

# Terminations: Understanding the Legal Landscape and Strategies for Limiting Potential Liability

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## Road Map



- Laws and regulations impacting termination decisions
- Pre-termination considerations
- Importance of documentation
- Tools for managers/supervisors
- Tools for human resources
- Documenting termination
- Getting your “ducks in a row”

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## Laws and Regulations: Employment “At Will”



- Either employer or employee can terminate employment relationship at any time, with or without notice, for any lawful reason
  - Many employers equate with, “we don’t have to give a reason for termination” or we can be vague (“going in a different direction;” “not a good fit”)
    - True. But is it a best practice?

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### Employment "At Will"



- Pitfalls of not providing a reason
  - 1<sup>st</sup> question from employee: Why?
  - If no/vague answer, human nature to assume hiding something or "pretext" for unlawful reason
  - Perceived lack of "fairness" even if not legally required
  - Unintended consequence: cause terminated employee to seek legal advice or file a claim against employer

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### Employment "At Will"



- Pitfalls of providing a false reason:
  - Layoff or reduction in force: terminated employee aware company advertising/recruiting for same or similar position
  - Vague explanation: may be sign of lack of supporting documentation or evidence that similarly situated employees treated differently
    - Significantly impacts ability to explain/defend decision

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### Employment At Will (aka "Because, Because, Because")



- Failure to provide reason = belief real reason is BECAUSE:
  - I complained about a supervisor making racial comments
  - I asked about my right to take Oregon sick leave
  - I told HR the company had misclassified me as "exempt" and that I should be getting overtime pay

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**Employment At Will**  
(aka "Because, Because, Because")



- Result: defend unarticulated/vague reason for termination months or years later if legal challenge
  - Decision makers' credibility
    - If no reason given at time of termination why should fact finder believe stated reason now?

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**Employment "At Will"**  
(aka "Because, Because, Because")

- Witnesses' recollection
  - Often vague/different over time
  - May no longer be employed; not as likely to be invested in assisting employer's defense

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**Employment "At Will"**  
(aka "Because, Because, Because")



- If do provide reason, should be truthful
  - Beware of shifting reasons
    - Without the particular fact/incident, would termination decision have been made
      - Clearly and honestly articulate actual reason(s)

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### Employment "At Will" Exceptions



- Law/Statute
  - Race, religion, age, sex (gender, including sexual harassment, sexual orientation, gender identity, failure to conform to sex stereotypes), national origin, marital status, physical/mental disability, military/veteran status, genetic information
  - Leave laws (OFLA, Oregon Sick Leave, FMLA)
  - Workers' compensation rights/claim
  - Association with someone protected by law (e.g., spouse of cancer patient; parent of disabled child)

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### Employment "At Will" Exceptions



- "Public Policy" (socially desirable motive)
  - Reporting alleged harassment or other alleged wrongdoing
  - Complaining about failure to comply with wage law
  - Health/safety complaint
- Whistleblower
  - Good faith report of criminal activity by employer
  - Bring civil proceeding against employer
  - Testimony at unemployment benefits hearing

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### Employment "At Will" Exceptions



- Contract/agreement
  - Employee handbook
    - Progressive discipline policy
    - Attendance/call in policy
  - Employment agreement
    - Termination for specified reasons
  - Collective bargaining agreement
    - "For cause" termination

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### Pre-Termination Considerations



- Employment policies
  - E.g., mandating progressive discipline vs. ability to impose any appropriate discipline, including termination; specific policy implicated by reason for termination (attendance; use of company's electronic systems, etc.)
- Job descriptions, performance evaluations, corrective action/warnings addressing particular issue

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### Pre-Termination Considerations

- Comparative situations
  - What has the company done in the past under similar circumstances
    - If previous transgression resulted in lesser discipline, what is justification for terminating now

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### Pre-Termination Considerations

- Ensure direct and indirect decision maker(s) able to articulate non-discriminatory, believable reasons for termination

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### Importance of Documentation



- Review personnel file and any “supervisory” file
  - Existence of supporting documentation
    - Who created document (name)
  - Dated
  - Does it say what you think it says
    - Performance evaluations often do not reflect issues resulting in termination
  - Documents may not exist or specifically address issue(s)

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### Importance of Documentation

- Lack of or weak documentation = greater reliance on credibility of decision maker and consistent application of particular policy/standard

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### Tools For Managers/Supervisors



- Train managers and supervisors about employment laws to understand context of termination decision
- Require consultation with HR *prior* to making termination decision
  - HR should not be relegated to payroll and post termination “clean up”
  - Analyze timing of decision: close in time to any protected activity results in problematic decision even if non-discriminatory reason
  - Consider authorizing HR or decision maker to consult with employment counsel if particularly risky termination

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### Tools For Human Resources



- If problematic termination consider authorizing human resources to offer severance package in exchange for employee's release/waiver of claims
- Can offer any form of severance employee not otherwise entitled to by contract (e.g., handbook policy), law/statute or terms of employment or collective bargaining agreement
  - Signed release/waiver reduces potential legal exposure

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### Tools For Human Resources



- Release/waiver of claims
  - Certain language required to secure effective release/waiver of employment claims
- Advise consultation with employment counsel

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### Documenting Termination



- Consider providing employee with letter briefly outlining (truthful) reason for termination
  - Emotional situation; employee not necessarily going to hear or retain substance of termination conversation
- Best practice even if not legally required

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### Preparing for Termination Discussion (Are your "ducks in a row"?)



- Decision maker and HR should consult regarding substance of discussion
  - If provide termination letter, suggest using letter as "script" for conversation
- Purpose not to debate reasons for termination; rather, to convey fact of decision and general explanation

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### Preparing for Termination Discussion (Are your "ducks in a row"?)



- Plan ahead:
  - Who will participate
    - Decision maker and possibly HR representative
  - Day of week and time of day
    - Generally not advisable to conduct on Friday or late in day
  - Where will conversation be held
    - Ensure privacy and confidentiality
  - What will co-workers, clients and others be told after employee informed of termination
    - Simple, brief message that does not discuss reasoning

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### Preparing for Termination Discussion (Are your "ducks in a row"?)



- Information technology issues
  - Immediately turn off/eliminate employee's access to electronic systems/networks/servers
  - Require return of laptop computers, cell phones, etc.
    - Require employee to disable access to e-mail system on personal device
  - Obtain passwords for all files, websites
  - If offer severance, require return of documents/data as condition to receiving

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### Preparing for Termination Discussion (Are your "ducks in a row"?)



- Document/data return
  - Understand potential for downloading/transferring/taking documents and data at or prior to termination
- Consider assigning HR representative to monitor employee's exit and prohibit access to computer and taking documents, thumb drives, etc.

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### Preparing for Termination Discussion (Are your "ducks in a row"?)



- Require return of keys, access cards, credit cards
  - Ensure expense reimbursement requests submitted within limited time
- Comply with final paycheck rules
  - If employee discharged, due not later than close of next business day
- Understand definition of "wages" due and owing
  - Does policy/past practice require payout of accrued PTO?

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# Thank You!

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