

Termination

Perhaps no situation carries as much potential liability for an employer as the termination of an employee. In order to reduce the risk as much as possible, employers must implement procedures that require employee terminations be handled in a consistent and professional manner. As a general rule, Tennessee follows the employment-at-will doctrine. This means the employer may discharge the employee at any time, with or without cause. The employee may also, in turn, quit his employment at any time, with or without notice. There are, however, exceptions, imposed by federal law, state law, and employment contracts (including collective bargaining agreements). Thus, it is important for the employer to keep these exceptions in mind and maintain prior, consistent documentation to support the termination should the employee later challenge the termination decision.

An employer also should remain mindful that, in exercising its management authority, two questions always arise in this context:

1. Can I terminate this person (legal analysis)?
2. Should I terminate this person (business culture analysis)?

This chapter will address the first question.

Exceptions to the employment at-will doctrine

There are several exceptions to the employment-at-will doctrine. Various federal anti-discrimination statutes protect employees from being discharged on the basis of race, color, sex, national origin, religion, age, disability, or military status. Employees working under a written employment agreement or a union contract may also be protected from discharge other than for good cause as defined by the particular agreement. Below are the generally recognized state and federal law-based exceptions to the employment-at-will doctrine.

Tennessee exceptions to employment at-will

Over the years, many states have chipped away at the employment-at-will doctrine and allowed employees to bring suits under wrongful discharge theories grounded in torts such as intentional infliction of emotional distress, defamation, and violation of public policy. In contrast, Tennessee has held to the employment-at-will doctrine and has, for the most part, refused to allow employees to pursue separate claims for wrongful discharge. While Tennessee does recognize the tort of “wrongful discharge in violation of public policy,” its parameters are quite limited in scope.

The Tennessee legislature and courts have, however, carved out a few exceptions to the employment-at-will doctrine.

Jury duty

An employer may not discharge, discipline, or otherwise penalize an employee who is absent from their employment for the purpose of attending a judicial proceeding in response to a subpoena, summons for jury duty, or other court order or process which requires the attendance of the employee at the judicial proceeding.

Labor organization membership

An employer may not, as a condition of employment or continuance of employment, require that an employee join a labor organization. Nor may an employer require the employee to refrain from such membership. This law is more commonly known as the “right to work” law.

Garnishment

No employer may terminate an employee because their earnings have been subjected to garnishment for indebtedness, even where more than one summons of garnishment may be served upon such employer with respect to the debt.

OSHA/hazardous chemicals

An employer may not discharge an employee for requesting information regarding hazardous chemicals, filing a complaint relating to the employer’s use of hazardous chemicals under either TOSHA or the Public Employee Hazardous Chemical Protection and Right to Know Act of 1988, or otherwise reporting or participating in an action under either of these laws.

Employment contract

An employee who has entered into a written employment agreement which specifically provides a definite duration of employment or limits the circumstances under which her employment may be terminated may bring a claim for breach of contract, claiming that the discharge violated the terms of the contract. In these situations, the employee commonly asserts that the employer did not have good cause (as defined by the contract) to terminate their employment.

Federal exceptions to employment at-will

A variety of federal statutes protect employees from being terminated on the basis of race, color, religion, sex, national origin, age, disability, pregnancy, and union activity. Most federal anti-discrimination and employment laws also prohibit retaliation against employees by their employers for exercising their rights to seek protection under these laws.

Title VII

Title VII of the Civil Rights Act of 1964, amended by the Civil Rights Act of 1991 (Title VII) applies to both private and public employers with 15 or more employees, labor organizations, and employment agencies, but not to certain bona fide private membership clubs. Among other protections, Title VII prohibits an employer from discharging an employee on the basis of race, color, religion, national origin, or sex (including

pregnancy, childbirth, or related medical conditions). See Chapter 8, Discrimination in employment for a more detailed discussion of Title VII.

Pregnancy Discrimination Act

The Pregnancy Discrimination Act (PDA) also applies to both private and public employers with 15 or more employees, labor organizations, and employment agencies. The PDA prohibits employers from discharging or otherwise discriminating against employees on the basis of pregnancy. The law requires pregnant women to be treated the same as men or non-pregnant women whose ability or inability to work is due to a non-pregnancy related illness or disability. The PDA does not, however, require better treatment for pregnant women.

Age Discrimination in Employment Act

Employer coverage under the Age Discrimination in Employment Act (ADEA) is similar to that under Title VII, except the ADEA only applies to employers with 20 or more employees.

The ADEA, as amended, prohibits an employer from discriminating against an individual with respect to discharge and other terms, conditions, and privileges of employment on the basis of the individual's age, provided that the individual is age 40 or older. See Chapter 8, Discrimination in employment for a detailed discussion of the ADEA.

Americans with Disabilities Act

The Americans with Disabilities Act (ADA) applies to employers who have 15 or more employees. The ADA generally prohibits discrimination and harassment in any aspect of employment, including discharge, applications, testing, hiring, assignments, evaluations, disciplinary actions, compensation, promotions, leave, and benefits. See Chapter 9, Disabilities and reasonable accommodation for a detailed discussion of the ADA.

Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) applies to any employers who have 50 or more employees. Under the FMLA the employee is entitled to up to 12 weeks of unpaid leave for the birth or adoption of a child, the employee's own serious health condition, or to care for a spouse, parent, or child with a serious health condition. An employer may not discharge the employee for exercising their right to leave under the FMLA. See Chapter 15, Family and medical leave for a detailed discussion of the FMLA.

National Labor Relations Act

The National Labor Relations Act (NLRA) prohibits discrimination, including discriminatory discharge, based on the employee's exercise of protected concerted activity (including but not limited to union activity).

Employee Retirement Income Security Act

The Employee Retirement Income Security Act (ERISA) governs all employee benefit plans unless specifically exempted. ERISA prohibits discrimination against employees (benefit plan participants), including discriminatory termination, who exercise rights under ERISA.

Note

A more complete list is located in Chapter 8, Discrimination in employment.

Reductions in force

Reductions in force (RIF) may be subject to the Worker Adjustment and Retraining Notification Act (WARN Act). The WARN Act requires most employers with 100 or more employees to provide 60 calendar days' notice in advance of mass layoffs or plant closings. A "mass layoff" is when a layoff of six months or longer affects 500 or more workers or at least 33% of the employer's workforce. However, the WARN Act does not apply if a layoff affects fewer than 50 workers.

Tennessee has enacted a similar law, but it has a different scope and additional requirements. It applies to most employers who have at least 50, but not more than 99, employees at a workplace located in Tennessee. Tennessee law is triggered when an employer reduces its number of employees by 50 or more during any three-month period. An employer must not only notify affected employees of the layoff, but also notify the Tennessee Commissioner of Labor and Workforce Development. This additional requirement does not apply if:

- the layoff results solely from a labor dispute
- or
- occurs at a temporary workplace or construction site
- or
- is the result of seasonal factors which are customary in the employer's industry.

Guidelines for terminating employees

Although an employer may legally terminate an employee for good reason, bad reason, or no reason at all (so long as that reason is not discriminatory), the company will be in a much better position to defend any challenged termination decision if it takes certain precautions prior to the decision to discharge.

Establish and follow work policies/rules

It is important, should a termination decision be challenged, that an employer has established written work policies and/or rules that support the basis for the decision to terminate. Rules and policies that are both clearly communicated and consistently applied are very helpful in the defense of an employment claim.

It is important that an employer continue to emphasize in its policies that it has the right to skip all levels of discipline and proceed to immediate discharge should the conduct at issue warrant this approach. The employer should also reserve the right to change its rules and policies at any time and note that any published rules and policies are not all-inclusive. Management should be thoroughly familiar with the employer's rules and policies so that managers and supervisors may fairly and accurately carry them out.

Review and investigate the matter

Any decision that is based on incomplete or inaccurate facts will be suspect, not only by the employee, but also by a jury. Thus, it is important for management, preferably an outside, objective party such as human resources, to review the decision to terminate, interview people with knowledge of the facts, meet with the employee and hear the employee's version of events, and make a written record of the investigations. It is important to be mindful that any record relating to the termination could be used as evidence in a wrongful termination lawsuit. Only facts and entries supported by sound reasoning should be reported

Involve human resources

As stated above, wherever possible, it is important to involve human resources personnel at all stages of discipline and/or termination. Supervisors should contact human resources whenever a problem with an employee arises. Meetings to discuss the employee's disciplinary problems or to terminate the employee should always include at least one representative from human resources to act as a witness and consultant. A factual record of a meeting with the employee is appropriate in most circumstances.

Confirm treatment of similarly situated employees

It is vital for employers to **be consistent** in their treatment of employees. Management should determine what the company's past practice in situations similar to the situation at hand and consider whether the employee is being treated the same as other employees in similar situations. If not, employers should consider whether different treatment can be adequately justified? Some things to consider are the employee's length of employment, position held, performance and disciplinary history, and other special circumstances that might distinguish the current situation.

Third-party review

The decision to terminate the employee as recommended by lower line management should be evaluated and confirmed by the executive in charge of that department or area, as well as a human resources executive.

Evaluate the possibility of a discrimination claim

Before making any decision to terminate, the employer should consider the state and federal laws prohibiting discrimination and evaluate whether the decision could trigger an employment discrimination claim. The employer should take into account:

- Is the employee a member of a protected group?
- What is the make-up of the remaining workforce from the standpoint of protected categories?
- Will the employee will be replaced, and by whom?
- What is the employee's tenure?
- Is there a written contract with the employee?

- Was the rule the employee violated a published rule? How? Where? When?
- Did the employee receive a copy of the violated work rule (for example in a policies and procedures manual or handbook)? Was the rule posted elsewhere?
- Has the employee been warned previously for violation of the work rule? By whom?
- Does the documentation in the personnel file support the termination?
- Are there unique circumstances such as the serious illness of a child or spouse that would trigger FMLA leave protections?
- Has the employee recently filed a workers' compensation claim or any other type of claim with a federal or state agency?
- Is the justification for the termination consistent with past practice, procedure and treatment of similarly situated employees?

Document to support the discharge

Accurate documentation of employee performance issues and/or discipline leading up to an employee's discharge is essential to the defense of any discharge decision. Written documentation is generally perceived as being true and accurate compared to recollections of witnesses. As such, all significant employer actions, including performance evaluations, disciplinary warnings, probationary periods, and performance improvement plans, should be documented and retained in the employee's personnel file. Documentation in employee files should reflect facts, not opinions.

An employer has a greater chance of prevailing when a termination decision is challenged if the documentation of the employee's performance and/or conduct supports the decision to terminate.

Communicating the decision to terminate

Terminating an employee is a delicate undertaking in the best circumstances. It is important that the employee understand the reasons for the discharge. Ideally, a representative of human resources should be present at the meeting in which the employee's manager communicates the discharge decision. Someone who attends the discharge meeting should document carefully the reason provided to the employee for the discharge and any response by the employee.

The termination meeting should be short and to the point, and the decision to terminate should be conveyed unemotionally and candidly. The employer should not try to soften the blow by complimenting the employee on other areas of performance as this sends mixed messages to the employee. The employee should be treated with dignity and respect at all times. Employees who feel they were treated unfairly are more likely to file a claim for wrongful discharge. Employers should keep in mind the following points when conducting a termination meeting:

- Review the employee's employment history briefly with the employee, commenting on specific problems that have occurred and the attempts to correct these problems.
- Within the first few minutes of the interview, inform the employee that he is being terminated.

- Explain the decision clearly and concisely.
- Avoid counseling the employee or complimenting the employee.
- Make sure the explanation given for the termination is consistent with the truth. The reason provided to the employee for the termination is essential should a lawsuit be filed. In some cases, failure to state the true reason for the termination or stating reasons inconsistent with reasons later stated has been held to be evidence of bad faith or discrimination. It is possible to say too little or too much, so careful consideration should be given to any documentation stating the reason for the termination. Where the termination involves a complicated matter, it may be wise to seek legal advice concerning the drafting of the separation notice.
- Explain fully any benefits, including COBRA and unemployment compensation, that the employee may be entitled to receive. If the employee is not entitled to certain benefits, explain the reasons for this.
- Allow the employee the opportunity to respond. Pay close attention to what the employee says, but do not argue with the employee or otherwise attempt to justify the decision.
- The decision to terminate must be based on a legitimate, nondiscriminatory reason and there should be business related reasons for the termination. When an employer is firing an older employee, a pregnant employee, a minority employee, or any other employee who falls into a protected category, it is essential that the person conducting the conference not make any reference to the protected characteristic that could be later be used as evidence of discrimination. This includes any references to race, color, sex, age, religion, national origin, or disability.
- The manager or human resources representative conducting the interview should be organized and confident in communicating the termination decision.
- During or after the meeting the employer should document what the employee was told and how the employee responded.
- At the time of the actual discharge, there should always be at least two managerial employees or at least one manager and one human resources employee present.
- Provide for the immediate return of materials, documents, tools, etc. in the personal possession of the employee. Retrieve all technology-related tools, such as laptop computers or cellular telephones. Do not allow the employee any opportunity to sabotage or confiscate data or access a networked IT system.
- Establish a procedure to retrieve IDs, delete passwords, and change locks and related security matters at the time the employee is terminated. Plan ahead if physical security preparations are needed.
- Remind the employee of any non-competition, non-solicitation, or confidentiality requirements that may apply.

- If appropriate, consider offering “transition pay” or severance pay in return for the contractual agreement of the employee not to file a lawsuit, but do not present that document at the termination meeting. If applicable, offer the possibility, and if the employee expresses interest, explain that a document will be prepared and forwarded.
- If appropriate, conduct a well-prepared exit interview and follow-up on any useful suggestions made by the exiting employee.
- Ensure the employee physically leaves with as much dignity as possible. In the case of discharge, give specific thought to transportation arrangements if the employee is impaired or added security measures if the employer has reason to worry about any potential workplace violence issues.
- Ensure all employment related documents are brought up to date and that they are complete, accurate, signed and approved as appropriate, and dated.
- Make sure termination procedures and exit interviews are consistent with all employees.

Replacing a terminated employee

Employers should be cautious when replacing an employee whom the employer suspects may file an employment discrimination claim. While it is always important to find the most qualified employee, it will make the former employee’s discrimination claim more difficult to prove if they are replaced by an employee of the same sex, race, national origin, or age.

Separation agreements and employee releases

If the employer believes the employee may file a claim upon termination or if there is a major dispute between the employer and employee at the time of termination, it may be in the employer’s best interest to enter into a separation agreement which contains a release of liability from the employee. As a general statement, settlement and negotiation documents are not admissible under the Rules of Evidence in a later lawsuit involving the matter being negotiated. In a separation and release agreement, the employer agrees to provide some additional consideration (usually in the form of monetary compensation) in exchange for the employee’s agreement to release the employer from any claims the employee might have that arose during employment with the employer. Separation and release agreements should always be prepared by the employer’s attorneys. However, as stated above, best practice is **not** to present such a release at the termination meeting. Doing so places focus upon the release, not on the explained legitimate reason for the termination. The employer should explain that transition pay or severance may be available but would require signing of a release according to policy. If the employee expresses interest, explain that such a document will be prepared. Separation agreements containing a release of claims on the basis of age discrimination usually require that the separated employee be given:

- additional time to consider the terms of the release
- an opportunity to meet with an attorney
- notice of these specific protections.