

STYBEL PEABODY & ASSOCIATES, INC.



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Planning to Fire a Member of Your Team?

Consider our three-dimension perspective.

Planning on firing someone on your team in the next ninety days? Look at your decision from three dimensions: legal, financial, and marketing.

Each dimension provides a valuable perspective. The following framework only applies to individual terminations. The dynamics of mass layoffs are different.

Legal Dimension

Ideas for this section were provided by David Wilson, a law partner with Hirsch Roberts Weinstein of Boston. Absent a written contract, employees in the United States are generally "at-will". At-will employment means that an employee can quit or be terminated for any reason or no reason at all as long as it is not an illegal reason.

If the termination is based on not performing up to written job expectations, we encourage employers to give an employee notice of the problem. Give the employee a chance to improve.

For performance-related issues, we also encourage employers to tell the employee the real reason for their termination (i.e. you were consistently late, you don't have the requisite skills, etc.). Avoid using some vague statements like "we are going in a different direction" or "you are not the right fit" for our organization.

While the employee enters your office to receive notice of termination, have someone from the company remove that employee's password from the computer system. The employee may wish to later access the system for appropriate personal information. That access should be done under supervision. This procedure protects the company and protects the employee should there be any cybercrime.

Documentation Before the Meeting.

Once the decision to end employment is made, the employer should document the legitimate business reasons for doing so and ideally have the head of human resources sign off on the termination.

Human Resources is the "gatekeeper of fairness" and they should be consulted before a final decision is made. Rely on your HR professional to explain company policy, practices, and history of how others have been treated.

During the Termination Meeting.

1. The meeting should take place in a conference room and not the person's office or your office. This gives the employee an easy way to "walk out" of an uncomfortable situation.
2. Have someone from HR or another corporate official in the room with you.
3. Is there any concern that this employee might become violent? Have a plainclothes detective or a private detective reading the newspaper in a spot near the conference room or in the waiting room.
4. Provide the employee with his/her final paycheck for all wages earned up to the day of termination and for all accrued paid time. (You are not required to pay for accrued sick time unless your policy states that you will.)
5. Notify the employee of his/her rights for health insurance continuation under COBRA.
6. Provide the employee with a pamphlet from the employee's State Division of Employment & Training regarding "How to File Unemployment Benefits."
7. Discuss arrangements to collect any company property (keys, cell phone, documents, computer, etc.)
8. Remind the employee of any obligations he/she may have under any confidentiality, non-disclosure, non-competition or non-solicitation agreements (provide copies of signed agreements and give to the employee).
9. Be ready to handle logistics, emotional response, and security issues.

9. Have the third person who was present at the meeting prepare a short memo regarding what was said, place the memorandum in the employee's personnel file.

10. Keep the facts regarding the termination confidential from other employees, to the extent possible.

11. If the employee brings up some unexpected fact that might change the decision (e.g., "My boss gave me that warning because I refused to go out with him" or "you are only doing this because I requested a leave"), hear the employee out, ask questions and take notes. Do not make any promises or otherwise react to the information. Thank the employee for sharing the information. Tell him/her that the termination decision still stands, but that you will investigate the matter and get back to him/her.

12. Document the conversation for the employee's personnel file.

13. Introduce the outplacement consultant at the termination meeting. And have the outplacement consultant enter the conference room as you leave. The outplacement consultant can help the employee deal with the next critical hours: (1) what do I say to my staff? (2) what do I say to my spouse and children? (3) what do I say to my parents? (4) what do I say to employees who call me up because they heard the news?

Avoid using an outplacement firm whose business model expects that employee to take the initiative for a virtual conference with a stranger. Many employees will not sign up. By the time the employee is ready to follow-up on the virtual outplacement assistance, the outplacement firm failed to provide value to the employee on the four critical issues mentioned above.

14. You will be asking the employee to sign a waiver of rights contract in return for severance benefits that are greater than provided by human resource policy. This is a legal document and state law often requires that you add a paragraph recommending that the employee consult an attorney prior to signing the document.

If the employee is required to pay legal fees during a time of uncertain financial future, there may be a tendency to seek a litigator who promises to take the assignment on a contingency fee basis. Another possibility is that the employee will seek out someone who is inexpensive but not necessarily an expert on employment law.

Some of our corporate clients provided a specific dollar amount that can be used by the employee to retain an employment law specialist to review the document.

Financial Dimension

When examining the costs of termination, you want your financial professional to examine the total costs of termination and not simply the transaction costs.

Transaction costs of the termination include severance payments, including outplacement if offered. It may also include the costs of hiring outside employment labor counsel to review the decision. Some of our clients pay the cost for employees to retain their own employment law specialists. In this way, they are guided by finding qualified employment attorneys rather than finding an attorney who is willing to take the case on a contingency basis.

Do not accept transaction costs as the basis of your decision. You want to understand the total costs of termination. These costs may include the cost of hiring a search firm to provide candidates.

Total costs include a temporary reduction of productivity as team members must stop projects, they are working on in order to engage in candidate interviews. It includes lost productivity, as it takes time for the new employee to become productive.

One useful framework is to view total replacement costs as equal to 150% of the total base salary of the employee being replaced. (Linn, 2016; O'Connell et al, 2007).

Looking at termination from a total cost basis may make you want to think about alternatives to termination!

Marketing Dimension

One of the biggest mistakes we see our corporate clients make is to think about employee termination as a binary event. The classic binary thinking is: "You are either on the bus or off the Bus!"

If you are "on the bus," the company wants to help you succeed in your job. If you are "off the bus," the company could not care less about you.

Applying binary logic to employee termination requires you to assume that your company does not operate within a business ecosystem. That employee you are firing will probably remain within your ecosystem upon the expiration of the non-compete contract.

Instead of thinking of termination using a binary framework, ask a systems question:

"What is the probability that this individual could have a direct or indirect impact on the business over the next four years?"

If the answer is "close to zero," then consider the termination event as a transaction event. Focus on cost minimization for the corporation while complying with your company's HR policies.

Suppose the answer is higher than 30 percent? Consider these examples:

A. The VP of XYZ Corporation fired a Director. Two years later, XYZ is seeking to purchase a competitor and the former Director is now VP of this firm. She considered her termination to be fair and became an in-house champion for the merger. She later played a key role in the successful integration of the two companies.

B. An Associate at the Smith Jones law firm was not going to be named Partner. Smith Jones has an “up or out” policy. The Associate had to leave. But the firm provided the Associate with valuable outplacement assistance and he was able to land a role as Associate General Counsel of a large company. Associate thought of himself as a proud alumnus of Smith Jones. Two years later he recommended that his company retain the services of Smith Jones.

C. A VP of Sales was fired. She also was a member of the Board of Directors of a major business school alumni association. Despite her disappointment at being fired, she appreciated the help the company provided to allow her to land on her feet. In her role with the business school, she has become a vocal champion to encourage young professionals to consider joining the company that fired her.

Chief HR Officer Susan Mccuaig (2019) cautions that the way you organize the termination event could turn that former employee into an “apostle for the company or a terrorist:”

“We know that terrorists have the potential to speak with more people through social media, at professional events, in discussions with former peers, and in discussions with search firms.

“While it is always a good idea to treat people well transitioning in and transitioning out, people tend to remember their transition out more vividly.”

Summary and Conclusions:

No business leader ever got an award or a promotion for firing well. And yet being effective at employee terminations is a critical leadership competency.

We have made the case for looking at employee terminations from three dimensions: legal, financial, and marketing.

We have cautioned against accepting the transaction-cost framework and suggested that you ask finance for a total cost analysis of the termination.

We have suggested that if you use an outplacement firm, you want a live outplacement consultant available to speak with the terminated employee as part of the termination meeting. Avoid outplacement firms whose business models expect terminated employees to sign up for an opportunity to speak with a “virtual” counselor. There are certain stressful times in life when face-to-face human contact is the respectful thing to do.

Finally, we have suggested that an “on the bus vs off the bus” attitude towards employees harms a company. Your company operates within a large business system.

References

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