



# Supervisor Newsletter

## Terminating Problem Employees

Firing an employee can be one of the most difficult things a supervisor ever has to do.

The May *Supervisor Newsletter* covered the importance of documenting willful misconduct before terminating a worker for a violation of the company substance abuse policy or other company policies. This issue will outline the best practices for termination that can help protect the company from litigation.

Following the proper procedures begins long before the termination date and will help avoid frivolous wrongful termination lawsuits.

The most important step in the employee dismissal procedure is to be sure to understand the employment laws for your state, your industry, and your company size. While it is true that most states are "employment at-will" states (this means that the law presumes that an employer may hire or fire an employee for almost any reason or no reason at all), it is always best to consult with competent legal counsel before firing an employee.

Consulting with an employment law attorney before firing a worker can save the company time and money later. Members of the Drugs Don't Work (DDW) program have free access to the DDW lawyer regarding any drug free workplace issues, and supervisors should always consider attorney consultation before taking the final step in the termination process. For legal assistance, contact Tommy Eden or Jonathan Martin at Constangy, Brooks, Smith & Prophete, LLC, headquartered in Atlanta.

## State and Federal Requirements

Some companies fall under federal drug and alcohol testing regulations and must comply with federal rules that dictate the

steps to be taken when an employee fails a drug test. Public and private employers that do not have workers covered under federal regulations must adhere to state laws, and there are state law differences that govern the steps supervisors must take when an employee fails a drug test.

In some states, a company cannot fire an employee for the first failed drug test if the individual agrees to complete a rehabilitation program. However, in most states, an employee can be fired for well-documented unacceptable work performance, and for violation of company policies (such as the substance abuse policy).

## Common Supervisor Mistakes

Too often, supervisors fail to adequately and accurately document performance issues before firing a problem employee. Waiting too long to take decisive action is another common mistake (although firing a worker as a knee-jerk reaction and without investigation first is even worse). It is critically important that managers fully understand the correct way to document unacceptable work performance, the best way to go about carrying out the termination, and all of the legal reasons for taking the action.

There are many reasons that a company might terminate an employee, including violation of the company substance abuse policy. As long as the reasons are not in violation of state or federal law, the decision to terminate should depend on the facts and circumstances of each case and the judgment of the employee's supervisor and upper management. But the first line supervisor's recommendation to terminate should, along with the policy violation(s), always be based on an *honest* record of the employee's work performance. One of the biggest mistakes supervisors make is to give good performance reviews to marginal employees

just to avoid confrontation. These inflated performance reviews could be used by the employee later in a wrongful termination lawsuit against the company.

Before the decision to terminate is made, all of the employee's supervisors and managers should meet to discuss whether termination is the best course of action. All documentation should be assessed to make sure that there is enough credible evidence to support the decision. The positive and confirmed results of a drug test—along with any disciplinary warnings and witnesses' statements (if any)—must be reviewed and verified. In the case of a lawsuit later, it will be important to demonstrate that a good faith investigation was conducted and that *all* company policies and procedures were followed in the termination process.

Supervisors must be fully aware of company policies which could limit the right to terminate an employee. Review the company Employee Handbook for any employment at-will policies, progressive discipline procedures, "just cause" requirements, and internal dispute resolution or arbitration policies before taking official action. Make sure that you have a complete understanding of the company substance abuse policy and the procedures required by the company's drug free workplace program.

Another mistake often made by supervisors is failing to realize that *not* firing an employee who has failed a drug test could result in harm to other employees and lead to company liability. Termination of an employee who has failed a drug test may be necessary to fulfill the substance abuse policy requirements

and to meet the company's contractual obligations.

### **The Termination Meeting**

Many lawsuits have been filed by former employees because they were angry over how the termination was carried out. For this reason and more, it is important to try to minimize the employee's embarrassment and anger.

The termination should be carried out as soon as possible after the decision is made—to avoid the possibility of gossip and rumors from spreading—and the meeting with the employee should be conducted at a time and place that will reduce contact with the employee's coworkers. If possible, allow the employee to pack up personal items after other workers have gone home, if he or she desires. This might require, however, that the termination take place right at quitting time and that two supervisors be present after hours to ensure that the employee does not damage company property.

During the termination meeting, the supervisor or HR manager should briefly state the unacceptable work performance and conduct and/or substance abuse policy violation(s) that have resulted in the decision to terminate the employee.

All interaction with the employee should remain respectful and professional at all times. If the employee becomes loud, argumentative, or threatening, the meeting should be ended immediately. And of course, for the sake of safety and to help avoid false accusations by the employee, termination meetings should always be attended by a second supervisor or manager as a witness.

**To help us combat substance abuse, go to [www.LiveDrugFree.org](http://www.LiveDrugFree.org) and click on "Donate!"**