



# ON RETAINER

— COUNSEL ON DEMAND —

## HOW TO PROTECT THE COMPANY WHEN TERMINATING EMPLOYEES

Every business has to terminate an employee at one time or another. Most do not consult an attorney before doing so, because of the time it takes to find a suitable attorney, as well as the cost of doing so each time the problem arises. OnRetainer Members have constant access to attorneys who are skilled at solving the problems involved in terminating employees, as well as other legal traps that employers fall into. Our Members never make any of the **Top 7 Mistakes Most Employers Make When Firing Employees**:

### 1) Firing employees in the heat of the moment

It is easy to get upset with an employee for doing something wrong, but firing them in the heat of the moment is never a good idea. Taking a step back and developing a strategic plan for dealing with the situation, in accordance with the information contained in this report, as well as with the company's policies and procedures, is a much better approach. OnRetainer recommends that its Members call and speak to their assigned OnRetainer employment lawyer prior to terminating any employees.

### 2) Failing to keep proper documentation of the reasons for termination

One of the best ways to defend against a discrimination claim is to show documentation that objectively demonstrates the reasons for the termination. Courts and juries are very suspicious of documents created immediately before or after the termination. Unless the termination is based on a single, egregious event, it's best to have a written history of problems with the employee. If the only written documentation justifying the termination is something you just created (or will be creating later), you should wait a while and establish a good paper trail documenting problems before terminating the employee.

### 3) Firing an employee because they complained or tried to organize the employees

Most employers are not aware that it is a violation of federal labor laws to terminate or even discipline an employee who complains about working conditions or safety in the workplace. It is also illegal to discipline or terminate an employee who attempts to convince other employees to organize into a union. If you have an employee engaging in such behavior, you must seek counsel from an attorney who has experience dealing with such situations. It is important to remember that even if you terminate an employee for other legitimate reasons, many claims are filed every year asserting that employees were terminated because of their complaints about situations in the workplace, so businesses need to take affirmative steps to protect themselves.

### 4) Not having a witness at the termination meeting

Employees often get emotional and even angry when they are terminated. Occasionally, they will assert discrimination claims at the termination meeting. Other times, they will assert that the terminating manager made statements that demonstrate they were fired for unlawful reasons. Having two managers present in the termination meeting will give the company a corroborating witness if legal action or a federal or state claim is asserted.

### 5) Not offering severance pay in exchange for a resignation and release

It is very difficult to overcome an unemployment claim when you terminate an employee. Typically, a claim can be avoided only if the employee resigns or is terminated for "gross misconduct." Most reasons you have to terminate an employee will

not rise to that level. The best way to avoid having the resulting increase in your unemployment insurance and to avoid expensive litigation is to offer the employee severance pay in exchange for their resignation and a release of all claims. Even if you haven't done anything wrong, an unhappy former employee may still bring some type of claim against you. Litigation is expensive, even when you are right. If the employee is over 40, you must comply with the Older Workers Benefit Protection Act, which requires that you give the employee at least 21 days to consider the release and to consult with an attorney and 7 days to revoke the release after it is signed.

### **6) Mishandling an employee's last paycheck**

In Texas, involuntarily terminated employees must be paid their final paycheck within 6 days. Unless you have a policy that specifically promises to "cash out" employees for unused vacation time and sick leave, you are not obligated to pay terminated employees for those items. Even if you have a great claim against the employee for damages or lost money or property, you are not allowed to deduct anything from the final check without written authorization at the time. An authorization signed at the time of hiring is most likely not good enough.

### **7) Not having a lawyer to train managers on these and other rules**

Having the owner and/or CEO of the company understand the information in this report is not enough. Many companies get sued because a manager who was not trained on these issues made mistakes in firing an employee. Having lawyers train your managers on how to prepare for a termination, how to carry it out, how to handle the situation after termination, and what to do if a claim is made or a lawsuit filed is a wise investment. Participating in a consortium like OnRetainer, that provides access to lawyers to train your team at a reasonable monthly cost, is your best bet for accomplishing this goal in a cost-effective manner.

### **Final Notes:**

Texas is an "at-will employment" state, which means that you can fire an employee for any legal, non-discriminatory reason—even for being annoying. Being legally allowed to do something, however, doesn't always make it a good idea. If the employee is in a protected class (race, color, gender, national origin, religion, age, disability, on FMLA leave, or on active military status), the employee could bring a claim for discrimination under state or federal law based on the termination. To protect yourself from higher unemployment insurance, federal or state labor claims, and lawsuits, you will need to build legal protections for your business. The best way to do that is to join OnRetainer. Your Membership includes a free analysis of your employment policies and procedures, as well as many other benefits. Check out our plans at [www.onretainer.net](http://www.onretainer.net), or call us at 713-574-9577.