

The Act of Terminating Employees - Cutting Down on after Termination Legal Battles

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Introduction

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Introduction to Wrongful Termination

Overview of wrongful termination

- CA is an at-will state but it is not a complete shield to liability (CA Labor Code Section 2922)
- A termination, even though employment is at-will, is wrongful when it is done in violation of public policy.
 - Gantt v. Sentry Ins. (1992) 1 Cal.4th 1083, 1094
- Termination can also be constructive




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Introduction to Wrongful Termination Cont.

Common additional claims in wrongful termination lawsuits:

- Defamation, libel, and slander
- Intentional infliction of emotional distress
- Invasion of privacy
- Discrimination



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Introduction to Wrongful Termination Cont.

Why is there so much wrongful termination litigation?

- The bases upon which claims of wrongful termination in violation of public policy is vast:
- Employees could allege that they were fired due to:
 - Discrimination on the basis of any of the protected classes
 - Out of retaliation
 - Because they sought CFRA leave or protections
 - Because they reported an OSHA violation
 - Because they complained about wage and hour issues (for example, not being paid overtime properly)
 - Because they testified at a hearing
 - For engaging in certain political activity
 - Because they reported penal code violations, fraud, tax violations, false claims act violations, ICRA violations, or BPC § 16600 violations


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Introduction to Wrongful Termination Cont.

SB 497

- CA Gov. Code Section was effective 1/1/2024
- AKA The Equal Pay and Anti-Retaliation Protection Act
- Creates a rebuttable presumption
 - Trigger: Adverse action within 90 days of protected activity
 - What this means
- Protected Activities (same or similar items to the wrongful termination bases we discussed)




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Introduction to Wrongful Termination Cont.



Where Do we Go from Here?

- Proactive practices leads to defensible decisions!

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How to Limit Post Termination Liability Exposure

Manage performance continually and effectively

Document everything

Follow company policy and apply the policies consistently and fairly


Thoroughly assess termination before you proceed

Be clear in the reason for termination

Be professional

Propose a severance agreement

Provide proper termination documents



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Manage Performance Continually and Effectively


CA is technically an at-will state, but there is an abundance of wrongful termination, discrimination, and retaliation litigation

Performance management practices can impact terminations by ensuring that any termination decisions are well-documented, justified, and not based on discriminatory reasons.

Proper performance management helps establish a clear record that the termination was for a legitimate, non-discriminatory reason related to job performance or business needs.

It helps to create your record of job performance and behavior, which serves as a foundation for termination

- Avoid claims of constructive dismissal



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Document Everything

Proper documentation practices involve documenting an employee's performance over time.

Documentation is crucial in California, where employers must be prepared to defend any termination decision.

Document everything. This includes (but is not limited to):

- Job performance
- Behavior issues
- Violations of company policy
- Communications related to informal guidance or coaching
- Formal training
- Employee concerns or issues reported (and employer actions, communications, and/or investigations in response)
- Complaints and commendations from co-workers, supervisors, customers etc. about the employee
- Disciplinary actions



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Examples of Documentary Forms

Annual Evaluations

- Performance evaluations are generally conducted annually, covering the evaluation period from the previous calendar year
- It is important to ensure these are done and include accurate and thorough information

Warnings

- Both verbal and oral should be documented

Performance Improvement Plans

- Written plan to manage and address recurring performance issues
- This should be a templated form for consistent use

Employee Events/Incidents/Complaints

- Catch-all
- Employee event of note
- Example of missed lunch

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Thoroughly Assess the Situation When Termination is Being considered

Jumping the gun on assessment can be disastrous

Assess the WHOLE situation

- At will?
- What does the handbook or company policy say?
- Protected leave in place?
- Disability requiring an RA?
- Protected activity?
- Consistent with past terminations?
- Documentation?




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Be Clear in the Reason for Termination

Vague vs specific rationale


- "Your services are no longer needed" or "The company is moving in a different direction"
- "The termination of your employment is because you have not met the expectations of the position, including but not limited to regularly being tardy to work and a failure to perform certain job tasks accurately and timely. Consistent with our company policies and practices, we have attempted coaching and/or discussing these deficiencies with you. However, you have not made the improvements necessary to continue employment."



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Be Professional



Remember, we're all human and terminations are hard

A respectful and delicately handled termination goes a long way

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Propose a Severance Agreement

Eases the impact of the termination

Serves as a vehicle for release of liability


Must be carefully drafted



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Provide Proper Termination Documents



Have your ducks in a row if you're planning to terminate

Final pay must be provided the same day of termination (unless the employee resigns with less than 72 hours notice)

Certain documents must be provided

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Be Consistent and Fair

California employers must ensure that performance management and termination processes are applied fairly and consistently across all employees. Being fair and consistent can help prevent claims of discrimination and retaliation.

Know your company's policies

Reach out to Human Resources (and remember your property is not a lone island)




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Consult with an Employment Law Attorney

An ounce of prevention is worth a pound of cure

Don't hesitate to reach out to an expert!



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Alternatives to Termination

Termination is the last resort

Considering other options may be appropriate:

- Additional training and coaching
- Reassigning/offering the employee to a job more suited to their skill set
- Implementing a Performance Improvement Plan




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Questions



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