

Employment Practices *Update*

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“Rightful” personnel terminations: *Breaking up is hard to do*

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Terminating the working relationship with an employee or volunteer is never a pleasant experience. Confronting substandard performance can be difficult for managers and supervisors. Emergency service organization (ESO) officers and leaders may avoid conflict by not directly addressing poor performance, which may further negatively impact culture, morale and even operations.

Following best practices guidelines for determining and conducting “rightful” terminations may help avoid costly lawsuits.

Common Mistakes in Terminating Workers

Avoiding these common pitfalls to help terminate personnel in a considerate, consistent and legal manner.

You never write – Beware of a lack of written documentation that supports the organization’s legitimate, business-related reasons for the dismissal. Employment lawyers often say, “If it isn’t written down, it is as if the event didn’t happen.” Timely documentation of a worker’s performance is crucial in capturing the real reasons why termination is necessary. Before making up your mind to dismiss, carefully examine the ESO member’s personnel file and other records of coaching, counseling, warnings, reprimands, performance improvement plans (PIPs),

evaluations, suspensions and last chance agreements.

Relationship counseling – Managing an employee or volunteer involves interpersonal relationship skills. Communication is key between those with supervisory duties and their subordinates to improve work performance and behavior. In most circumstances, termination is the last resort after extensive retention efforts to steady performance. Taking time for good faith counseling and performance rehabilitation is viewed by judges and juries as equitable, as opposed to making hasty decisions to terminate.

Do what you say – Follow written policies and procedures, individual employment contracts and collective bargaining agreements. Review and abide by the organization’s written documentation with regards to progressive discipline, evaluations, performance improvement plans (PIPs), job descriptions, grievance procedures, investigations, terminations, exit interviews and other personnel matters.

The silent treatment – An organization may increase its exposure to liability in a wrongful termination case by remaining silent as to the reasons for the dismissal. Without an explanation for the discharge, the discharged individual may speculate about whether there were unfair or unlawful reasons behind the

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decision. When facilitating a termination session, deliver a succinct, respectful, yet firm explanation as to why the employee or volunteer is being terminated.

The end should not be a surprise – Poor risk management could be to blame if a worker is surprised that he or she is being discharged. Be deliberate in establishing performance improvement plans and communicating the possibility of termination if standards are not met.

Don't let emotions get the best of you – Don't let hurt feelings or anger dictate decisions about terminations. Emotions can lead to hasty dismissals that are not well supported by coaching, counseling or disciplinary documentation. Likewise, in a termination meeting, don't let the discharged worker's emotions

cause you to lose your composure. Expect a wide range of emotions from the dismissed worker, including anger, fear and sadness. Prepare yourself mentally to best handle the termination meeting by remaining professional.

Avoiding the problem – It is a mistake to transfer or assign a difficult employee to another shift, station, department or team within an ESO rather than address the issues at the root of the problem. Occasionally, a change may be successful. Commit to a plan to turn performance around, and if unsuccessful, discharge may be the best next step for the organization.

Finding fault with the little problems – Severing the working relationship is typically warranted when an ESO member makes an outrageous mistake or there has been a documented pattern of problems. Sometimes, a supervisor doesn't adequately record a pattern of a particular member's deficiencies but wants to terminate anyway. Rather than take the time necessary to document a pattern of future problems, a supervisor may look for the ESO member in question to violate a

minor rule or policy and pounce on the opportunity to discharge. A wrongful termination lawsuit may hinge on a firing for an offense that didn't result in discharge for other personnel. It is recommended that administrators primarily responsible for human resources act as gatekeepers to ensure disciplinary and termination decisions are consistent throughout the organization.

Other Tips for Rightful Terminations

Be deliberate in establishing performance improvement plans and communicating the possibility of termination if standards are not met.

Not off the hook if an ESO member quits – There is a misconception that if an employee or volunteer quits, the organization has dodged a legal bullet and cannot be sued for wrongful termination. Constructive discharge is the legal claim that is closely related to wrongful termination, but differs in that the member quits and still

sues the organization. Constructive discharge involves a former ESO member that argues he or she had no other reasonable option but to quit due to intolerable conditions. Therefore, be aware of situations where it appears a member is being isolated, bullied, harassed or otherwise pushed out of the organization by other members or superiors.

Perception can be reality – Closely scrutinize decisions to terminate, but particularly in situations where the employee or volunteer may have previously engaged in legally protected activities on the job, such as:

- Lodging a complaint of harassment, discrimination or retaliation.
- Filing a workers' compensation claim.
- Reporting a violation of the ESO's policy or external law or regulation.
- Taking leave (medical, family or vacation).

There may be the perception that the ESO's decision to terminate was the result of the member's participation in legally

protected activities. In these situations, even more of an obligation rests with the organization to demonstrate the dismissal was based on legitimate and documented business factors.

Involve human resources and legal counsel – Consistency is the goal for reaching fair disciplinary decisions. Those responsible for human resources can help build consistent practices across an organization. Likewise, internal or external labor and employment counsel could be relied upon to ensure equity for personnel and protection for the ESO. Qualified legal counsel can help navigate jurisdictional requirements with respect to managing personnel relations, discipline and termination.

Severance agreements – Consider whether entering into a severance agreement is in the best interests of the ESO and departing member. This contractual agreement typically includes the employer giving financial consideration to the employee in exchange for the employee's pledge not to sue the employer. Unless set forth in a prior written contract, employers are not generally required to offer a severance package to dismissed workers. However, a severance agreement may better allow the employee to move forward, while limiting the employer's exposure to personnel related claims like harassment, discrimination, retaliation and wrongful termination.

Conclusion

Managing professional relationships and performance can be a very difficult task. ESOs are justified in their reluctance to discharge an employee or volunteer too soon without first giving an opportunity to turn performance around. However, retaining an underperforming and possibly divisive individual too long may harm morale, productivity and culture. In the end, responsible ESO leaders establish high standards for performance and behavior, provide supportive coaching and counseling and may be forced to terminate the working relationship after exhausting reasonable progressive disciplinary steps.