

Steps to Follow Before Terminating Underperforming Employee

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We have a short-term employee we recently moved into a new position, but he just isn't "getting it." His manager wants to terminate him at will, but I'm concerned because he falls into a couple of protected categories: He's 52 (over 40) and a Muslim, and we haven't given him any warnings. What are our options?

Although California is an "at-will" state, meaning an employer can dismiss an employee for any reason as long as it isn't an illegal reason, this question presents the danger of exercising at-will terminations without thinking through the decision.

Disciplinary Process

In this instance, the employee is in two protected categories—age and religion. Plus, the employer has not worked with the employee. A personnel file empty of warnings could cause an employee to think it was his race and religion that led to the termination, not his job performance.

If an employer has exercised due diligence and disciplined the employee about the performance issues, it can rebut the claim the employee was being discriminated against.

Therefore, even with at-will status, it's advisable to go through the disciplinary process before terminating an employee. Claiming at-will will not protect an employer from a claim of discrimination.

Mandatory Notices

In addition, it is important to remember that all departing employees—whether the reason is termination, resignation or layoff—must receive three documents:

- Notice to Employee as to Change in Relationship;
- the Health Insurance Premium Payment (HIPP) form; and
- Form 2320—For Your Benefit from the Employment Development Department (EDD).

The first two notices are one-page documents available on **HRCalifornia**. The third is available on the EDD website, **www.edd.ca.gov**.

The COBRA (continuation coverage rights) election form also should be provided if the employee is on the company health benefits plan.

Lastly, when terminating an employee, besides the forms noted above, the employee must be provided his/her final paycheck at the time of termination. If the employee wants the employer to mail the check, he/she must direct the company to do so in writing.