employment dates**—The employee’s date of hire, termination date and last day should be clearly documented in his or her personnel file. This information is especially important in the case of COBRA administration, since there are many deadline and notification requirements that employers must follow. Having this information clearly documented can save HR managers the hassle of trying to find this information retroactively.
9. **Performance reviews**—Some supervisors give employees inflated performance reviews since they are afraid that honest evaluations will damage their working relationships and employee morale. Inflated performance reviews give employees a false sense of security and create risks for your company. If you terminate an employee due to performance issues, but performance reviews show an average or fair rating, this could open the door for legal troubles.
10. **Workplace posters**—Some states require employers to post certain unemployment benefits posters at their workplace. A failure to furnish these required posters in places where they are easily visible to all employees can result in penalties for your company. For more information on your state’s requirements, contact Joanna Morrow today.

TIP: Save yourself time. Ask me for an easily customizable sample termination letter and employment termination policy.

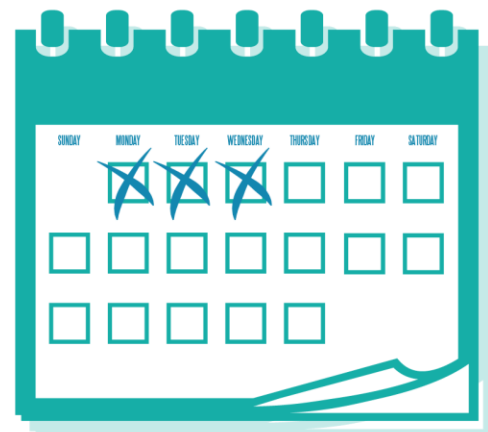


9 Best Practices for Terminating Employees

Another way to reduce your company's legal risks is to try and keep the termination process as positive as possible. A positive termination may sound like an oxymoron, but if executed properly, you can make the process less painful and protect your company from retaliation and discrimination claims. Below is a list of ways to improve the termination process.

1. **Employee perception**—Is the employee aware that there is an issue? Has he or she been given the opportunity to improve? Employees should be aware of the possibility of being fired. It should never be out of the blue.
2. **Prepare in advance**—Review your company's policies, contracts and past precedents to make sure you're following your company's protocols. Have a plan in place for what you want say and be prepared for how the employee may respond.
3. **Communicate with IT**—Let IT know which devices have been issued to the employee (cellphone, laptop, etc.) and when to retrieve them. All company and client data should be removed from devices that do not belong to the company—this is especially important as bring your own device policies become more commonplace. Work with IT to determine when logins and access to other technology should be disconnected.
4. **Meet in-person**—While it can be tempting to communicate via email or the phone, make sure to have the termination discussion in-person, unless doing so is impossible due to locations. Ideally, an HR professional should lead the conversation. Consider having another HR representative or a manager in the room as well as a witness, but make sure this individual is well-versed in termination best practices so they don't say anything that could get the company in trouble later on.

When to Terminate an Employee



Early in the week



Mid-to-late afternoon

5. **Timing/location**—In general, meetings should be between five and 15 minutes. Reserve a private room for the discussion, so employees don't have to worry about others overhearing the conversation. In addition, consider holding the meeting during lunch or when fewer people are in the office, so the terminated employee will not have to collect their belongings when everyone is around.
6. **Security**—Everyone will react differently to being let go. If you fear that an employee may react physically, call security or local law enforcement to escort the employee out of the building. In addition, make sure you collect company property, such as the employee's ID badge, laptop, company cellphone and parking pass before the employee leaves.
7. **Be honest**—Tell employees the truth about why they are being let go. Avoid apologizing since it may sound like you aren't confident in your company's decision. Do your best to maintain a positive and professional attitude throughout the conversation. Do not blame anyone else in the organization for the decision and make sure the employee knows the decision is not negotiable.
8. **Benefits communication**—Let employees know what will happen to their health insurance, 401(k) account, health savings accounts and any other benefits. Discuss any outstanding balances employees may have and whether they are eligible for COBRA coverage. Clearly communicating the status of their benefits upfront may help reduce the number of follow-up questions employees have.
9. **Treat employees with respect**—Follow the golden rule of treating others how you would like to be treated. Employees should be let go with dignity and respect. Even after they are gone, they will continue to be ambassadors to your brand or could even become a client down the road. End the conversation on a positive note by thanking them for all their contributions and wish them luck in their future.

How to Communicate the News

After an employee has been let go, it is important to effectively communicate the news to the rest of your staff. Below are some tips along with sample verbiage that you can use when communicating terminations to your employees.

Do's

- Make a straightforward, short announcement about the termination
- Be transparent about the news
- Minimize employee concerns and fears
- Thank the departing employee for his or her hard work

Don'ts

- Ignore the issue or sweep it under the rug
- Provide too many details about the termination
- Wait weeks to tell employees about how the spot will be filled or how workloads will be allocated
- Apologize or seem unsure about your decision; be confident

SAMPLE EMPLOYEE NOTIFICATION:

"John Smith is no longer with the company, effective today. We appreciate all of his hard work over the years, and we wish him the best in his future. In the next few days, we will discuss how his responsibilities will be divided up and reassigned among the team while we recruit for the opening. If you have any questions, please see me privately."



In Conclusion

Regardless of the reason for an employee's separation, terminations can be stressful for all parties involved. Help minimize your stress by developing a comprehensive termination process. By following the best practices outlined above and creating protocols to promote proper documentation, you can defend your company against claims of wrongful termination and costly legal fees.

If you have any questions about the resources mentioned in this toolkit or for state-specific guidance, please contact Joanna Morrow today at 602-903-4047.



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