

Employee Termination



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Despite everyone's best intentions, companies must occasionally terminate employees. Whether due to an employee's performance or wrongdoing or as a result of a company's financial situation, terminations are always difficult. If handled poorly, they can result in lawsuits or complaints to government agencies claiming discrimination, retaliation, wrongful discharge, wage and hour liability, defamation, and more.

This eBook will cover many major issues related to employee terminations:

- **Terminations for cause – Applicable laws, cautionary circumstances, and tips for making the process easier and more organized**
- **Post-employment issues – Payments of final compensation and benefits and successful transitioning tips for the company and departing employees.**
- **Releases of claims – Navigating the minefield of requirements to enter enforceable severance and release agreements.**
- **Planned layoffs/reductions – Issues unique to larger scale workforce reductions.**

Handling terminations well can make the situations easier for everyone involved and reduce the risk of related litigation.

Termination for Cause

Unfortunately, it is sometimes necessary to terminate an employee for cause. In the United States, in general terms, "cause" can mean everything from a pattern of poor performance to dangerous or criminal behavior. However, "just cause" is an art form in Canada; "cause" can also be specifically defined by a union contract, collective bargaining agreement, or employment contract. Before terminating for "cause," you must understand what that means in your specific situation.

TERMS OF EMPLOYMENT AND LAWS GOVERN TERMINATION REQUIREMENTS.

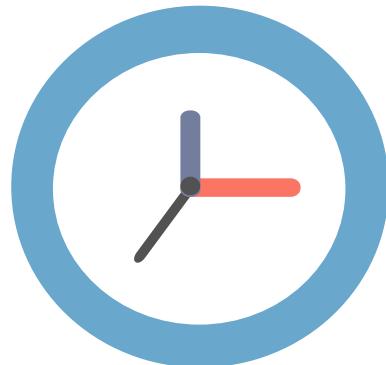
In the U.S., most employees are “at will” employees. This means that employees are free to leave their employment at any time without penalty, but employers may also discharge employees without notice or compensation – for any reason or no reason at all. In Canada, employers typically must give an employee both notice of disciplinary or performance issues and the opportunity to remedy the problem before terminating him or her (or compensation in lieu of notice). Make sure that you know the laws of the jurisdiction in which your employee works and the requirements you must meet before you begin termination proceedings.

An employment contract with the individual employee may dictate binding terms related to termination (notably, provisions regarding notice, penalties, severance, and non-compete or non-solicitation agreements). If an employee is subject to a union contract or collective bargaining agreement, then that agreement as well as applicable federal and local laws may control termination requirements and processes.

It is also important to be aware of laws that prevent termination of an employee in certain circumstances. For example, the U.S. Family and Medical Leave Act (FMLA) guarantees most employees up to 12 weeks (three months) of unpaid medical leave for themselves or to care for a sick family member; maternity leave falls under this law. During a period of FMLA time, an employee may not be terminated because of his or her absence. Additionally, if an employee is injured or ill, be aware that you may

have obligations to offer reasonable accommodations for the disability or medical condition rather than terminating employment if the employee is still able to perform essential job functions.

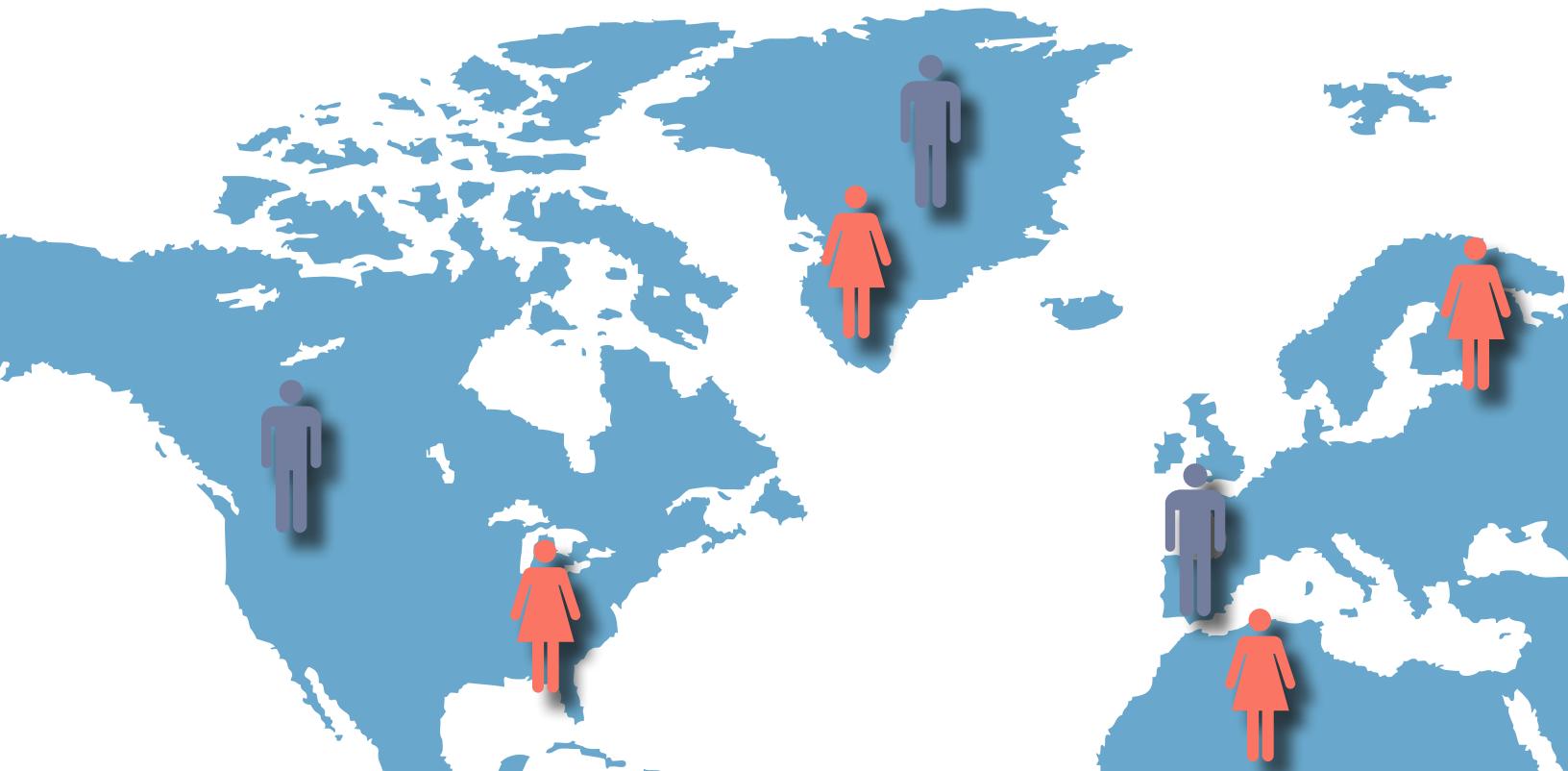
In addition to understanding applicable laws, be sure that any internal policies for discipline and termination – whether written or unwritten – are made clear and followed uniformly for all employees. If you don't have formal policies but have established customs and practices typical to terminations, be sure that you exercise caution. If you fail to follow your company's formal or informal policies, it can be circumstantial evidence to support a wrongful termination suit.



BEWARE OF SPECIAL CIRCUMSTANCES

Certain characteristics are protected under various state, provincial, local, and federal laws; these include gender, race, nationality, age, disability, and more. It's not illegal to fire an employee who is a member of a protected class for performance issues. It is illegal, however, to base your termination decision on the employee's protected characteristic(s).

This seems straightforward when discussing race or gender, but it can get more complicated when an employee has performance issues related to a medical limitation or a condition like drug or alcohol addition. It's a good idea to seek legal counsel if you have any concerns about terminating an employee with medical or psychological issues.



DOCUMENT, DOCUMENT, DOCUMENT!

Certain characteristics are protected under various state, provincial, local, and federal laws; Whether they are prescribed by law, contract, agreement, or company policy, you should set out the terms of your discipline and termination policies in writing (online and/or in a written handbook). Make sure that your employees receive and acknowledge receipt of the policy, and update this regularly; you can do this easily with an online, automated workflow.

When putting together a termination package, be sure to include all relevant documentation and information:

- *The employee's application for employment (and, ideally, other hiring documentation such as the job posting, job description, interview records, and any other pre-employment submissions by the employee)*
- *Your written code of conduct, disciplinary and termination policies*
- *Performance appraisals, evaluations, annual reviews, and self-evaluations*
- *Records of disciplinary counseling and formal disciplinary action*
- *Written documentation of the findings of any internal investigation related to the termination*
- *A separation letter, and, if appropriate, a release agreement*
- *An itemization of the employee's final compensation, including final paycheck and payout of bonuses, vacations, commissions, severance payments, and incentives as applicable*
- *Information on continuation or transfer of benefits such as insurance, pensions, and retirement accounts*

TIMING IS EVERYTHING

How you terminate someone is often just as important as why you let him or her go.

Treating your employees like criminals – before or after their termination – fosters resentment and hostility and increases the risk that you will face a lawsuit.

Plan appropriately for a termination. Have your paperwork prepared, and meet with the employee privately. Don't schedule the meeting for first thing in the morning or last thing on Friday afternoon. The employee's direct supervisor should inform the employee of the termination, and a member of the company's management, HR, or legal team should also be present. If security is necessary, have them available but not present in the termination meeting. Be direct and straightforward about the reasons for termination, but don't expound or allow yourself to be drawn into an argument or emotional discussion. Have knowledgeable HR representatives available to discuss the employee's insurance issues, retirement accounts, and options for continuing medical coverage (i.e., COBRA in the U.S.).

Whenever possible, it is best to let an employee know she is terminated before canceling access to company systems (such as buildings, computer systems, etc.) or publicizing the news; no one wants to find out she's terminated on Twitter.

Post- Employment Issues

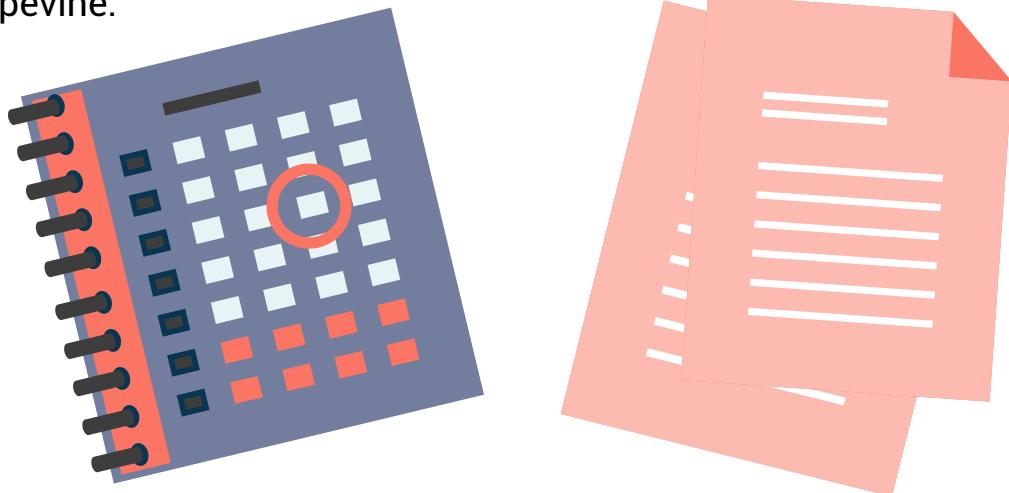
Even after you've had your termination meeting with the employee, many issues remain.



SAYING GOODBYE

Allowing a terminated employee to, at the least, gather his things and say goodbye to other employees is both respectful and kind. Escorting him out of the building with a hastily packed box of items is a humiliation that is rarely necessary. If you think there will be issues with allowing a terminated employee to gather his things, arrange to have them packed for him and taken out to his vehicle (or delivered to his home).

If you are arranging a future separation, such as allowing an employee to formally retire or setting an end date for employment, agree on a plan for the remainder of the employment period. Work with HR and the departing employee to discuss giving notice to clients, vendors, and other partners of the employee's departure. Make sure that outside parties know who their new contact will be. If the employee will send out an email or other communication to announce her departure, discuss how it will be characterized and phrased and in what circumstances it is appropriate to include her own contact information. Make sure you're on the same page as to how to communicate news about the employee's departure internally as well; don't leave it to the office grapevine.



FINAL COMPENSATION

Arrange for disbursement of the employee's final paycheck and other accrued benefits or compensation. If your company has a formal policy or pattern and practice of paying out vacation and benefits, make sure that you arrange for these as well. Pay careful attention to the applicable time requirements; in some cases, these payments must be made immediately or within days of termination.

In many provinces in Canada, employees are legally entitled to a fair and reasonable termination package, either in accordance with the employment contract or with common law rights. Severance is not required by law in the U.S. for most employees but may be required by an employee's contract or collective bargaining agreement.



MOVING FORWARD

Take care to shut off network and security access, change passwords or authorizations, take back keys or change keycodes, and recover all property and equipment belonging to the company. If the employee is subject to a noncompete, nondisclosure, or nonsolicitation agreement, discuss its terms with her as well as the ongoing duty to maintain the confidentiality of company trade secrets, passwords, and other sensitive information.

Establish what the company will tell future prospective employers with regard to references and recommendations, and if the company will provide re-employment or placement services. It may also be beneficial to discuss the employee's eligibility for unemployment insurance coverage and what the company's position will be regarding the termination.

You should ensure that you remove the terminated employee's name, likeness, and other representative information from company letterhead, stationery, emails, and/or websites following the termination. Encourage her to quickly change her online profiles (like LinkedIn and other professional sites) to remove her current affiliation with your company. It's not necessary to wipe her from the entire history of the company (e.g., taking down photos from past social media or blog posts) but ensure that, going forward, you are no longer linked.

Release of Claims

A voluntary release of claims can ensure that you don't have to worry about the possibility of future litigation related to a terminated employee because he voluntarily gives up any legal claims (known or unknown) that he may have against your company. However, many requirements must be met to obtain a legally binding, valid release. You should consult with legal counsel who is experienced in the rules and regulations of the jurisdiction in which your employee works to ensure that both the terms and presentation of your proposed agreement are legally sufficient.

RELEASES MUST BE VOLUNTARY AND SUPPORTED BY CONSIDERATION

Most importantly, both in the U.S. and Canada, a release of claims must be optional; you cannot force or pressure an employee to sign one. You must also offer the employee consideration – something of value to which she is not otherwise entitled. (For example, you cannot withhold a final paycheck or refuse to turn over an employee's personal possessions until an employee signs a release.) "Something of value" is usually a severance package, which can include both monetary and nonmonetary remuneration. This must be above and beyond any severance package to which an employee is entitled by law or contract.

OLDER WORKERS HAVE ADDITIONAL RIGHTS

If you are asking a worker over the age of 40 to sign a release agreement, there are additional rules you must follow in the U.S. These include language you must include in the agreement itself as well as time periods you must allow for the employee to consider and then potentially revoke the agreement after signing. Rules in Canada regarding discrimination and termination of older worker vary dramatically from province to province, offering extensive protection for workers in some locations and virtually none in others.

SOME CLAIMS CANNOT BE WAIVED

You cannot require an employee to waive future claims against your company, i.e., claims that have not yet arisen at the time of separation. So, for example, a release of claims signed at the close of employment cannot bar a departing employee from filing suit over an auto accident with your company's vehicle a year later.

Employees also cannot release their rights to file or testify regarding claims with the U.S. Equal Employment Opportunity Commission for violations of the ADEA (Age Discrimination in Employment Act), Title VII (Civil Rights Act, prohibiting discrimination based on protected classes), the ADA (Americans with Disabilities Act), or the EPA (Environmental Protection Act).



Planned Layoffs/ Reductions

If you are planning large scale layoffs or workforce reductions, take care to comply with federal, provincial, and state laws as well as union, collective bargaining, and employment contract requirements.

Some localities and industries require issuing notice of planned layoffs or taking other formal steps prior to laying off workers.

Collective bargaining and other union agreements can require reductions according to seniority and rank. This can undermine some types of layoffs, such as a plan to close an entire company location. To comply with the terms of your agreements, you may have to relocate rather than terminate some of those employees.

If you are terminating a group of older workers or offering an "early retirement incentive" program, use caution to ensure that you follow the rules and protections afforded under federal, state, and local laws. Most importantly, retirement incentive programs must be truly voluntary and not coercive. In the U.S., the Older Workers Benefit Protection Act sets out specific guidelines for such terminations; in Canada, the Human Rights Code and various provincial laws govern these situations. Failure to abide by these regulations can result in lawsuits, EEOC claims, or Human Rights Tribunal complaints.

Organized employee files and documentation can be invaluable in streamlining terminations, whether for cause or as part of a workforce reduction. An integrated HR and payroll system makes procuring employee information, reports, and data easy and fast. StarGarden can help you customize and implement a software solution to manage your HCM and HR documentation. Visit us at www.stargarden.com, or contact us by clicking below to get started!

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