



QUARTERLY SPECIAL REPORT

**REAL LIFE
TERMINATION LESSONS:**
*HOW TO KNOW IF IT'S OKAY
TO FIRE AN EMPLOYEE*

HUMAN
RESOURCES





REAL LIFE TERMINATION LESSONS:

HOW TO KNOW IF IT'S OK TO FIRE AN EMPLOYEE

One of the most common inquiries we get from customers are stories that end with: “Can I fire this employee?” Given the details of individual situations, sometimes that answer is clearly, yes you can, and you probably should. Sometimes the answer is NO — if you want to stay out of court, that is. But most often the answer is a resounding ... it depends. The six scenarios in this report can help you understand whether it's okay to terminate an employee or not.

There are, of course, different types of terminations. Voluntary terminations, which we more often refer to as “quits” or resignations, or possibly retirements, are usually not a problem. They can be inconvenient, but legally, they are usually not a problem.

Next there are involuntary terminations. While this category could include layoffs which are somewhat different, what we’re talking about is firing an employee, or the kinder description, “letting someone go.”

Of course, the point of all this termination talk is to avoid “wrongful termination” which is when an employee who has been “let go” files a lawsuit claiming the reason for the termination was an illegal one.

You might be asking: How can a termination be “wrong” when an employee was hired “at will?”

What is the at-will doctrine? In 49 states (sorry, Montana!) and Washington D.C., employers may terminate employees at any time and for any reason, as long as that reason is not illegal, such as retaliation for protected activity or discrimination against a protected characteristic, such as gender, race, religion, age, etc.

Under the at-will doctrine, an employer is technically free to terminate an employee whose shirt they don’t like or who prefers a different sports team. Since those characteristics aren’t legally protected, nothing is stopping an employer from using them as grounds for termination.





It's important to stop and ask if any of these things might come into play when considering a termination:

- ▶ Has the employee recently been injured? While it's not completely forbidden to terminate an employee following an injury (especially if it occurs after repeated corrections and warnings), it's almost never a good idea to fire someone for the injury itself (or resulting workers' comp claim). Even if an employee's injury, medical care, or worker's comp claim costs a company money.
- ▶ Next, you should never terminate an employee for reporting illegal behavior. This can range anywhere from reporting harassment to acting as a whistleblower under federal law. Even if the employee's actions harm your company in some way, reporting illegal behavior is almost always a protected activity. On another note, if your first instinct is to fire an employee for reporting this type of behavior, you may want to look at the larger picture of your workplace priorities.

Finally, perhaps the most obvious but most unexpectedly complicated entry on our red-light list: you should not terminate employees for any discriminatory reason. Complicated because discrimination isn't always as easy to spot as you might think. While you might be imagining a situation in which a manager says something clearly inappropriate like "I just don't like Jo because Jo is X" (and here, X could stand for any protected characteristic — age, gender, religion, etc.), it's rarely that cut-and-dried. For instance, have you ever said an employee is just "not a good fit" for your culture? Look around. If your culture is a bit homogenous, the decision to let someone go who doesn't fit it might pose a hidden risk of discrimination. Or, if an employee seems incapable of accomplishing the task at hand, take a second to consider what that really means before jumping right to termination. Is it possible the employee is struggling with a disability that you've failed to accommodate correctly?

Discrimination can also be a factor when considering termination for employees who are pregnant or disabled. If an employee's condition is the only reason you're considering termination, it's pretty clear-cut discrimination.

It may help to think of potential terminations in terms of traffic lights.



Green light situations
the way is clear to
go forward and
terminate.



Yellow light situations
slow down, look
for obstacles, and
cautiously consider
if terminating would
be okay.



Red light situations
cases where you
most definitely
should **STOP** and
not terminate an
employee.

Following are six “real-life” scenarios. Read each one and consider whether you think it’s a red, yellow, or green light situation. Remember, red means STOP, do not terminate, yellow means maybe it’s okay, but proceed with caution, and green means GO ahead and terminate.

SCENARIO 1: EMPLOYEE SEEKS ACCOMMODATION

A manager named Joan leads a very busy team. It doesn't help that two of Joan's reports are out on FMLA leave for various reasons. Now a new team member, Calypso, has asked Joan for a flexible schedule or some time off to attend a round of in-vitro fertilization (IVF) appointments to get pregnant. Calypso doesn't have an FMLA serious health condition, isn't even eligible to take FMLA leave yet, and doesn't have a disability. Joan ponders letting Calypso go and filling the position with someone who could be at work when needed.

Do you think terminating Calypso would be a red light, yellow light, or green light?



ANSWER: RED Light! The Pregnant Workers' Fairness Act (PWFA) requires employers to provide reasonable accommodations to a qualified employee's or applicant's known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause an undue hardship on the operation of the business of the covered entity.

IVF treatment to get pregnant is a related medical condition (difficulty in becoming pregnant or infertility) if the employee is seeking health care related to it. Employers may not retaliate against individuals exercising their rights under the PWFA.

Therefore, terminating Calypso because she asked for an accommodation due to her pregnancy-related medical condition, would violate the PWFA.





SCENARIO 2: MARIJUANA MADNESS

A company's new hires are required to pass a drug test before beginning work. An individual who is hired as a forklift driver takes the test and tests positive for marijuana. The hiring manager wants to end employment immediately.

Is this a good idea?



ANSWER: This is a yellow light situation.

What you do will depend on state marijuana laws. It's risky to end employment until you know:

1. The marijuana laws in the state where the hire is taking place.
2. Whether or not the new hire has a medical marijuana card.

You need to proceed with caution until you have this information. In California, for example, marijuana testing is restricted because a positive test does not prove that an individual is under the influence of marijuana. It is only allowed for employees in the building and construction trades, or for positions requiring the test under federal regulations. So, in California, the light is red. It's also red in New York and New Jersey. In states without legal marijuana, such as Kansas or Kentucky, the light is green, however.

In states where medical marijuana is legal, the light is yellow until you determine whether the individual has a medical marijuana card. If the individual has a medical marijuana card, you should consider whether off-duty marijuana use can be accommodated based on job responsibilities. The new hire may also be given time to talk to their doctor about switching to another form of treatment, and then testing again in 30 days.

Marijuana is legal for recreational use in 24 states and for medical use in 37, so a positive marijuana test is definitely a yellow light situation until you know what type of state laws you're dealing with. It doesn't hurt to plan ahead and familiarize yourself with those state laws, so you're prepared and have a plan in case this situation comes up.

SCENARIO 3: ARRESTED WHILE PROTESTING

Employee Charlie didn't call or show up for work one morning because he was arrested at a political protest the night before. Charlie's supervisor doesn't approve of the cause Charlie was protesting for and wants to punish Charlie by using this arrest as a reason for termination.

Should the employer terminate Charlie?



ANSWER: This is a yellow light situation. You may be thinking that Charlie could be terminated for not calling in and not showing up to work. That might be acceptable IF the employer applied this same level of discipline to any employee who was a no call/no show. However, if others with similar infractions of the attendance policy have not been terminated, using this as a reason to terminate could be asking for trouble.

Another issue here is that employers must realize that arrest does not equal conviction. Maybe Charlie was innocently standing NEXT to someone who threw a water bottle at a police officer and won't be charged when that fact comes to light.

Third, the employer should look at the entire situation. It makes a difference if Charlie was perceived to be representing the company because of the way he was dressed at the protest (like if he was wearing company apparel) or what he was/is saying publicly or on social media. The company may have a policy that the views expressed by employees must not be attributed or associated with their employer.



SCENARIO 4: EXHAUSTED FMLA LEAVE

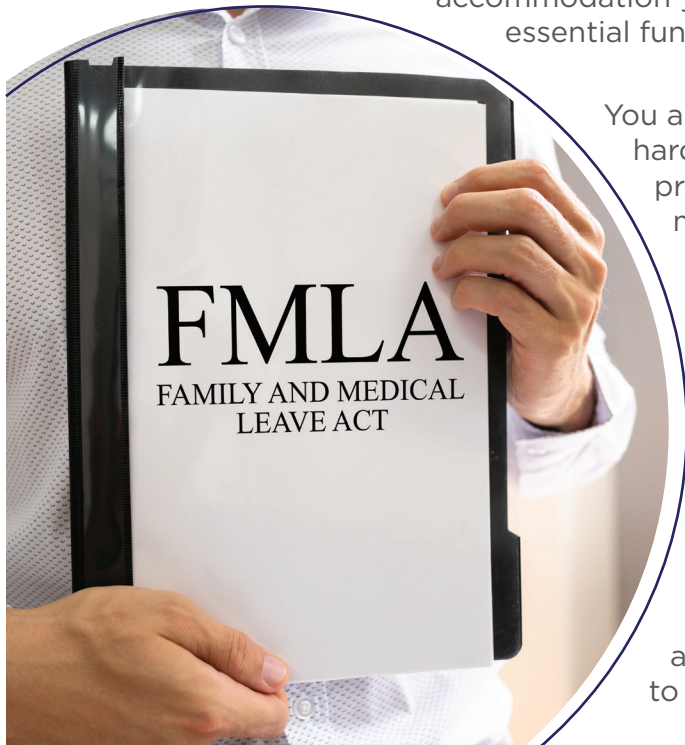
An employee's FMLA paperwork states that the employee will require more than 12 weeks leave.

After the 12 weeks has been exhausted, can this employee be terminated?



ANSWER: FMLA is a complicating factor that automatically makes this a yellow-light situation. If an employee exhausts their 12 weeks of FMLA leave taken for their own serious health condition and cannot return to work because of the continuation of the condition, your FMLA obligations cease, but you will have obligations under The American's with Disabilities Act (ADA) to consider.

The ADA requires you to provide a reasonable accommodation to a known disability. In this case, the employee has provided a timeline for return (12 weeks), which qualifies as an accommodation request. When an employee requests a workplace change (such as time off) due to a medical condition, you are required to engage in an interactive process with the employee, with a focus on identifying an effective reasonable accommodation. What accommodation you provide will depend upon the employee's limitations in relation to the job's essential functions.



You are not required to provide a reasonable accommodation that poses an undue hardship, but failure to at least consider your ADA obligations, including the interactive process, could risk a discrimination claim. The term: "undue hardship" basically means significant difficulty or expense with respect to your particular resources and circumstances. There is no easy test for these situations; they must be handled on a case-by-case basis. In addition, undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business. You must assess on a case-by-case basis whether a particular reasonable accommodation would cause undue hardship.

Now, if this employee had asked for excessive or unlimited time off, this would be a different conversation. While providing leave beyond the 12 weeks of FMLA leave has been seen as a reasonable accommodation under the ADA, recent court cases have found that indefinite leave is not reasonable. If the employee cannot provide a timeline for return within the foreseeable future, it would probably be appropriate to terminate.

SCENARIO 5: ANGRY SUPERVISOR

A floor supervisor recently just LOST it, threw down a hardhat, and made threatening statements to an employee who made a mistake. This supervisor has gotten angry on other occasions, but never made threats before.

Can you terminate?



ANSWER: Green light. It's definitely appropriate to terminate. If this was a one-time, out-of-character outburst, you might consider if there are other factors at play in determining whether to discipline the supervisor or whether to simply issue a warning that this type of behavior is unacceptable. However, if you believe this is just an escalation of the other angry behaviors demonstrated in the past, it is likely appropriate to terminate. In fact, threats of violence or actual violence might even warrant termination on the spot. Depending on the situation, you may need to involve another person as a witness to the firing — or even call the police if the behavior has escalated.



SCENARIO 6: EMPLOYEE SHARES TOO MUCH

Shortly after hire, a new employee started questioning coworkers about their salaries, and discussed their own openly. This caused quite a bit of turmoil when people realized how much others were making.

Can you terminate for this if the employee is still in their probationary period?



ANSWER: Red light. Even though you'd probably prefer your employees not to discuss their salaries openly (or secretly, for that matter), you may very, very rarely prohibit or punish this kind of activity. The National Labor Relations Act (NLRA) protects employees' rights to discuss working conditions, including pay, even if it causes turmoil within your company. Even if your employee were doing this outside of work, or on social media, it would still be considered "protected concerted activity" under the NLRA.

Attempting to silence or reprimand employees who do this is most likely going to land you in hot water at some point. Again, even though it isn't ideal for any employer to have a rabble-rousing employee, this is actually one of the most unambiguous red-light scenarios described here. This employer would be well advised to get rid of their policy against discussing salary data immediately, before it attracts a lawsuit.

In addition, it's important for employers to understand that a probationary period gives them no more right to terminate an employee than they would otherwise have. While it does afford some benefits, such as the ability to pay a bit less, or an opportunity to clearly outline company expectations, or even the ability to withhold benefits for a short time, a probationary period does not provide you any additional rights to fire employees. A lot of employers aren't aware of that, so it's something we like to remind them of often.



FINAL THOUGHTS

Maybe these six scenarios got you thinking about situations in your own organization in which employees were terminated. Did you do the right thing? Or maybe you're dealing with a situation right now where you're wondering whether terminating an employee would put you at risk of a wrongful termination claim. Terminations are often complicated, but knowing that some scenarios are bright red light situations, some warrant proceeding with caution, and others are green light "go ahead and terminate" situations may help you make the right decision.



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