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# Six Pitfalls to Avoid in Employee Termination

A White Paper

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The Nation's Compliance Expert  
Safety ♦ Environmental ♦ HR

If you have not been sued by an employee you've terminated, don't count yourself lucky yet.

With unemployment at the highest rate since 1983, the number of lawsuits filed by terminated employees is at an all-time high. Just Google the phrase "how to sue when laid off," and you'll find over half a million articles.

The U.S. Equal Employment Opportunity Commission (EEOC) reported a 15 percent increase in the number of bias charges filed with the agency in 2008, on top of an 11 percent jump during the two prior years.

Even if you successfully defend your case, you still lose. According to California employment and labor law attorney John Boggs, the legal fees incurred by a company for a successful defense against a single claim brought by an employee are often between \$75,000 to \$125,000.

"Many employees look upon a legal settlement for a payday at a time when a new job is hard to find," Boggs said. "The time for employers to protect themselves from losing a lawsuit is before they terminate the employee."

While you can't prevent employee lawsuits, the actions that you take prior to employee termination can have a major impact on whether or not you win the case in court, or on any settlement negotiated outside of court.

Here are six pitfalls to avoid in employee termination:

## 1. Hiring a high-risk employee.

Start with the basics — drug, background, and reference checks are designed to protect companies from bringing problem employees into the workplace. While most companies now perform these checks, it's amazing how frequently new employees are hired before all of the results are confirmed and approved.

- **RECOMMENDED ACTION** — Have safeguards in place to ensure that applicants are not hired until a full due diligence is completed and reviewed by all required managers. These safeguards will include mandatory processes, signoffs, and checklists before hiring — or they could be delivered, through an automated human resources software solution. Regardless of the system, it must be bulletproof with no workarounds or shortcuts.

*HotlinkHR™ forces compliance with the applicant review and hiring process, so that job offers cannot be made until all required checks have been completed and reviewed. The CFO of a Southern California dealership remarked, "It's a relief to know that we are doing the best possible job of hiring quality employees. And if the rejected applicants end up going to work for my local competitors, well, that doesn't hurt my feelings one bit."*

## 2. Using out-of-date and noncompliant employee handbooks and policies

Here's a quick way to increase your liability risk — Exhibit A in the courtroom is your company's handbook, with a policy that is not in compliance with the prevailing state or federal laws.

How can a company stay in sync with a steady stream of changes in employment law? In 2008 alone, significant changes were made to the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), and new military leave requirements. Any breach in corporate compliance could open the door to potential employee legal action.

It's a daunting task to stay up to date, even with Human Resources staff attending training and continuing education classes. Policies and handbook changes need to be triggered by changes in the law, not "when there is time" or on a once-a-year refresh.

- **RECOMMENDED ACTION** — Identify a source of expert advice for the company policies and employee handbook, including a process to ensure updates and training when the law changes. This might be a labor attorney who works on retainer to your firm, an HR resource that you subscribe to, or an automated system that updates an electronic database where your employee handbook and policies reside. Regardless of the system you select, be sure that you have some system in place.

*HotlinkHR is updated automatically each time there is a change in federal or state law. Alerts are sent electronically to managers, and employees are required to sign off on a handbook each time it is viewed.*

### 3. Vague or missing job descriptions

If you terminate someone for nonperformance, the court will look to the job description as the standard against which the employee's work should be measured.

Be honest: Does your organization have current job descriptions for all employees? Do the job descriptions clearly specify, in detail, the responsibilities, essential job functions, and reporting relationship?

You can expect a plaintiff's attorney to cast a wide net in order to demonstrate discrimination against the employee. Allegations of gender or racial discrimination and charges of retaliation make up the two biggest categories of employee complaints to the EEOC. When job descriptions are well drafted for all employees, a company can demonstrate consistent expectations among all employees.

- **RECOMMENDED ACTION** — Do not treat job descriptions as a quick task that any manager can perform. Adopt a job description format that conforms to best practice standards for complying with the law and that is consistent within your industry. Seek the advice of an employment attorney, trade organization, or other trusted resource.

*HotlinkHR has a library of job descriptions prepared by labor attorneys and refined through years of scrutiny in court cases. These job descriptions are embedded within the total employee management system and are linked to performance evaluations and to disciplinary actions to provide a closed-loop system.*

### 4. Performance Reviews that Avoid Difficult Conversations

A performance review is your company's official statement on how satisfactorily an employee performs his or her required duties. If an employee is terminated for performance reasons, there had better be a history of performance reviews that reflect poor performance.

A performance review that avoids a frank discussion geared towards areas for improvement and does not clearly call out unacceptable performance issues is unfair to employees and a potential risk for employers.

A review full of "happy talk" that misses fact-based observations of substandard performance will be a gold mine for your terminated employee in a courtroom.

- **RECOMMENDED ACTION** — The organization needs a standardized performance evaluation system that is based on job-related objective criteria as specified in the job description.
- **RECOMMENDED ACTION** — Supervisors need to be trained on how to conduct consistent evaluations and give constructive feedback to employees.
- **RECOMMENDED ACTION** — A fail-safe process is needed to ensure that all employees sign an acknowledgement that they received and reviewed the performance appraisal.

*HotlinkHR's forced compliance system links content from the job description to the performance review, enforces the regular review of all employees' performance, and requires employee signatures on their reviews.*

## 5. Inconsistent and Poorly Documented Disciplinary Action

“That’s not fair. Joey did the same thing and didn’t get in trouble.”

The familiar playground refrain of inconsistent enforcement of rules, and of inconsistent punishment for breaking rules or not meeting expectations, is the central and often the winning argument in employee discrimination lawsuits.

There are two primary reasons for employee discipline:

1. Performance deficiency — the employee follows the rules but doesn’t perform to the expectation of the position;
2. Company Policy Violations — the employee may perform well, but doesn’t follow company policies and rules.

If an employee perceives unfair disciplinary treatment, whether for reasons 1 or 2, he or she is likely to become disgruntled, resulting in a further drop in performance. Often there is a second and more damaging impact, as the wronged employee becomes a vocal anti-company voice to other employees.

It is critical to have bulletproof documentation in the company files before any termination for disciplinary reasons.

- **RECOMMENDED ACTION** — Be aware if the employee is a member of a protected class, which can be defined by age, race, gender, or disability. If so, review the intended disciplinary action to evaluate if it could be interpreted as discriminatory activity.
- **RECOMMENDED ACTION** for performance deficiency — Build your case. Do you feel comfortable that an outside investigator, examining written evidence, will find that the employee did not meet the standard of performance and that you have treated others in similar situations with the same level of discipline?
- **RECOMMENDED ACTION** for rules violation — Build your case. When there is a rules violation, be sure you have a written record of an investigation, signed under penalty of perjury. This should include interviewing the employee in question, with a witness present and a signed statement plus a wrap-up memo.
- **RECOMMENDED ACTION** — There are many legal considerations with discipline. Be sure that you have consulted an employment attorney on the particular situation or similar situations.

*HotlinkHR forces compliance with many elements of the disciplinary process, including linking disciplinary statements to company policies and requiring signatures on prepared documents.*

## 6. Botched Employee Termination

In the past, employers often tried to “buy off” employees who were being terminated by essentially swapping a sweet severance package for the former employee’s signature on an agreement not to sue. This is often not possible economically, because of tight financial conditions of companies. It is also compounded when large numbers of employees are laid off at one time.

This puts the pressure on terminations to be managed within the company by a forced compliance process, so that the termination can withstand a legal challenge.

There are many legal considerations to employee termination; the first consideration is human. How a termination is handled on a personal level can make a huge difference in whether the former employee files a lawsuit. Treat employees with fairness and dignity during the termination process, and they are less likely to want to “get even” with the company.

Common lawsuits filed by terminated employees are based on accusations of:

1. Discrimination against a protected class, such as age, race or gender
  2. Underpayment of wages and benefits
  3. Inadequate warning that a position was about to be eliminated
- RECOMMENDED ACTION — Ensure that the termination process complies with all laws, such as the Older Workers Benefit Protection Act, which allows 45 days for workers over age 40 to sign a severance agreement and requires employers to disclose information about the ages and job classifications of other employees who were retained or terminated.
  - RECOMMENDED ACTION — Conduct workforce analyses in advance of mass layoffs to ensure that no minority group is disproportionately affected by job termination.
  - RECOMMENDED ACTION — Ensure that company termination procedures are in place, including documentation and review of termination decisions by higher-level management.
  - RECOMMENDED ACTION — Consult an attorney prior to any termination action.

*HotlinkHR forces compliance with a termination process established by the company and compliant with the law, including creation of the necessary documentation and recording of electronic signatures*

Don't breathe a sigh of relief too soon after a termination. EEOC guidelines allow 180 days for a laid-off employee to file a grievance; many state equal employment agencies have a window of 300 days.

The best defense is a human resource process that is legally compliant and consistently applied throughout the entire organization. Where compliance can be enforced by an automated system, the management burden is minimized, employees are treated consistently and appropriately, and business risk is minimized.



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KPA's onsite, on-call, and online environmental and safety services reduce accidents and associated costs while ensuring the highest level of compliance with EPA and OSHA regulations.

HotlinkHR™ is an online system that cuts legal and administrative costs, forces compliance with state and federal regulations, and increases protection against employee lawsuits.