



## Work Sample

### **Avoid costly “wrongful termination” charges with proactive steps**

If there is anything worse than being accused of making a wrongful termination (aka wrongful discharge), it is having to go to court to prove your innocence. That’s because you could have acted entirely legally, but lose the case anyway if jurors believe your action was “unfair.” Here’s what you can do to avoid that costly, reputation-damaging fate.

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What *is* wrongful termination? If you are accused of that after firing an employee working under a contract, the answer is simple: You violated the terms of the contract (or concrete labor law provisions described below). But if, more typically, the charge comes from an employee without a contract, the “employment at will” doctrine prevailing in most states not absolute. Also, state labor laws can trip you up if you don’t know them well.

Under federal labor and civil rights law, a firing would be deemed “wrongful” in any of these scenarios:

- You are retaliating against an employee who filed a discrimination charge or participated in a discrimination investigation
- You terminated an employee who refused to commit an illegal act requested by a superior in the company
- You singled out the employee based on race, nationality, age, gender or sexual orientation
- You have violated your own termination procedures as described in your employee handbook
- You terminated an employee based on a physical or mental disability without providing reasonable accommodations to enable the disabled employee to perform essential required tasks.

### **When to seek expert advice**

Wrongful termination charges based on assertions of a violation of the Americans with Disabilities Act are very common because the laws governing disability “are particularly complex,” notes Elizabeth Falcone, a Portland-based labor lawyer with Ogletree Deakins. “Pick up the phone and talk to an expert” before terminating anyone with disability, she urges.

State labor laws (on disability and other issues) often vary widely and may add tougher standards than those under federal law. In Oregon, for example, the

threshold for age discrimination (40 under federal law) begins at age 18, with the intention of protecting the rights of young workers as well as older ones. Oregon also prohibits employees from being fired if they are absent for long periods to participate in the Olympics, Falcone says.

### **Constructive discharge**

Terminations can be deemed wrongful not only when the employee is explicitly fired, but also under the doctrine of “constructive discharge,” when an employee is, in effect, forced to quit. State definitions vary. California’s supreme court has defined constructive discharge as a situation in which “the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee’s resignation that a reasonable employer would realize that a reasonable person in the employee’s position would be compelled to resign.”

Your goal is not only to stay within the boundaries of legally defensible terminations, but to prevent employees from filing claims in the first place, no matter how easily they could be shot down in court. Most employers settle to avoid the high cost of taking the case to court. Terminated employees generally are seeking monetary compensation, not reinstatement to their former job.

Many wrongful discharge suits originate from what Falcone calls a “gotcha situation”—the employer has been looking for an opportunity to fire an employee whose performance or behavior has been a problem for a long time, and finds one. It’s far better to manage and discipline such employees from the start. At least that way if they are terminated, they won’t be angered by a perception of being caught in trap.

Other steps to minimize the prospects for a wrongful termination case include:

- If performance issues are involved, be sure to have documented prior discussions of performance issues, and that you have given the employee a reasonable opportunity to address those performance concerns. While this is not technically required in an employment at will state, if it comes down to a jury trial, the law may be irrelevant if jurors simply believe you have been unfair.
- If the planned termination is based on misconduct, carry out a prompt and complete investigation with interviews of all parties before making the your decision. Take care not to threaten, intimidate or confine the accused employee during the investigation.
- During the termination interview, state the grounds for the discharge clearly, confidently and succinctly. Be polite, professional and do not allow the discussion to digress to unrelated topics. Failing to state the grounds for termination may puzzle and anger the employee, increasing the likelihood of litigation. Also, if litigation ensues and the grounds for termination are given subsequent to the termination, the employee’s

attorney may assert, persuasively, that there was no original legitimate reason for the termination, and that you had to invent a plausible explanation after the fact.

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