

LAW MEMO

How to fire gracefully and legally

Few managerial tasks are as unpleasant as firing an employee. At best, the process is stressful and disruptive. At worst, it can damage reputations or result in a wrongful discharge lawsuit.

Employment-related matters represent the largest share of claims filed under nonprofit Directors' and Officers' (D&O) Liability policies. Nearly 60 percent of all claims allege wrongful termination or discharge. Many claims arise from the perception that the employee was treated unfairly or that the employer acted illegally. So clarity and consistency are the best approach to employment practices.

This issue of *Arts Law Memo* explains the employment-at-will doctrine, summarizes the laws that restrict an employer's right to fire an employee for discriminatory or retaliatory reasons, lists reasons generally considered to be good cause for dismissal and offers some effective termination techniques.

It also addresses the delicate matter of terminating a volunteer.

CONTRACTORS & UNION MEMBERS

Most organizations hire several kinds of workers. Your graphic designer is probably a freelancer. Actors and stage managers might be members of the Actors' Equity Association. Executive and artistic directors of major cultural institutions generally have employment contracts, while the administrative staff typically is employed "at-will."

Contracts between your arts organization and an individual, such as a freelancer or consultant, or a group of employees, such as a union, typically specify the length of the employment relationship and the reasons why either party can terminate the agreement. In other words, the contract governs both the organization's ability to fire the worker and the worker's ability to quit.

When the terms are violated, a breach of contract claim could arise, which could send the parties to mediation, arbitration or court.

EMPLOYMENT AT-WILL

Missouri and Illinois are "at-will" employment states, meaning workers who are not on contract or members of unions are employed on an indefinite basis, but at the employer's will.

Traditionally, both the employer and the employee could end the relationship at any time and for any cause or for no reason at all. But during the last few decades, the at-will doctrine often has been viewed as anachronistic, overly harsh and inconsistent, so the right to fire has been eroded by federal and state law and the courts.

The exceptions to the at-will doctrine fall into three broad categories: laws that forbid discrimination, laws that forbid retaliation and claims relating to implied contracts.

DISCRIMINATION

Several federal laws protect employees against discrimination in the workplace. The protection lasts through the entire employment relationship, beginning with the hiring process and ending with dismissal.

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, sex or national origin. The Pregnancy Discrimination Act, an amendment to Title VII, prohibits employers to treat a female worker differently because of pregnancy, childbirth or related medical conditions.

The Age Discrimination in Employment Act prohibits discrimination on the basis of age against employees who are more than 40 years old.

Under employment provisions of the Americans with Disabilities Act (ADA), discrimination against "qualified" disabled employees or applicants who are able to perform the "essential functions" of a job is prohibited. A qualified individual is one who satisfies the requisite skill, experience, education, and job-related requirements of the position.

The ADA protects those who have a

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VLAA helps artists and arts organizations solve and avoid legal and accounting problems by:

- Making referrals to lawyers and accountants;
- Mediating arts-related disputes;
- Publishing *Arts Law Memo* and concise how-to guides;
- Sponsoring seminars and public forums;
- Arranging for guest speakers;
- Maintaining a reference library;
- Operating an arts space clearinghouse;
- Supplying model contracts and other arts law and business materials;
- Facilitating meetings;
- Conducting and disseminating research on issues affecting the arts;
- Contributing articles to publications;
- Collaborating on arts advocacy initiatives;
- Matching volunteers with arts organizations seeking board members; and
- Providing access to the national VLA network.



This issue was written by Sue Greenberg, VLAA's executive director.

This publication is distributed with the understanding that VLAA is not engaged in rendering legal or accounting counsel. We urge you to seek professional services to address your specific needs.

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Lawful Reasons for Firing an Employee

- Performing poorly on the job
- Refusing to follow instructions or insubordination
- Abusing sick leave
- Being absent excessively
- Being tardy habitually
- Engaging in verbal or physical conduct constituting sexual harassment
- Possessing a weapon at work
- Violating company rules and policies willfully or repeatedly
- Being dishonest or falsifying records, including employment applications
- Endangering health and safety
- Engaging in criminal activity
- Using alcohol or drugs at work
- Behaving violently at work
- Using company equipment or materials without authorization
- Engaging in outside activities that constitute a conflict of interest

Source: *The Employer's Legal Handbook* (Steingold) and *The Personnel Handbook for Growing Companies* (McWhirter).

physical or mental impairment that substantially limits one or more major life activity. This could cover a broad range of disabilities such as paralysis, speech impediment, facial scarring, blindness, cancer, heart disease, HIV/AIDS, and most emotional illnesses.

STATE AND LOCAL LAWS

While these federal laws apply to employers with more than 15 or 20 employees, Missouri's anti-discrimination statute covers businesses employing six or more persons.

Some municipalities also have laws prohibiting discrimination. Local laws often add categories of protection to those covered by state and federal regulations. In St. Louis City, for example, it is illegal for an employer to discriminate based on marital status or sexual orientation.

RETALIATION

Missouri and Illinois laws make it illegal for an employer to fire employees who file workers' compensation claims or for having wages withheld for child support or other garnishment.

Under the Occupational Safety and Health Act, employers cannot fire employees who complain that working conditions do not comply with federal or state health and safety rules.

IMPLIED CONTRACTS

Sometimes fired employees file lawsuits charging that job security promises made by the employer were not kept. So-called "implied" employment contracts can take several forms, including ambiguous language contained in employee handbooks or encouraging statements made during interviews or performance reviews.

Including an at-will employment

statement on job applications, which is acknowledged by the prospective employee, may provide protection against implied contract claims.

PROBLEM VOLUNTEERS

By definition, volunteers are not employees. But arts organizations should use the same standards for avoiding discrimination in the management of volunteers as they do in hiring and firing of employees.

Of course, the decision to terminate a volunteer should be a reluctant last resort. According to Steve McCurley, who has written extensively on the subject of running volunteer programs, "firing a volunteer is an admission that volunteer management has failed. It means that the interviewing system did not work, or the job design was faulty, or that training and supervision did not operate the way it should."

McCurley suggests several approaches that may be more appropriate and less painful:

- *Re-Supervise*. Make sure the volunteer understands the assignment and your organization's approach to getting the job done.

- *Re-Assign*. Transfer the volunteer to a new position. Working with different people could solve the problem.

- *Re-Train*. If the problem is a lack of knowledge, try a different training approach.

- *Re-Vitalize*. Perhaps the volunteer is burned out. Try a sabbatical.

- *Refer*. Maybe it's time for a different setting. Is there another organization that would be a better fit?

- *Retire*. Thank and honor the volunteer. Departures should be handled with dignity and, ideally, before serious damage is done.

If none of these approaches work, McCurley says it is helpful to have a system in place for addressing problem volunteers. That system should include policies on probation, suspension and termination that are communicated in advance; a fair process for investigating the situation and reaching a thoughtful determination; and even-handed enforcement.

“There’s no easy way to do this..”

10 EFFECTIVE TERMINATION TECHNIQUES

- 1. Hire with care then communicate clearly.** Make sure the employee understands the job’s responsibilities, workload, schedules and deadlines, what constitutes unacceptable behavior and that the employment relationship is “at-will.” If your organization has an employee handbook, new workers should acknowledge, in writing, that they understand its contents.
- 2. Be consistent.** If your organization has written policies, follow them. Good policy makes for good behavior and limits exposure. Bad policy, or a good policy not followed, increases your legal and financial exposure.
- 3. Honesty is the best policy.** If your organization conducts annual or periodic performance reviews, don’t engage in “grade inflation.” Be candid or a jury will wonder why an employee with five years of “excellent” evaluations was fired for poor performance.
- 4. Make paper.** Unproductive employees should not be surprised by your decision to let them go. Give them the time and opportunity to adjust their performance. As soon as problems occur, start documenting them. A verbal reprimand might be followed by a written warning and then by formal notice that the employee’s job is in jeopardy. As you create the paper trail, remember that the documents will be discoverable if the wrongful termination case goes to court.
- 5. Plan ahead.** Avoid firing on the spot unless the employee is being discharged for gross misconduct. Terminate the employee in private. According to conventional wisdom, it is best to avoid the end of the work day, the end of the work week, or the day preceding a holiday.
- 6. Be clear.** Don’t use ambiguous expressions like “laid off.” Employees should understand why they are being terminated and that the decision is final. Present a written termination notice outlining severance terms and procedures to be followed after the meeting.
- 7. Be prepared to answer questions.** Terminated employees may ask about the option to resign, continuation of benefits, their right to claim unemployment compensation, severance or vacation pay and their last paychecks. In Missouri, employees must be given their final paychecks immediately. In Illinois, the check can be cut on the next scheduled payday.
- 8. Preserve the employee’s dignity and privacy.** An employee who is treated with respect during the termination process is less likely to sue. Listen with empathy. Be polite, but don’t send mixed messages. Say only what is needed to be said. Don’t talk about the termination before, during and after the fact with anyone who does not have a direct interest in the matter.
- 9. Answer questions from outside authorities consistently and accurately.** One person should be designated to discuss post-employment claims with state and federal agencies.
- 10. Get help.** If you have questions about employment laws, consult an experienced attorney.

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Books

The Employer's Legal Handbook by Fred S. Steingold should be on every manager's bookshelf. It offers practical guidance on hiring and firing, personnel practices, wage and hour regulations, independent contractors, discrimination and workers with disabilities. *The Employer's Legal Handbook* is published by Nolo Press (nolo.com), known for its reliable, up-to-date, plain-English books on legal issues. The company's mission is to make the legal system work for everyone—not just lawyers.

In *From the Top Down: The Executive Role in Volunteer Program Success*, Susan J. Ellis identifies the critical link between the top leader of an organization and the overall success of its volunteer program. Ellis is the founder and president of Energize, Inc. (energizeinc.com), a training, consulting and publishing firm specializing in volunteerism.

These books and many others on arts law and business practices are available at the **St. Louis Volunteer Lawyers and Accountants for the Arts library** located within the Regional Arts Commission office, 3540 Washington, in Grand Center. The expansion of VLAA's library (which now includes the **Foundation Center's database on CD ROM**) and promotion of its use is made possible by a generous grant from the Gateway Foundation.