

Tips When Terminating an Employee: What **NOT** to Say



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— Our Agenda:

1. Who is getting canned?
2. No surprises when someone is fired!
3. Avoiding claims of discrimination, harassment, and retaliation
4. Should you give a reason for the termination and how detailed?
5. Prepare talking points and stick to them. Goal = 10-minute conversation.
6. Cover their ongoing benefits.
7. When should you get a release?
8. How do you get a graceful exit with the least emotions possible?
9. Do you have to investigate departing employee complaints?
10. What NOT to say when terminating an employee.

1. Who is getting canned?

A. Popularity contest should not be the basis



—— 1. Who is getting canned?

B. Not just anyone should decide:



1. Who is getting canned?



1. Who is getting canned?

C. Reduction in Force (RIF)

- Worker Adjustment and Restraining Notification (WARN) -provides protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs.
- “Employer” is defined as having 100 or more employees
- If a reduction in force is necessary, confer with legal counsel if you have 100 or more employees or work in a jurisdiction with local laws that could impact how and when you give notice.
- Legal authority:
 - Statute – 29 USC § 2107(a)
 - Regs – 20 CFR 639
 - DOL guidance (need to check if accurate) - <https://www.dol.gov/agencies/eta/layoffs/warn>).

1. Who is getting canned?

D. For individual separations, valid reasons:

- a. Documented Job Performance Concerns (best and see rest of this presentation!).
May include or separately be other reasons:
- b. Violation of Company Policies or Procedures
- c. Habitual tardiness or absenteeism
- d. Criminal behavior
- e. At will and not an illegal reason
- f. Engaged in Discrimination/Harassment/Retaliation

2. No Surprises! (Job Disappearance)




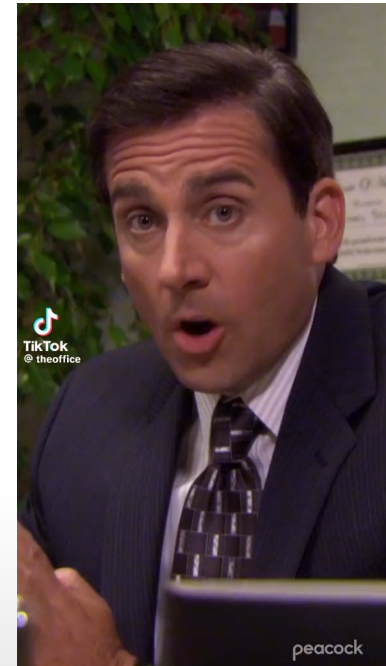
2. No Surprises

A. Documentation and timelines

- Has the employee been given realistic job expectations, resources needed to perform well, and time to improve?
- Has HR/Legal been involved to make sure progressive discipline is followed?
- Are the job performance considerations documented?
- Are there conflicting documents (such as favorable job performance evaluations, raises, bonuses, etc.) that tell the employment story, and how do you explain the ultimate decision?

3. Avoiding Claims of Discrimination, Harassment, and Retaliation

- Is employee a member of a protected class?
- Has employee recently engaged in protected activity?
- Is there cause? 
- Do documents establish consistent, legitimate non-discriminatory, non-retaliatory reason or the termination?
- How have any similarly-situated employees been treated in the same or similar circumstances?



4. Should you Give a Reason?



4. Should you Give a Reason?

A. Ideally, yes!

- In a best-case scenario, an employee who is terminated is not surprised as the employee was told of job expectations and when not meeting them and was given an opportunity to improve in a reasonable time and with appropriate resources available.
- Due process requires public employees receive notice of the reason for an adverse job action and an opportunity to be heard.
- Best to leave a little bit of wiggle room because some of the reasons might be hard to articulate, might be defined differently by different supervisors.
 - “among other things,....” “the main reason...”

4. Should you Give a Reason?

B. After Acquired Evidence Doctrine

- The after-acquired evidence doctrine allows employers to use evidence discovered after an employee's termination to limit or prevent damages for wrongful discharge if the misconduct would have led to the employee's termination if discovered.

5. Prepare Talking Points and Stick to Them

(Be clear and concise, professional, and respectful.)

- Manage the return of company property and data, revoke access to company systems, and ensure security measures are in place.
- Discuss last paycheck procedure and timing. Include exact amount if different for any reason.
- Address ongoing benefits or when and how additional information will be shared.
- Have a plan for the employee to collect personal items.

6. Cover what benefits will continue and for how long

(Discuss benefits clearly and in a detailed fashion.)



6. Cover what benefits will continue and for how long

A. Benefits

- Health Insurance: Explain COBRA rights or continuation of health benefits.
- Severance Packages: Detail any severance pay and how it will be disbursed.
- Retirement Plans: Provide information on savings or pension.
- Other Benefits: Clarify unused vacation pay or stock options.
- Unemployment: Provide link to apply and information they will need.

7. When to get a release.



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A. Release

- If the employer is giving more than is legally obligated (i.e. pursuant to a contract or policy), it may be appropriate to have the employee sign a release to give up rights they otherwise would have. A common example is when there is a severance payment.
- Ensure the release is legally sound and reviewed by legal counsel. There are different legal requirements on time to sign/revoke based on age, RIF, etc. This is a good use of your legal spend.
- Give the employee time to review the release and recommend they consult with a lawyer of their choice.
- If the employee is able to negotiate any of the language, this may be enough to keep the agreement's ambiguities from being constructed after the employer as sole drafter.

8. A Graceful Exit

(How do you get a graceful exit with least emotions possible?)



8. A Graceful Exit

Balance Sensitivity and Firmness

- Preparation: Be well-prepared for the meeting with all necessary documentation and a clear plan for the discussion.
- Private Setting: Conduct the meeting in a private, neutral setting to maintain confidentiality and respect, help them leave unnoticed.
- Clear Communication: Be clear and concise in your explanation, avoiding jargon or euphemisms.
- Support: Offer support such as outplacement services or counseling.
- Explain procedure (cut off access to email, allow person to tell you what they need immediate from their office so you can get and provide, that remaining items will be sent to their home via courier quickly)
- Be Patient: Answer any questions about procedure and allow the employee time to be composed enough to end the meeting. Some questions will require you to confer with HR/Legal so politely acknowledge the question is a good one and that you will get back to them once you confirm you have all the information they will need in response.

9. What if the person has a complaint, do you still investigate?

(Yes, always investigate complaints.)

- Take It Seriously: Treat any complaint seriously, even if the employee is leaving. You may be legally required to investigate.
- Impartial Investigation: Conduct an impartial and thorough investigation.
- Document Findings: Record the findings and any actions taken in response to the complaint.
- Feedback Loop: Confirm with legal counsel whether it is appropriate to Inform the employee of the outcome of the investigation.

10. What NOT to Say



10. What NOT to Say

YOU'RE FIRED



**TIME FOR YOU
TO GET ANOTHER JOB**



**YOU HAVE LOST THE
ABILITY TO WORK THIS JOB**



JOB N'T



**YOU HAVE JUST
GOT DEMOTED TO CUSTOMER**



10. What NOT to Say

“This is really hard on me.”

(This isn't about you!)

“I'm not sure how to say this....”

(Then you aren't ready. Go back and create a script.)

“We've decided to go in a different direction” (or some other cliché)

(This just isn't true and is confusing.)

“Here is where you are wrong” (then they start arguing – do not engage)

Instead try this: “I understand how you feel... but nothing we talk about will change my decision.”

“You've done a great job.”

(Then why the heck are you firing this person?)

“I know you didn't love it here.”

(No silver linings are going to feel genuine and will do more damage. You can't make this better for them in this moment.)

“Let me know if there is anything I can do for you.”

(Hey, how about you give me my job back? Or a reference? Or a severance? You are both going to feel terrible and efforts to ease the pain will likely only increase it.)

Questions & Answers

How can we help you navigate these thorny issues?!

Thank you!

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Legal Disclaimer

This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.