

FIRING TIPS FOR THE INDEPENDENT PHARMACIST

By Amanda C. Fields, General Counsel for American Pharmacies

The termination of a bothersome employee may seem like an easy decision, but the reality is that the firing process can have long-term repercussions on a small business. A difficult employee can become a difficult adversary after they are fired. The wise employer will establish and adhere to policies and procedures for the hiring and firing of employees, which will reinforce the decision to fire an employee and go a long way in protecting a business from any future legal action for wrongful termination.

In Texas, as in most states, employment is governed by the "employment-at-will doctrine." This doctrine specifies that an employee or an employer may end the employment at any time without cause. Nevertheless, under certain conditions, an employee may sue an employer for termination, which creates what is called a wrongful termination lawsuit. There are exceptions to the employment-at-will doctrine, such as a written contract between the employer and employee, that allow the employer and employee to alter the employment relationship. Oral promises from the employer to the employee could also alter the employment-at-will doctrine in very limited circumstances. If the employer were to deviate from the written or oral contract by terminating an employee, then the employee could sue the employer for wrongful termination. Some of the most common lawsuits today are retaliatory termination suits. This is when an employee is fired for committing an act, within their rights, that the business did not like. Wrongful termination suits can also be sought if an employee was terminated based on their race or sex. Employees have also brought suits against their former employers for defamation, fraud and other related claims. Texas courts generally do not favor wrongful termination suits, and many of these lawsuits are unsuccessful. In many cases, courts will defer to the employer's reasons for termination (because no cause is needed under the employment-at-will doctrine) unless the employee can bring strong evidence of ulterior motives that demonstrate wrongful termination.

This article will serve to describe the appropriate firing process to utilize in the termination of an employee, thereby avoiding wrongful termination and other employment related lawsuits.

The Firing Process

First, you should investigate the employee. If you are considering firing an employee for misconduct, your first step is to investigate any negative incidents and determine how the employee acted inappropriately and/or with misconduct.

There is always the possibility that things are not as they appear to be and that appropriate justification is present for the employee's actions.

Secondly, you should review your employee's personnel file. Hopefully, you created a personnel file during the hiring of the employee and continued to add to it during the tenure of the employee. The personnel file may contain useful ammunition for the firing process, if you have properly documented the negative employment history of the particular employee. A strong paper trail is a necessary component of a firing, as good documentation of poor work performance or attitude is essential in defending against a wrongful termination lawsuit. You should always make a record of any verbal warnings you have given to the employee and issue written warnings to him well before the firing. Negative performance reviews are also a must. If you are trying to figure out whether to fire someone for persistent problems (such as poor attendance or performance), you should find some indication in the personnel file that the employee was informed of these issues and given an opportunity to improve. On a related note, you want to avoid the firing coming as a surprise to the employee, and you can do that by giving weak employees every opportunity to improve their work performance or attitude before opting to terminate. If you can demonstrate that you have given the employee time to improve, there will be fewer grounds for a lawsuit. Additionally, other employees will feel less threatened by the implications of the firing. Employees who have been aware for some time that their continued employment is on the line will find the actual firing less traumatic. They may even seek and find employment elsewhere before you can fire them. The bottom line is that you should avoid firing someone who has no idea that his job is in jeopardy, and careful documentation in the personnel file can assist both you and the employee in this regard.

Third, you should review your internal written policies and procedures, such as an employee handbook, hiring package and any other written guidance or documentation that applies to the situation and was in effect during the employee's history with your business. Before you hire your first employee, you should create clear, consistent and thorough written policies and procedures, incorporating the potential problems you might face with your employees, including rules for resolving the problems. Of course, it is difficult to envision all the potential scenarios, so you may consider purchasing an employee handbook that covers general employee policies and procedures, including termination procedures. Or you may want to consult with an employment law attorney who can draft a specific employee handbook for your business. This way, you will be certain to create an accurate employee handbook that will stand up in court if necessary. While an employer is not required by law to have an employee handbook, it is recommended. An employee handbook provides a centralized record of the employer's policies and procedures. When a problem with an employee arises, you

can simply refer to your employee handbook and apply the appropriate disciplinary measure or resolution, documenting it in the employee's personnel file. This helps you deliver consistent discipline. It is always beneficial to have the employee handbook in the hands of the employee before taking action to terminate, so that the employee knows they can lose their job in certain circumstances. As you are reviewing these written documents, note whether your written policies and procedures and/or employee handbook have requirements regarding the disciplinary and/or firing process. For example, do they require that your employee was provided a warning about misconduct prior to termination? Have you followed your internal protocol? Many companies have warnings for certain behavior and automatic firing for other situations. If these rules are not in place prior to the termination, then it can become difficult to ascertain the appropriate circumstances for a firing. At this same time, you should also review any federal and/or state regulations or laws that are applicable to incidents and/or the misconduct of the employee at issue, as they may further support your decision to terminate.

Fourth, consider what your employee was told verbally, as it can be equally as imperative as written policies and procedures. For example, did you or another manager/supervisor tell the employee anything that contradicts your written policies and procedures, employee handbook or the hiring package that was provided to the employee? Have you or a manager/supervisor led your employee to believe that he would not be fired if he improved within a certain amount of time? Has anyone made statements that could be construed as discriminatory, harrassing or inappropriate to the employee? Discuss this carefully in a confidential meeting with your managers/supervisors, and compare your treatment of the subject employee to other employees. A fired employee's most effective argument to a jury is that you have acted unfairly by treating the employee differently from others who have been in the same position. If you have always treated your employees by the same rules, you do not have to worry. However, if your treatment is inconsistent, you should have a valid reason for treating an employee differently—for example, one employee's performance problems lasted longer than another's or one employee's misconduct was more serious.

Fifth, consider the context of this potential firing. Even if you have carefully followed your written policies and procedures and been consistent with your treatment of the subject employee as compared to other employees, you could still face legal repercussions if you do not consider the surrounding circumstances. Consider the timing of your firing decision—for example, if you terminate an employee who recently complained of sexual harassment, you risk a retaliation claim. Also look at how this termination will look in light of your other firing decisions. If you detect a pattern—for example, that you are firing only women or older employees, your employee may claim that discriminatory firings exist.

Sixth, consider all your options and do not take firing lightly. If you are considering terminating an employee for persistent problems, you have likely already tried disciplinary measures short of termination. Even so, now is an appropriate time to revisit the issue. Do you think that the employee will be able and willing to improve? If so, a lesser disciplinary measure might be effective—particularly if you have made some managerial missteps in your dealings with the employee. Usually, even a very weak job performance can be brought up to a satisfactory level. Firing, on the other hand, involves a significant legal risk. It also has a traumatic impact on other members of your staff, even if they understand and appreciate the reasons for the termination. However, you will have to consider whether making an exception or bending the rules for this employee will seem unfair to others. In this same context, get a second opinion from your managers/supervisors. Ensure that this consultation is extremely confidential, as the word of the impending termination should never get out prior to the termination, causing embarrassment to the employee. This second person should review your decisionmaking process. This step will ensure that your decision is deemed reasonable, legitimate and well-supported. If this second person finds that your decision is weak and easily challenged, then you can determine whether you need to salvage the relationship or continue to properly investigate and document the evidence to better support your decision.

Seventh, consider utilizing an attorney to bless your decision. If you are faced with a close call of any kind, or if you are unsure as to whether your decision is legally supportable, then consult with an employment law attorney prior to taking any action. An experienced attorney should be able to review the applicable facts and provide you with some legal advice and/or recommendations, usually with a few hours of his time. This brief consultation may save yourself the legal expenses of defending a wrongful termination lawsuit.

Finally, if you ultimately decide to terminate the employee, then properly plan the execution of the termination. Take time to carefully contemplate the logistics of the termination meeting. Do not ever impulsively fire an employee in front of other employees. You need time to think and plan the firing, and proceed through the firing process outlined herein, even if the entire process is completed within a day or two. This includes writing an employee termination letter. It is important that you write your letter professionally and with great care. Otherwise, you might find that your former employee uses it against you as the basis of a legal claim. The same is true of the termination meeting; you should never say too much. The employee can use what you say against you. Always be professional and nonjudgmental. If you do not carefully plan out what you are going to say during a firing, and stick to it, chances are you will offer kind words regarding

their work performance. This can lead to legal action. During a firing, you do not want to discuss the positive aspects of the employee's performance. You want to provide the employee with the basis for termination, tell the employee they are terminated, hand them the termination letter, answer any questions and conclude the meeting. If there is severance pay or anything else owed to the employee, such as vacation pay, you should have a check cut to give the employee at the conclusion of the meeting. With that said, treat the employee you are firing kindly during the termination process. Being kind, without conveying anything positive about their job performance, can assuage the trauma. When conveying the firing to the employee, try your utmost to curb your own personal feelings, and refrain from responding to or entertaining any emotional outbursts exhibited by the employee. Even if the employee you are firing irritates you, do not let on. By distancing yourself from the emotion of the event, the meeting can conclude sooner and with less drama. Remember that there is a catch to any firing, as even difficult employees have coconspirators inside the workplace. An employee rarely isolates himself from everyone in the workplace. Therefore, you should keep the termination private and away from the eye of your staff, but consider having another manager/supervisor present during the meeting.

Remember to document your decision in the employee's personnel file and maintain the file for the long-term. You should document your decision in an internal memorandum to the employee's personnel file, keeping your description relatively brief—describe the reasons why you decided to fire the employee, any previous efforts to allow the employee to improve, your consultations on the matter, the dates of any previous disciplinary meetings and warnings and a description of the termination meeting. Include a copy of the termination letter in the personnel file.

After the firing, be careful if you are asked to serve as a reference. If you are requested to serve as a reference for the employee, and are not comfortable giving a positive reference, then you should not. In such a situation, less is better than more. When prospective employers call, tell them that you can only confirm dates of employment and job responsibilities and no more. You must take care not to defame the employee to a prospective employer, because this will leave you vulnerable to a defamation suit from the former employee.

Conclusion

One of the most difficult tasks you face as an employer is firing employees. Employees who consistently break the rules, do not perform the functions of their job or cause difficulties in the workplace can be a strain on the work environment and disrupt business from being performed. Assuming that you have taken steps to help an employee improve his work performance, and they are not working, it may

be time to fire the employee. By handling the termination in a humane, legal and ethical manner, you will ensure that your business and the firing decision are above reproach. Remember that how you fire an employee sends a powerful message to your remaining staff—either positive or negative. While firing is a last resort, do not jeopardize your business's success to retain a nonperforming employee. Fire an employee to ensure the success of your business.

We hope you will take these tips into consideration when terminating employees. Questions? Please contact Ms. Fields at amandacfields@gmail.com