

## **How to Fire an Employee and Avoid a Wrongful Discharge Lawsuit**

**By**

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One of the questions I am most frequently asked is, “We have an employee who is not doing his/her job, but we are afraid to terminate him/her for fear of a lawsuit. What do we do?” The irony of this question is that North Carolina is an employment at will state which means that an employer may fire someone with or without a reason at any time, and an employee may quit at any time with or without a reason. So, why are so many medical practices concerned? They are worried a disgruntled former employee will file a wrongful discharge lawsuit.

Employees these days are more legally savvy than ever. They know how to shop for an attorney who will take their case against the “employer who wronged them.” They are familiar with the common causes of action against an employer. These can include harassment, age discrimination, disability discrimination, breach of contract, race discrimination, and retaliation for complaining about health and safety conditions, among others. It is no wonder employers are anxious about having to spend time and money defending a lawsuit that may not even be legitimate.

There are several ways to protect yourself as an employer who needs to dismiss an employee. The goal is to reduce your chances of a lawsuit, and if you are sued, to have a strong defense. First, even though this is an employment at will state, it is a good idea to have a legitimate business reason to fire someone. Appropriate reasons include poor performance, excessive absenteeism, breaking the practice’s rules, and refusing to follow directions, to name a few.

Prior to dismissal, you should document the offending behavior (with details and dates), and provide the employee notice of the applicable policy or expectation that is not being met and the consequences (disciplinary action). It is a good idea to outline these items in a written document and have the employee sign it to indicate he or she has notice of the employer’s dissatisfaction. Other forms of documentation that may be supportive include performance evaluations, warning notices, personnel policies, witness statements, patient complaints, or evidence such as inaccurate time cards or improper documentation. Make sure the written record supports the employer’s decision and any remedial action.

If disciplinary action is imminent, it is important that an investigation is done to evaluate the facts and review any applicable documentation. The disciplinary action applied should be appropriate based on the behavior and practice policies. The more you inform your employee of their bad conduct and demonstrate that it is well documented

along with opportunities for improvement, the less likely that employee will believe they have been wrongfully terminated.

Also prior to dismissal, you should consider several principles. Most importantly, have you applied the practice's policies and procedures consistently and fairly? For example, women who are pregnant must be treated in the same manner as other employees with similar abilities or limitations. Therefore, employers must hold open a job for a pregnancy related absence the same length of time jobs are held open for employees on sick or disability leave. If a pregnant woman is going to be out longer than your practice policies allow and you want to dismiss her, make sure you have not allowed another employee leave longer than your standard policy.

Consider whether there is an express or implied contract with the employee that may prevent dismissal. Did you make verbal representations during the hiring process such as, "This is such a great place to work, we have never had to fire anyone. As long as you get your work done, you have nothing to worry about."? Courts have held this to be an implied contract and found in favor of the employee. Review your employee handbook and any written policies that are in effect. While these are not considered an employee contract, the employer can be held to its standards. Have you followed the procedures in those documents?

Once the termination decision has been made, it is important that the employer explain the reasons to the employee. The explanation need not be in writing, but the interview should be carefully documented. If possible, a witness in management should be present. A termination letter specifying the termination date and outlining any benefits to be paid is helpful. You may also want to provide a list of property that needs to be returned. North Carolina law requires that the final paycheck be available the next regular payday and that it contain pay for unused vacation unless the employee was notified in advance (perhaps by an employee handbook) that your policy was otherwise.

Dismissing an employee is usually an emotional event, however, if the employer can focus on the basics – documentation, communication, treating employees fairly by uniformly enforcing practice policies – the less likely the practice will find itself in court.