

TERMINATION TIPS FOR THE INDEPENDENT PHARMACIST

Amanda C. Fields, General Counsel for American Pharmacies (APRx) © American Pharmacies 2011

Introduction

The termination of a bothersome employee may seem like an easy decision, but in reality the firing process can have longterm repercussions for a small business. A difficult employee can become a difficult adversary after being fired. The wise employer will establish and adhere to policies and procedures for the hiring and termination 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. This article outlines the appropriate process to use when firing an employee, thereby avoiding wrongful termination and other employment-related lawsuits.

In Texas, as in most states, employment is governed by the "employment-at-will doctrine": an employee or an employer may end employment at any time without cause. Nevertheless, a terminated employee still may sue an employer, under certain circumstances, in what is known as 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 race or gender. 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.

The Firing Process

- 1 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 the employee has appropriate cause for his or her actions.
- 2 Review your employee's personnel file.** Hopefully, you created a personnel file when you hired the employee and maintained it during his or her employment. 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 a must. If you are considering firing someone for persistent problems (such as poor attendance or performance), that employee's personnel file should contain documentation that he/she was informed of these issues and given an opportunity to improve. On a related note, you want to avoid the prospect of totally surprising the employee, and you can do that by giving weak employees every opportunity to improve their work performance. 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. Avoid firing someone who has no idea that his or her job is in jeopardy -- careful documentation in the personnel file can assist both you and the employee in this regard.

- 3 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 employer policies and procedures. If a problem with an employee arises, you can simply refer to your employee handbook and apply the specified disciplinary measure or resolution, documenting it in the employee's personnel file. You should ensure that all employees receive a copy of the handbook at the time of their hiring so that each understands that he/she can be terminated under certain circumstances. As you review 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 receive 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.

- 4 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/she would not be fired if job performance improved within a certain amount of time? Has anyone made statements that could be construed as discriminatory, harassing or inappropriate to the employee?

Discuss these questions 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.

- ⑤ **Consider the context of the potential firing.** Even if you have carefully followed your written policies and procedures and been consistent with your treatment of the subject employee relative to other employees, you could still face legal repercussions if you do not consider the related circumstances. Consider the timing of your decision—for example, if you terminate an employee who recently complained of sexual harassment, you risk a retaliation claim. Also look at how the termination will look in light of other firing decisions. If you detect a pattern — for example, that you are firing only women or older employees, your employee may claim a discriminatory firing.
- ⑥ **Consider all your options and do not take the firing lightly.** If you are considering terminating an employee for persistent problems, you have likely already tried disciplinary measures. Even so, now is an appropriate time to revisit the issue. Do you think the employee might be able and willing



to improve? If so, a lesser disciplinary measure might be effective — particularly if you have made any managerial missteps with the employee. Even a very weak job performance can usually be brought up to a satisfactory level. Termination, on the other hand, poses a significant legal risk. It also has a traumatic impact on other members of your staff, even if they understand the reasons. However, you will have to consider whether making an exception or bending the rules for this employee will seem unfair to others.

Get a second opinion from your managers/supervisors. Ensure that this consultation is extremely confidential, as the word of the impending termination could cause embarrassment and distress to the employee. This second person should review your decision-making process to ensure that your decision is reasonable, legitimate and well-supported. If this second person finds that your decision is weak and easily challenged, you can determine whether you need to salvage the relationship or continue to properly investigate and document the evidence to better support your decision.

- ⑦ **Consider hiring an attorney to review 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 just a few hours of paid time. This brief consultation may save you the legal expenses of defending a wrongful termination lawsuit.

If you ultimately decide to terminate the employee, then properly plan the termination process.

Carefully contemplate the logistics of the termination meeting. Never impulsively fire an employee in front of other employees. You need time to think out the termination, and proceed through the process carefully, even if it takes 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. Never say too much, as the employee can use what you say against you. Always be professional and non-judgmental. Carefully plan out what you are going to say, and stick to it. Do not offer kind words regarding the employee's work performance — this can lead to legal action. During a firing, explain the basis for termination, tell the employee he/she is terminated, hand over the termination letter, answer any questions and conclude the meeting. If there is severance pay, vacation pay or anything else owed to the employee, have a check cut to give the employee at the conclusion of the meeting. With that said, treat the affected employee kindly during the termination process. Being kind, without conveying anything positive about job performance, can ease the trauma.

When informing the employee of the termination, control your personal feelings and avoid responding to any emotional outbursts from the employee. Do not display irritation, sadness or happiness. Keeping your distance from emotions of the event will allow the meeting to 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 is rarely isolated from everyone in the workplace. Therefore, you should keep the termination private and away from the eyes of your staff, but consider having another manager or 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 for the employee's personnel file, keeping your description relatively brief. Be sure to include:

- ▶ the reasons why you decided to fire the employee
- ▶ any previous efforts to allow the employee to improve
- ▶ your consultations on the matter; 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 later asked to serve as a reference for the employee, and are not comfortable giving a positive reference, then you should not. If prospective employers call you for a reference, confirm only dates of employment and job responsibilities — **nothing more**. 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 staff. Employees who consistently break the rules, fail to perform job functions or cause difficulties in the workplace can strain your work environment and disrupt business. Assuming that performance improvement has not occurred after you have given an employee reasonable opportunities to improve, it may be time to fire the employee. Handling the termination in a humane, legal and ethical manner will ensure that the firing decision is above reproach. Remember that how you terminate an employee will send a powerful message to remaining staff — either positive or negative. While firing is a last resort, do not jeopardize your business's success to retain a non-performing employee. Fire an employee to ensure the success of your business.

Questions? Please contact Amanda Gohlke Fields at afields@aprx.org

© The preceding material is the sole intellectual property of American Pharmacies (APRx) and may not be distributed or reproduced without our express consent.