

Guide to Employee Terminations

An Employer's Foundational Handbook for Separations



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Termination is difficult.

We get it. It's hard to see a person who's a great fit or who does a tremendous job voluntarily leave the company. Morale and workloads are affected, and then there's the paperwork landslide and increased workload that follow.

And *involuntary* dismissals? Many of us would rather things get better on their own. But our 45-plus years in the HR industry tell us that they often don't. Instead, performance and conduct issues usually get worse over time, and not dealing with them from the get-go can open the door not only to an uncomfortable work environment and high turnover, but also to liability.

Our foundational guide to terminations will help you build the necessary knowledge and skills to effectively terminate employees when you need to.

Know Your Termination Basics

Types of Terminations: Retirements and resignations in which the employee makes the choice to leave the company are classed as **voluntary terminations**.

Involuntary terminations happen when an employer requires an employee to leave the company. These can be layoffs or firings, and terms are occasionally negotiated between employer and employee.

At-Will Employment

At-will law prevails in California, which means that either employer or employee can end the employment relationship at any time, with or without cause. However, over time, exceptions to at-will have arisen via courts and legislature, and company behavior now sets a precedent that must be met in future actions with other employees.

The result is that, despite signed at-will agreements, specific classes of workers are strongly protected against unfair dismissal and can file wrongful termination lawsuits.



Avoiding Lawsuits

First and foremost, terminating an employee should always be done with forethought and considered action. Second, take the purposeful steps discussed in this guide, which may help to prevent a lawsuit or to limit your liability should one occur:

Avoid Discrimination and Retaliation Like the Plague!

As an employer, it's important to know that a variety of characteristics are strongly protected under California law.

Discrimination

Anti-discrimination statutes protect permanent and temporary employees, unpaid interns, and candidates against all forms of discrimination—not just unfair hiring and dismissal practices—based on certain characteristics, including:

- ▶ Age (40 and above)
- ▶ Skin color and race (including hair texture and ethnic hairstyles)
- ▶ Religion (including religious dress and grooming practices)
- ▶ Pregnancy, childbirth, breastfeeding, or related conditions; or denial of pregnancy disability leave, or reasonable accommodation
- ▶ Sex, including sexual harassment (Federal law includes payment of wages)
- ▶ Gender, gender identity and gender expression (includes transgender and transitioning or transitioned persons)
- ▶ Sexual orientation
- ▶ Marital status
- ▶ National origin and ancestry (including driver's licenses for undocumented workers)

Discrimination (continued)

- ▶ Physical or mental disability
- ▶ Medical condition (cancer/genetic characteristics/genetic information)
- ▶ Military and veteran status
- ▶ Union activity

Beware of joint liability for discrimination against temporary workers. In California, temps hired via a staffing agency may be considered both your employee and the staffing agency's employee. You are responsible for terms, conditions, and privileges you control; the same goes for the agency.

Courts pay attention to who had control over the working conditions at issue. Therefore, if problems arise with a temporary worker, be sure you and your staffing company are on the same page about where responsibility lies and who will do what to resolve the issue. Investigate the issue if necessary, and document the issue, findings, and resolution.

Retaliation

You cannot retaliate against an employee or applicant because they exercise a legally granted right, such as making a complaint about harassment on the job.

Retaliation can include heavy-handed actions like demotion or termination; middle-spectrum moves like a transfer to a less-prestigious location or unwarranted reduction of work hours; or, on the subtle end of things, ignoring, isolating, or undermining an employee.

Retaliation can come from ownership, management, or fellow employees. Any way it happens, it's strictly illegal.

Protecting Your Business Against Claims of Retaliation

How do you protect your company against retaliation claims? First, you must ensure that anyone who files a legal complaint or otherwise exercises a legal right is protected against it; second, you must deal with disciplinary problems consistently across your employee pool, including documentation and disciplinary decisions and actions.

1. Use Your Power for Good: If you receive a complaint, know that it's not a sign of disloyalty to your company. Complaints can be uncomfortable to make, and most persons who make them are reaching out to those in authority for help. As the authority, employees need you to fairly enforce protections and discipline. Being the boss comes with power. Use it for good.

2. Write It Down: Have a written policy prohibiting retaliation and train your employees—particularly supervisors and managers—on what comprises retaliation and what it can look like in its various forms.

3. Keep It Private: Inhibit retaliation by keeping your complaint procedure private. Limit knowledge of a complaint to people who need to know about it.

4. Make It Fair: Conduct a fair and reasonable investigation. Speak to the people involved, document objective facts, and base decisions on adequate information. Consult legal counsel if you're unsure about the consequences of your decisions.

5. Take the Course: We strongly recommend you and your employees complete an online harassment prevention training course if you have not already done so. If you have five or more employees, California law requires completion of such a course every two years.

Retaliation, Discrimination, and Employees with Discipline Problems

The above discussion is not to imply that an employee with a disciplinary or performance issue who also happens to have exercised a legal right, or who claims discrimination, can't be terminated for a legitimate, non-discriminatory reason.

The action is legal if the termination is made in response to the employee's performance and disciplinary history and is not a retaliatory response to the employee's exercise of right or claim of discrimination.

Document, Document, Document: This is where documentation of performance and conduct issues are critical, and why Allevity—HR professionals in business for more than 45 years—places such importance on it.

If you have documented an employee's disciplinary problems consistently, you should be able to prove your motive for a termination (demotion, transfer, what have you) was performance- or conduct-related, not a retaliatory or discrimination-based action. That kind of documentation can't be overvalued in the effort to protect your company from liability.

Consistency Is Your Ally: Setting clear work and performance expectations for employees, then treating your best worker and your worst one consistently when they don't meet those expectations should be standard policy.

Consistency across your employee pool should be your default. Like thorough documentation, the benefit of consistency across your employee pool can't be overvalued when it comes to protecting your business against charges of discrimination, retaliation, or unlawful termination.

The above practices speak well for your business, and when courts find they are followed with good faith, they will generally support the actions taken despite a possible disagreement with the result.

Employee Discipline

Yet another ally on your side is how you handle employee discipline. There are laws and statutes that when followed will support your decision-making process, but a good employee discipline process offers more.

Such a process furnishes us with the opportunity to document performance and conduct issues, thus protecting our businesses in the long run, and helps sort issues that can be resolved and improved upon—bettering your employee and decreasing turnover—from those that can't.

For more information on employee discipline, see our [Guide to Employee Discipline](#), also part of Allevity's online Content Library. The guide to discipline contains information on:

- ▶ Poor performance versus poor conduct
- ▶ Dishonesty, absenteeism, and tardiness
- ▶ Progressive discipline and the pros and cons thereof
- ▶ Warnings and Investigations
- ▶ Documenting disciplinary actions, and
- ▶ Deciding on and carrying out a termination

Congrats!

If you've read this far, we're impressed!

HR certainly has its convolutions, but it's what we do best. We hope we've made a complicated subject accessible and useful to you.

Look for companion pieces to this article to come in our Content Library.

Allevity is here to help

We are dedicated to being a resource for you and for our community. If you found this article helpful, please let us know! And, of course, we're here to answer your questions.

**Please note this article does not constitute legal advice and is not a substitute for it. Before taking action, consult legal counsel if you're unsure about the consequences of your decisions.*

Need help with clarification on the termination process? We're here to help!

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