

Laid Off Vs. Fired

Q. I have an employee who is trying hard but just not working up to our standards. I know I need to terminate him, but he's a nice guy and I don't want to hurt his feelings. Is it OK if I tell him he is just "laid off?"

A: In one sense, there's not much difference between the two terms, and whether an employer uses "laid off" or "fired" to describe the employment action can be just a matter of semantics. However, your choice of words may very much affect how the employee views his chances of being "recalled" to work at some future point.

Of course, a "firing" or "termination" usually has a worse connotation and it typically means the action is permanent. While the employee's feelings may be hurt, there's little chance he wouldn't realize that you are not planning to call him back.

However, if you tell the employee that you are "laying him off," he may believe your actions are based on restructuring, a reduction in force, or simply a lack of work. Employers sometimes take the "easy way out" and label a separation a "layoff" when they are really terminating an employee for poor performance. They may do this to avoid confrontation, documentation, discipline and hurt feelings. Oregon is an employment-at-will state, so at-will employers who use this strategy aren't necessarily breaking the law.

Still, it's a risky approach that may be a recipe for a lawsuit, because the so-called layoff gives the impression that the employee will be returning when the economy recovers or when revenues rise. In fact, the employer may have no intention of ever reinstating the person. When this "laid off" worker - who was never counseled about performance issues - learns that a replacement worker has taken his place, he quickly figures out that he was fired, and he may conclude that the employer had a discriminatory motive.

There are also a few legal distinctions between layoffs and terminations. An employee who is laid off for lack of work will often be eligible for unemployment benefits, but the Oregon Employment Department may deny benefits if it determines that an employee was discharged for willful misconduct.

Oregon's wage and hour regulations make another distinction. When an employer terminates an employee, the employer must pay all final wages by the end of the next business day. But when an employee is laid off and the employee returns to work within 35 days, the layoff is not considered to be a termination under the wage rules, and the employee's wages are simply due at the next regularly scheduled payday following the layoff.

When an employee is laid off with no reasonable expectation that he will return to work, the employer must treat the layoff as a termination, and all wages are due by the end of the next business day following the layoff.

Q: What are the legal rules employers must use when selecting individuals for layoff and recall? Does a company have to recall a laid off employee, or could it hire someone else instead?

A: There really aren't any laws that speak to layoff and recall criteria other than the general prohibitions on discrimination and retaliation. It's up to the individual company to determine how it selects workers for layoff and recall. A company may base its decisions on seniority, attendance, performance, production rate, job description, or some combination thereof.

In the absence of a collective bargaining agreement or other employment contract, an at-will employer could bring in a new employee rather than recalling a laid-off worker. However, a company that does this should maintain good documentation of its criteria to show that it was not discriminating.

For more information about this and other employment issues, visit our website at www.oregon.gov/BOLI or call us at Technical Assistance for Employers at 971-673-0824.