

Employee Layoffs and Terminations: A How-To Guide

By Karen Sutherland

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Legal Background

Washington is an at-will state, meaning that, *in most situations*, employees can be terminated at any time, with or without notice, and with or without cause. There are exceptions, however, such as if there is an employment agreement (which could be individual or a collective bargaining agreement), where the termination would violate public policy (such as if it is motivated by or related to the employee exercising a legal right, or if the employee violated a company policy in order to save someone's life), or where it is because of the employee's disability (unless the disability could not be reasonably accommodated), race, sex, marital status, national origin, creed, religion, being over 40, or other protected class.

If the employee fits within any of the exceptions to at-will employment listed above, then the employer will need to be able to show that the termination was in accordance with the employee's contract (if there is a contract), and that the termination was not motivated by a reason that violates public policy or is because of the employee's membership in a protected class.

Additionally, if the employer is planning a mass layoff or plant closing and the employer has more than 100 employees, the Worker Adjustment and Retaining Notification Act (WARN), 29 USC § 2101 et seq., 20 CFR 639 probably applies.

If the employees who are being laid off or terminated work or live in another state, the laws of the other state may impose obligations in addition to, or in place of, the obligations that are present in Washington.

Practical Guidelines

Not all of these practical guidelines are required by law. However, following them will make it easier to defend yourself as an employer if your decision to terminate or lay off an employee or group of employees is later challenged, and will probably make the process smoother. If you are a public entity, additional steps may need to be taken that are not described here.

- If there is a possibility that the employee is covered by a contract (including a verbal contract or binding personnel manual), be sure to follow all of the steps in the contract or manual.

- If there is a possibility that the employee is a member of a protected class and the termination is for disciplinary or performance reasons, document the reasons in writing as they occur, share the information with the employee, and provide clear guidelines on what the employer's expectations are and on how to improve. Only terminate the employee after documenting that the expectations have not been met, and after the employee has had an opportunity to correct the problems. Contact a lawyer who practices employment law or an impartial human resources professional to double-check your decision.
- If the problem is so bad that you believe it merits immediate termination, double-check your decision with a person who was not involved with the problem, such as an attorney or a human resources person from another division or company.
- Be consistent - similar problems generally deserve similar treatment. For example, if one employee who strikes a co-worker is fired but another employee who engages in the same conduct is given a written reprimand, then the fired employee may claim that he or she was fired because of membership in a protected class, or in retaliation for exercising a legal rights (such as having an L&I claim, or being absent for jury duty or FMLA leave, etc.).
- If you are anticipating a layoff, after you have selected the employees to lay off, double-check your decision for possible unintentional bias. You may be subject to challenge if a disproportionate number of women, employees over 40, disabled employees, or employees who are members of some other protected class are among the employees being laid off. For assistance with this task, contact a lawyer who practices employment law.
- Keep in mind the effect that layoffs and terminations have on the employee's life. Most employees will remember the moment of termination forever, and I recommend that you try to lessen its traumatic impact.
- Give the termination news in person - not by e-mail, telephone or written note.
- Do not make jokes about the termination during the termination process, even if you are nervous and/or tired because you have been terminating employees all day.
- Do not terminate the employee in front of co-workers (except where logistically necessary for mass layoffs).
- Give the employee time to compose himself or herself before having to face co-workers.
- Terminating employees on a Friday afternoon often means that the employee will spend the weekend feeling helpless and cut off from resources. Terminating an employee during the workweek allows the employee to immediately contact the state unemployment office and to begin making contacts with career counselors or others.

- Try to have someone in management who knows the employee present for the termination. A team approach (two management representatives or a management person and a human resources person, or a management person and a career counselor) is good because one person can be taking notes, and there is more than one witness to what is said. It may also be helpful to have another person present to lessen the chance that the employee will react abusively.
- If you anticipate that the employee will react abusively, evaluate the safest way for you to conduct the termination, such as a private area of a public place (restaurant booth with a ready escape route, for example). If you expect the employee to react violently, contact a professional for advice prior to the termination.
- Unless the employee reacts abusively, allow the employee time to gather his or her things and leave in an unobtrusive way. Employees respond negatively to being escorted out of the workplace by a guard because it makes them feel like criminals.
- Arrange for deactivation of computer passwords and access cards and other sensitive matters to coincide with giving the employee news of the termination, not before termination occurs.
- Let the employee know what you plan to tell co-workers, vendors and customers about the termination, and what information you will provide to reference seekers.
- If the employee is not expecting to be terminated, the employee probably will not fully grasp what you are saying the first time you say it. Repeat the information several times if necessary.
- Do not make excuses or get in an argument about the grounds for termination. Make it clear that the decision has already been made, and is not negotiable.
- If you are aware of any specific concerns that the employee will have about his or her future, try to get the answers ahead of time - such as whether there will be a severance payment, whether the employer will provide a reference, how health insurance and retirement plans will be handled, outplacement services, EAP, etc.
- If the employee has possible claims against the employer, prior to termination contact a lawyer who practices employment law about a reasonable severance payment in exchange for a release.
- If the employee is eligible, let the employee know how to apply for unemployment benefits.
- If you have a noncompete agreement, nondisclosure agreement, nonsolicitation of employees agreement or similar agreement that is effective after termination, remind the employee about it and give the employee a copy to take home.

- If you do not have a noncompete agreement, nondisclosure agreement, nonsolicitation of employees agreement or similar agreement and you would like one, it can be negotiated in exchange for a severance payment or other consideration (like continuing to pay health insurance premiums).
- Develop a checklist ahead of time of things that need to be covered in any separation from employment (whether voluntary or involuntary), such as a list of specific equipment and keys that need to be returned, passwords and access cards that will need to be disabled, covering the employee's workload until a replacement is obtained, notification to co-workers, vendors, and customers, COBRA information, keeping a current address for W-2's, etc.

Keep in mind that there are many other things that should be considered during the termination process. In order to make the process go as smoothly as possible, contact an attorney whose practices includes employment law before terminating the employee.

These materials are not intended and should not be used as legal advice or other recommendation. If you need a legal opinion on a specific issue or factual situation, please contact an attorney. Anyone using these materials should not rely on them as a substitute for legal advice.