

"What? I'm Fired?" Handling the Discharge Process and Termination Meeting

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BREAKOUT SESSION #201

**What? I'm Fired?"
Handling the Discharge Process and Termination Meeting**

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I. INTRODUCTION.

Terminating an employee is never an easy thing to do. However, once you have determined that termination is the right decision (and legitimate and non-discriminatory), it is critical that you that you carry out that decision in a way that avoids legal risk. The worst thing an employer can do is to create risk when it did not exist in the first instance. Unfortunately, missteps during the termination process (i.e., when meeting with an employee, documenting the decision, or carrying out administrative tasks) can unnecessarily create risk and legal exposure. These materials describe some tested best practices and recommendations on how to carry out an effective termination.

A. Why is this important?

- Reduced legal exposure
- Accomplished by following (legal and practical) "Best" Practices
- Don't turn a legitimate termination into a risky termination

II. THE FUNDAMENTALS OF AN EFFECTIVE TERMINATION.

A. Basic Principles.

1. Be honest with employee.

Example: If the employee is being terminated for performance issues, then say that. Don't characterize the termination as a downsizing / job elimination if that is not true.

2. If the truthful reason for the termination is not legitimate, then you need to rethink the decision.
3. Treat the discharged employees with dignity and respect.

Example: Conduct the termination meeting in a confidential manner. Don't parade the terminated employee through the office

space to collect his/her belongings with an armed security guard trailing behind.”

Example: When terminating the employee, ask yourself, “What would a jury think about how I am treating this employee?”

4. Unless the situation truly warrants it, avoid having the employee escorted out by law enforcement or security.
5. Be confident (with your decision).

Example: You did your homework, checked your facts, and you gave the employee the chance to tell her side of the story. You have determined that termination of the employee is not only legitimate, but it is in the best interest of the organization. The termination meeting is not the time to waffle about the decision and create the impression that you are indecisive.

6. Wishy-washy rationale increases employee suspicion and risk.
7. Plan ahead.
 - An employee’s termination should be carefully coordinated.
 - IT (email, your network or servers, important business documents, employee’s desktop, laptop, etc.).
 - Security /Admin (keys, access badges, etc.).
 - How to communicate decision to other employees and how to respond to questions about the same.
 - Consider impact on message to clients.

III. HOW TO DOCUMENT THE TERMINATION.

A. Best Practices for Conducting the Termination Meeting.

1. Who can / should be present?
 - Employer witness. Always recommended.
 - Employee-requested witness. Maybe? But, definitely not a friend, parent, spouse, lawyer.
 - Special rules apply in the union context (i.e., Weingarten rights, union steward, etc.).
2. How should you communicate the message?
 - Be direct. Don’t beat around the bush. You can be compassionate, respectful and direct at the same time!
 - Determine what you intend to say -- in advance.

- Do Not just “Wing It”.
- Minimally, create talking points that will guide the conversation. All of the main/primary reasons for the termination should be addressed.
- If you have concerns about staying on task, you can script the message. There is risk that the terminated employee may feel devalued, etc., as a result of this approach.

3. How should the meeting be documented?

- Carefully!
- Must be well written, precise.
- Complete and accurate.
- Capture main discussion points.
- Describe reason(s) for termination!!
- Employee’s response.

Example: During a termination meeting, the employee says, “You got me. My performance is objectively poor and I have been slacking off for years.” Always document an employee’s “admissions” – in quotes if possible.

- Always include basic information such as attendees, date, time, duration of meeting.
- Only one employer representative should be assigned the task of documenting the meeting to avoid conflicting versions. However, the second employer representative must review the documentation once completed for accuracy.

4. When should the meeting be documented?

- As soon as possible. The best practice is to complete your documentation of the meeting the same day.
- The longer the period between the termination and documentation of it, the risk of inaccuracy increases measurably.

5. Where should the meeting be held?

- The termination meeting should always be conducted in private and as confidentially as possible.
- Avoid “public” terminations!

6. What if an employee attempts to engage in a debate about the merits of the termination decision?

- Avoid – Do not take bait.
- You cannot lose “control” of the termination meeting.

7. Under What circumstances do I suspend a termination meeting and potentially reevaluate the decision?
 - If new information comes to light that is significant and/or poses new risk.

IV. WHAT ARE AN EMPLOYER’S LEGAL OBLIGATIONS TO A TERMINATED EMPLOYEE IN MINNESOTA?

A. Legal obligations to a terminated employee.

1. Payment of final wages.
 - a. Under Minnesota law, for *private* employers, earned and unpaid wages for discharged employees are: “immediately due and payable upon demand of the employee.” If the employee's earned wages and commissions are not paid within 24 hours after demand, whether the employment was by the day, hour, week, month, or piece or by commissions, the employer is in default.” Minnesota Statutes Section 181.13(a).
 - b. Failure to make payment can result in result in penalties (and recovery of the employee’s attorney fees).
 - c. Different rules apply to employees who quit or resign. When any such employee quits or resigns employment, the wages or commissions earned and unpaid at the time the employee quits or resigns shall be paid in full not later than the first regularly scheduled payday following the employee's final day of employment, unless an employee is subject to a collective bargaining agreement with a different provision. If the first regularly scheduled payday is less than five calendar days following the employee's final day of employment, full payment may be delayed until the second regularly scheduled payday but shall not exceed a total of 20 calendar days following the employee's final day of employment.” Minnesota Statutes Section 181.14, subd. 1.
 - d. Under Wisconsin law, employees (except those employed on a commission basis) who quit or are discharged must be paid no later than the date the employee regularly would have been paid under the employer’s established payroll schedule. In situations where an employee is separated as a result of the employer merging, liquidating, ceasing business or relocating, employees must be paid within 24 hours of the time of separation. Wisconsin Statutes Section 109.03(2)-(3).

2. Unlawful deductions from wages.

- a. Employers must be aware of Minnesota Statutes Section 181.79 which makes unlawful certain wage deductions, including those made from a final paycheck.
- b. Employers are prohibited from making any deduction, directly or indirectly, from the wages due or earned by any employee, who is not an independent contractor, for lost or stolen property, damage to property, or to recover any other “claimed indebtedness” running from employee to employer.
- c. Exception. Deductions may be made if, after the loss has occurred or the claimed indebtedness has arisen, the employee voluntarily authorizes the employer in writing to make the deduction. A deduction may not be in excess of the amount established by law as subject to garnishment or execution on wages.
- d. An employer and an employee are prohibited from agreeing to disregard the requirements of the statute. Any such (attempted) agreement is void by operation of statute. Some exceptions apply (i.e., in the case of a collective bargaining agreement, rules for certain commissioned salespeople, certain loan agreements).

B. Respond to requests for truthful reason for termination.

1. A discharged employee has the right to request in writing, within 15 working days following termination, that the employer inform the employee of the “truthful” reason for termination. An employer is obligated to respond within ten working days of its receipt of any such request. Minnesota Statutes Section 181.933.
2. What’s the best strategy when responding?
 - Highly specific response. This can be effective, but employer must be confident it facts are 100% correct.
 - General/vague. This approach should be employed if some of the facts are uncertain and/or if the employer is concerned about boxing itself into a corner.

Example: You are being terminated because we have determined your behavior and performance do not meet our expectations.

*This is a perfectly “lawful” response to a truthful request for termination.