

# THE LUTI LAW FIRM

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### PROTECTING YOUR BUSINESS FROM EMPLOYMENT LITIGATION

ORIGINALLY PUBLISHED  
IN MONDAQ.COM  
APRIL 4, 2003

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In this day and age, particularly in the current economic climate, businesses are faced with the reality that they must pay significant attention to the bottom line. Increasingly, this augmented scrutiny forces business owners and managers to take a hard look at the job performance of employees. When this review reveals employees who may be qualitatively substandard, the employer is faced with the prospect of firing them.

Employee termination issues are always sticky, particularly in California's litigious climate. A careful employer's decision to fire an employee must always be coupled with the following question: "How can I do this without being sued?" While it is impossible for an employer to completely avoid being sued by a fired employee, there are steps that can be taken to ensure that the employer is prepared to defend any potential lawsuit a disgruntled terminated employee may bring.

As a preliminary matter, the key to successful employment litigation – and any litigation for that matter – is preparation. It is much easier for an attorney to defend an employer who, when faced with a wrongful termination suit, can point to the exact reason why the employee was fired or point to numerous specific incidents that led to the employee's termination. Conversely, the employer who nebulously contends that a terminated employee was fired for being "awful," or something similar, will find defending a lawsuit an uphill battle.

In California, an employer can terminate an employee for any reason, as long as the legitimate reason is a lawful one. Some *unlawful* reasons for firing employees include: race, gender, disability, age, retaliation for certain actions and a plethora of many others. While the employer may subjectively reason that none of these unlawful reasons apply to the specific employee the employer plans to fire, rest assured that the employee, once terminated, will certainly come up with a myriad of unlawful reasons they were fired if they file suit.

As a result, before making the decision to terminate an employee, an employer should, at a minimum, run through the following checklist:

*Why Are You Firing The Employee?* If an employee is being fired based on substandard work performance, this reason should be communicated to the employee. Many employers make the mistake of attempting to smooth things over and tell the employee that business is slow and the employee is being laid off as a result. Making this sort of excuse creates the expectation that the employee will be rehired once business picks up.

*Who Is The Employee That You're Firing?* If the employee being terminated is a member of a protected class (i.e. a minority, disabled, female or a person over forty years of age) it becomes even more important that the employee is being fired for legally acceptable reasons. Additionally, it is imperative that these reasons are documented in the employee's personnel file.

*Show Me The Paper.* The employer must be able to support the reason for the termination. If an employee is being terminated for tardiness, disciplinary reasons, poor performance, or poor attitude, etc., there should be a corresponding record of lateness, discipline problems, poor work evaluations, or poor attitude evaluations in that employee's file. For example, it is insufficient to contend that an employee came in late, yet not have an accurate attendance record of the employee. In such a case, the employee's personnel file should contain detailed attendance records, documented memorandums to the employee about absences, written warnings to the employee about absences and records of any disciplinary action that may have been taken against the employee as a result.

Deciding to fire an employee is never easy. Nevertheless, when making this decision, the employer should always do its best to objectively examine the entire picture. Terminations should never be spur of the moment or off the cuff – they should always follow a clearly delineated chronology of events. Such a clear documented history puts the employer in the best possible position to defend the lawsuit of a fired employee.