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Fire the Bum

In this article I will give you a quick overview of the legal analysis for firing an at-will employee.

I will assume the employee is “at-will,” meaning that you have not entered into an employment contract with the employee. You can fire an at-will employee for any reason or no reason at all (with some restrictions – see below).

FIRST, make sure the employment is really at-will. Call me if an oral or written employment contract exists, if you have made promises to the employee about his or her security, or if your company handbook has special termination policies.

SECOND, know your risks. Your risk when firing an employee is that the termination is deemed wrongful, that is, made on illegal grounds. Wrongful termination is a tort, and a big-ticket liability item. Further, even if you have legal grounds to terminate employment, nothing can stop the employee from suing you. Defending a lawsuit is expensive.

THIRD, if employment is at-will, you may fire the employee for any reason or no reason, including poor performance. That said, you may not terminate employment for any of the following reasons:

- *On account of a protected status.* The protected statuses that you should worry about are: *race, *religion, *gender, *pregnancy, *age over 40, *disability, *sexual orientation, and *national origin and status as alien (so long as the employee is legally permitted to work).
- *On account of the employee engaging in some protected activity.* For example, you may not fire an employee for complaining about workplace health or safety, whistle-blowing, refusing to commit fraud or falsify documents, or filing a workers compensation claim.

FOURTH, investigate the facts surrounding the termination, and make sure the employee’s personnel file supports the termination. Think through the decision fully and carefully.

FIFTH, timely deliver the final paycheck and other termination notices and forms.

SIXTH, be careful when discussing the employee with other people. You do not want to defend a defamation suit. Even though truth is a defense, again, a lawsuit is expensive. Ideally, you should make no comments at all about the employee. Respect the employee's privacy.

LAST, concerning references, you are not obligated to give them to the employee's prospective new employers. If you plan to give a reference, keep these pointers in mind: (i) Avoid telephone references; instead use a reference letter that the employee has seen and approved. If you give a reference over the phone, keep notes of the conversation. (ii) Stick solely to documented facts, and tell the truth. Do not hide negative facts, because this can lead to a lawsuit from the new employer, e.g. for failing to disclose the employee's tendency to violence.

Please feel free to call me if you want to talk more about this topic.

Ideas

You grow up the day you have your first real laugh at yourself. – *Actress Ethel Barrymore.*

Government is like a baby: an alimentary canal with a big appetite at one end and no sense of responsibility at the other. – *Ronald Reagan.*

Modern liberal democracy is based on twin principles of liberty and equality. The two are in perpetual tension: equality cannot be maximised without the intervention of a powerful state that limits individual liberty; liberty cannot be expanded indefinitely without inviting various pernicious forms of social inequality. Each liberal democracy thus must make tradeoffs between the two. Contemporary Europeans tend to prefer more equality at the expense of liberty, and Americans the reverse, for reasons rooted in their individual histories. These are differences of degree and not principle; while I prefer the American version in some ways over the European one, this is more a matter of pragmatic observation and taste than a matter of principle. – *Francis Fukuyama, from "After the End of History."*

The capacity of human beings to bore one another seems to be vastly greater than that of any other animal. Some of their most esteemed inventions have no other apparent purpose – for example, the dinner party of more than two, the epic poem, and the science of metaphysics. – *H.L. Mencken.*

Funny Papers

June is prom month. No additional comment is required.

