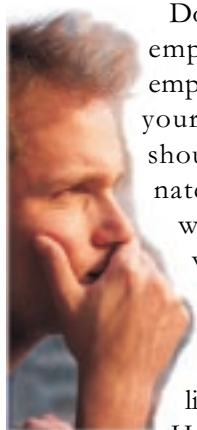


## Legal Pad

### How to Avoid Liability From Terminating an Employee (Something to think about.)

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Do you have an employee whose employment with your company should be terminated? Are you wondering whether you can terminate the employment without liability later on?

How do you reduce your risk of a lawsuit? If these are familiar questions, read on.

The general rule of thumb on termination of employment in Oklahoma is that employees are employees at will and their employment may be terminated without liability, provided that there are some exceptions to that rule. Some exceptions include:

1. An employment contract. The employment contract provides the terms that must be followed to bring about a termination of an employee's employment. (As a personal bias I prefer not using the language "terminate the employee," which has another meaning.) A labor union contract is a contract and special rules apply.

2. If the employee is in a classification protected by law. Title VII of the Civil Rights Act of 1964, 42 USC Section 2000e, forbids discrimination in the terms and conditions of employment, including dismissal of employment, as well as job applications, interviews, hiring, retention, promotion, compensation and benefits. Title VII exempts companies with fewer than 15 employees and limits damages of companies with 15 to 100 employees to \$50,000. (Other limitations apply to larger

companies.) Forbidden grounds of discrimination include race, color, religion, sex, pregnancy and national origin. The Age Discrimination in Employment Act, 29 USC Section 621, protects individuals over 40 from age-based job discrimination. Employers with less than 20 employees are not covered by this Act.

The safest way to terminate an employee is establish a non-discriminatory or business reason to carry out the employment termination. Consider and follow the following guidelines, which focus on protecting the company from a lawsuit, and not necessarily on the most expedient method of carrying out the employment termination:

1. Set up a procedure to document the employment history and get recommendations from other company supervisory personnel. With each employee, have a personnel file that contains all of the pertinent facts that make the Company unhappy with the employee, all of which should be documented as the matter moves along. Verify that the information is objective. Employment reviews should be included and reviewed to be sure the current concern is consistent with the reviews or that more documentation is needed to justify the termination. The objective is to establish a consistent non-discriminatory or business necessity for the employment termination. A terminated employee will try to show discrimination.

2. Review the facts for an employment contract or company policy, which can be an employment contract as to what it covers. Is the contract or the policy being followed for the termination?

3. Did the employee understand what is expected of him or her? Can that fact be verified with the personnel file? If the termination is contemplated because of a single action on the part of the employee, is termination the proper punishment or should a warning be given? Has

the employee been informed that there is something wrong with his or her performance? Will the termination be looked at as fair by others? If the employee's conduct is a threat to himself or herself or the safety of others, then the termination is easier to justify. Will the termination be a surprise to the employee?

4. Write and put the reason for the termination in the employee's personnel file and substantiate the fact that the offending behavior occurred, referring to any policy of the Company that is violated. Include verification that the employee knew of the policy or proper behavior and any prior counseling on the subject. Include reference to any prior performance evaluations that may refer to prior incidents of the behavior. Only include things that you are willing to discuss with the employee and in front of a jury.

5. Consider whether to provide severance pay, and is vacation pay accrued for the employee? Discuss with the employee whether unemployment compensation will be available. If an employee is terminated for cause (meaning misconduct on the part of the employee) then the employee will not be entitled to unemployment compensation. If you choose to pay benefits that are greater than 6 months of unemployment compensation, then you can ask for a release from the employee filing the claim, since it affects your unemployment compensation tax rates. Don't let word of the pending termination leak out before the event.

6. In conducting the employment termination, have two people involved that represent the Company, one as a witness, and in a private room so there is no public dis-

play or words. If you anticipate the employee will threaten the safety of those involved, have a security person on standby. Collect any Company property at the time, including credit cards and keys and arrange to retrieve any Company property that may be at the employee's residence. Discuss the kind of reference you will give or agree to give no information except to verify employment. Do not provide information to other employees about the termination unless they need to know.

Consider all the factors suggested and you will reduce the likelihood of a court challenge to your actions. The foregoing list does not cover every contingency, but will work as a good operating agenda for most employment terminations. If you have serious concerns and anticipate that the employee will likely sue your Company, then consult a personnel expert or an attorney. It can become low cost insurance to protect you (your Company) from loss. It is not as easy as the rumor mill might suggest for an employee to establish a case for employment discrimination. Caution is required, but time works in favor of the company. In order to make a claim, the employee claiming under Title VII must go through the Equal Employment Opportunity Commission so that it can evaluate the potential claim and perhaps try to resolve the matter itself. If it or a counterpart state agency does not act, it must give a right to sue letter

to the employee. The claim must be made within 180 days of the incident, so there is a short statute of limitations.

An added note to keep matters in perspective from an asset protection viewpoint. When I evaluate the risk of operating a particular type of business, I try to assess how risky is the activity that is to be conducted by the business. In addition, I assess whether there will be employees. Having one or more employees other than the owners is inherently risky and I normally recommend that a business that has employees be formed as a corporation or limited liability company so that the owners stockholder(s) or interest holder(s) are generally protected from personal liability for actions taken by the company or its employees. The second part of protecting yourself is to take the necessary steps to be sure your company keeps proper minutes, has a bank account separate from the account of the owner, files all of the required tax returns, and generally acts like a business and not just the alter-ego of the owner(s). Preventive action like these items can prevent a disastrous consequence whenever you tackle a risky activity like terminating an employee's employment.

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