

# Practice Management

## Dealing With Employee Termination: Smart Strategies for Optimizing Your Team

**Urgent message:** Letting employees go is never easy. This article offers tips for protecting your business and yourself if termination is necessary. Among the key recommendations are compiling documentation and seeking legal advice.

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Letting an employee go, whether due to job performance or economic necessity, is never a pleasant situation. Although an urgent care center strives to provide high-quality patient care, it's also a business. This means that difficult decisions regarding front-line staffing must take into account the bottom line.

Despite the ease with which Donald Trump terminates his apprentices, the reality for urgent care operators is much more complicated than simply saying "You're fired." Terminating an employee affects an individual's ability to provide for him or herself and family, interrupts daily routines and social relationships, and skews the person's sense of purpose, identity, and fairness. A child's security and wellbeing—both today and in the future—is jeopardized when a parent loses a job. In this regard, the act of terminating an individual's employment is quite traumatic and, as such, it psychologically impacts everyone concerned, including co-workers and even patients.

In addition to making the difficult decisions concerning staff terminations, as well as planning how that uncomfortable meeting may play out, there are also



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legal considerations that are designed to protect the employer and the employee. Doing your homework prior to terminating an employee is necessary to limit potential adverse outcomes to the organization.

### The Consequences of Ignoring Problem Employees

Because of the time, effort, and frustration that human resource issues can create for managers, sometimes it's

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**Table 1: The Effect of a Problem Employee on an Urgent Care Center**

- **Loss of productivity** - An employee who arrives late to work, leaves early, and spends most of his/her working time “stirring the pot of discontent” is not committed to you or your business, which means you’re being short-changed on the wage you pay.
- **Employee morale** - An employee whose underperformance is tolerated or who is allowed to behave badly decreases morale and creates a workplace that can be detrimental to your effective and committed employees.
- **Bad behavior is contagious** - Problem workers’ bad attitudes and habits sometimes “rub off” on their fellow employees. An employee who does not face consequences for poor performance may cause other employees to believe that they, too, can get away with such behavior.
- **Breeding resentment** - Your employees who care about their jobs, the business, and your opinion of them will resent that they work harder, better, and more professionally—and may draw the unflattering conclusion that you care more about one problem employee than about the rest of the team.
- **Staff turnover** - If you want to retain staff, nipping an employee problem in the bud will prevent your most productive and happy employees who resent working with “deadweight” from leaving. “Like attracts like” so those who are disengaged or lack opportunities elsewhere stay, and over time your center spirals down to a “B-” or “C-” grade operation.
- **Potential legal issues** - Employees who cross the line with other employees may land you in hot water legally. Harassment or discrimination of one employee by another employee may involve the employer if it can be proven that the employer was aware and did nothing to remedy the situation.
- **Lost customers/revenue** - A poor employee who does not value customer service, who will not go out of his/her way to serve patients, or constantly seeks to “punish” the owners will cost you word-of-mouth and will negatively impact the ability to attract repeat visits and grow your business.

*Adapted from:* The Consequences for Supervisors Who Ignore Poor Business Performance. Shaddock, Dianne (2011). Articlesbase. <http://www.articlesbase.com/human-resources-articles/the-consequences-for-supervisors-who-ignore-poor-employee-performance-4191377.html>

tempting for a supervisor to ignore a chronic problem with an employee. Unfortunately, ignoring a problem won’t make it go away and will most likely compound the situation and create additional issues with other employees who are valuable to the business.

When faced with the potential for a performance issue with an employee, the manager’s first step should be some type of intervention and corrective action plan—to give an employee an opportunity to fully understand the expectations of the position, to receive coaching, and to have a “fair shot” at improving his or her performance. But assuming that doesn’t work, the employee who is chronically late, frequently absent, has a negative attitude, cannot or does not perform his or her duties, treats patients poorly, or alienates “good” employees through gossip and other forms of harassment, is a liability to the organization, and one it cannot afford to keep.

### Why Urgent Care Operators Retain Poor Employees

Despite the damage they know problem employees cause the business—in addition to day-to-day impact on general morale, resources, and time—managers have been known to keep these people on board for three reasons:

- “Any staff is better than no staff.” Finding qualified employees can be difficult. There’s a learning curve

for new hires and the business continues at its regular pace without a let-up for new or short-handed staff. As a result, managers assess there’s less risk in sticking with the status quo than facing staffing issues. This commonly occurs when a manager is asked to perform the duties of the vacant position in addition to his/her own responsibilities.

- “I don’t have time to replace him/her.” It does (and should) take time to find a candidate who would be a good fit for the center’s culture and who has the skills and personal qualities desired. Posting a help wanted ad, screening resumes, and conducting interviews takes time away from a manager’s already hectic day. Plus, the manager may believe that for all the effort, there is a possibility he/she you won’t find a person with the qualities and experience needed.
- “Maybe the situation will improve if I just give it a little more time.” Terminating an employee is never enjoyable, but ignoring the situation will likely make it worse, not better. The message sent to this employee is one of tolerance. That is, management knows about it and is clearly okay with underperformance, poor attitudes, workplace harassment, and unethical conduct. Such perceptions can devastate a center’s cohesive work environment, esprit de corps, and synergy.

Keeping a bad employee will affect not only you—the urgent care operator—but also your other employees, your patients, your reputation, and ultimately your bottom line. **Table 1** lists the adverse consequences of ignoring problem employees.

### Termination Tips and Considerations

When you decide an employee needs to go, termination typically occurs under one of three conditions. An employee may choose to be let go voluntarily, he or she may be fired for cause (involuntary termination), or may be let go as part of an organizational restructuring or reduction in force. The condition upon which an employee is terminated determines, in large part, both the employee's and the employer's rights and obligations.

#### Voluntary Termination

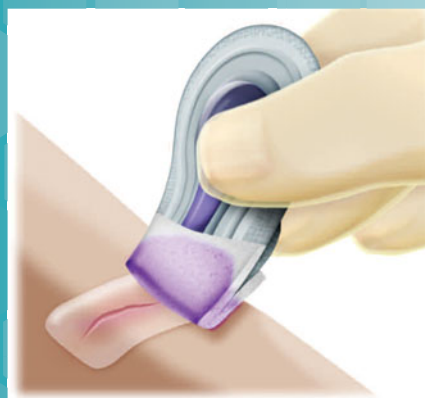
Employees sometimes choose to leave their jobs of their own volition. When an employee resigns, he or she is generally not entitled to state unemployment or

employer separation payments. Employees may “quit” for many reasons, such as a spouse's transfer, a better/ different opportunity at higher pay or more desirable hours, to pursue higher education or because they decide they don't need the money. Don't assume that someone is leaving because of unhappiness in his/her present position. If there is any doubt as to why an individual is leaving, it's a good idea to ask. If there is a problem that you are unaware of that has caused someone to feel dissatisfied, that is information that you should know—either because you may want to attempt to persuade the individual to stay or you may need to make improvements to your operation before other employees follow his/her lead out the door. This is why a standard exit interview process may answer some of these questions.

Sometimes a job is just not a good fit, and the employer and employee agree together that this is the case. This usually occurs during a 90-day post-hire “probationary period.” In other cases there is a blatant violation of company policy, such as stealing, and the

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**Table 2: Failure to Document Expectations and Performance Results in Discrimination Claim\***

About 15 years ago, a physician entrepreneur started his urgent care center with the intention of treating employees and patients like “family.” He hired a seasoned medical assistant who was returning to the workforce after the graduation of her teenage sons. Through focus and dedication, over the years, she learned clinical coding, medical billing, bookkeeping, payroll, and other business “basics.” As the number of patients at the urgent care center grew, the woman’s responsibilities increased, and the owners eventually added additional center locations to serve the community. Being involved with the business from the beginning, she was promoted to the role of Director of Operations.

But while the business was advancing, the operations director was falling behind. Equipped with a modest formal education but years of on-the-job training and “trench knowledge,” her capabilities had been stretched to their limits by the now multimillion dollar enterprise. Employee turnover increased, major accounts were lost, receivables bloated, and volume stagnated due to process and system issues affecting front-line service. The employee was simply incapable of taking the business to the “next level.” When outside investors evaluated the enterprise for equity funding and future expansion, one of their requirements was that a new director with an MBA and experience managing larger entities be put into place.

Because of the close relationship between the entrepreneurial-founder and the operations director—and his strong desire to not “hurt anyone’s feelings”—there were no annual performance reviews. Expectations of the changing work environment were never outlined. Nor was there a plan for the operations director to address her skill deficits. She was constantly told “great job,” “good work,” and “keep it up” by a boss who wanted to avoid confrontation and “be encouraging.” Although the business was suffering a number of cracks, the woman’s personnel file was flawless and she was promised a prosperous future with the business.

Then one day the former owner and new management sat her down with a termination agreement. They explained the new direction of the business and how they didn’t feel she was any longer a “good fit” for the role. To “clear the way” for the new director, the former director was not offered a different position, was not offered a remediation plan, and was not offered the opportunity to pursue higher education. She was given a check and her walking papers.

Her reaction? Years of praise and a flawless personnel file meant this firing could mean only one thing...age discrimination because the individual who replaced her was 20 years younger. By failing to follow a process of outlining, measuring, and providing feedback on performance expectations, the urgent care center had set itself up for a discrimination lawsuit.

*\*A fictional, hypothetical example, based on common circumstances in growing urgent care centers.*

employee agrees to quit rather than be fired “for cause,” which can impact the employee’s ability to secure future employment. From a management standpoint, this is the preferred result in a performance situation. After educating and coaching an employee as to your expectations of the position, he or she may realize that it isn’t a strong match.

Regardless of whether quitting is an employee’s sole decision or a mutual decision between employer and employee, formal written notice of resignation should be provided by the employee to prevent future legal issues. Because an employee who resigns surrenders legal rights, it’s very important that evidence show the resignation was not forced or compelled. When an employee resigns, it’s also important to ensure:<sup>1</sup>

- company property is returned and accounted for (phones, laptops, keys, badges, etc);
- outstanding charges are paid;
- a discussion is held for a successful hand-off of accounts, customers, or projects;
- confidentiality/non-compete agreements are dis-

cussed;

- employee is counseled by human resources or payroll personnel regarding any insurance, retirement funds or benefits and how transition will transpire; and
- an exit interview is performed to discuss the employee’s reasons for leaving and to identify areas for improvement for the business.

When employees quit voluntarily, it is customary for them to give advance notice. However, “at will” employment does not require the employer to accept the notice. The manager may choose to end the employment relationship immediately to prevent morale problems with other staff members or the opportunity to steal information or assets. To prevent other employees from abandoning their jobs in the future, as a courtesy, the employer should consider paying the 2 weeks’ salary even in the event that the employee does not work that time.

*Involuntary (For Cause) Termination*

Firing a non-performing employee is never a simple or easy matter. Even with intelligent hiring, encouragement for development, and a program for performance evaluation and corrective action, there will always be situations in which termination is still necessary.

Many states have “at-will” employment, meaning that employees can be fired at any time, for almost any reason, or even for no reason at all. However, there are *exceptions* to every rule, and especially to this one. Exceptions include circumstances such as when an employee has:

- A collective bargaining agreement or other binding contract (oral or written) with the employer;
- Been subject to illegal discrimination (e.g., age, sex, race, religion, disability, sexual orientation in some jurisdictions, etc.);
- Filed a workers’ compensation claim;
- Insisted on a safe/healthy workplace;
- Reported or refused to engage in criminal acts;
- Been called for military duty or jury duty; or
- Experienced financial indebtedness (e.g., wage attachment including child support and IRS garnishment).

In addition, an employer may be subject to civil liability if harassment has occurred.

Discrimination, harassment, and hostile work environment claims may arise from a seemingly routine performance-based termination. These situations can pose traps for employers because although the direct cause of termination (e.g., performance) may be well documented, the “poor performance” could ultimately be traced to an inconsistent application of company policy or other harassing or discriminatory actions or conditions (e.g., unequal access to training, threatening or degrading statements, withholding necessary resources, etc.).

Before you decide whether to terminate an employee, you will want to ensure that no contract exists and that none of these exceptions to “at will” employment apply. The state department of human rights or employment is a valuable resource for background and education in this area. It’s always best to seek legal advice if you have any questions.<sup>2</sup>

At the conclusion of the period you have allowed to see the employee’s performance improve, you may conclude that he or she has not met the minimum expectations for the position and should be terminated for cause. The following steps should then be taken:<sup>3</sup>



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*“The typical objective in a layoff is to reduce expenses through the paring down of payroll and benefit related costs. Such cost savings may make a RIF attractive, but large-scale reductions also entail substantial costs, both in upfront severance-related compensation, and in longer-term, often hidden costs, such as legal expenses associated with claims by terminated employees, attrition of valued employees, and downstream costs of hiring again when economic circumstances improve.”*

—Tips for Planning Reductions in Force. Rosen, Michael. (2009). Foley Hoag LLP, Foley Hoag eBook Library.

- *Make the decision by balancing risks/rewards.* If at this point you see no other way to remedy the situation and improve the employee's performance to the minimum acceptable standards, you must begin the process of protecting yourself and your company against any possible negative repercussions. Documentation is essential, and should be collected throughout the improvement process. Examples of poor performance or violation of company policy should be “written up” and addressed with the employee in a timely manner. In addition, notes about any performance meetings or discussions of write-ups should be documented. This should be a “Memo to the File” and completed immediately after the conversation.
- *Investigate the conduct/incident.* Employers should conduct an independent investigation, particularly if the issue resulting in the decision to terminate did not directly involve the employer (i.e. theft witnessed by another employee, claims of sexual misconduct between employees). Again, a written report is required. Be wary when an employee claims discrimination and be prepared to defend against such a claim. Let the employee tell his/her side of the story and interview all relevant parties to the incident/conduct. Every urgent care center should have policies and procedures for handling harassment allegations. If an employee claims that he or she has been subject to illegal discrimination, you should follow the procedures laid out by Human Resources and make sure that the issue is examined with professionalism and discretion.
- *Check the personnel file of the employee.* You should become knowledgeable regarding the employee file and any documentation therein, especially any documentation of previous problems. Check the file for mention of written/verbal warnings, employee evaluations, previous discussions with the employee, and the discipline matters or policies violated. An empty personnel file may indicate that this behavior or incident has occurred for the first time. This may play a role in your decision to give the employee another chance. In addition, an empty personnel file may also create the conditions for litigation over the employee's dismissal. [See the example in **Table 2**]
- *Examine written policies.* Make sure you are intimately familiar with your company policies in effect during the employee's tenure. *Make sure you have followed your own policies!* The employee should have received adequate written notice that his or her conduct could result in termination (written communication of verbal warnings, clear written policies in an employee handbook or obvious misconduct). Ensure that your policies do not preclude you from terminating the individual's employment, and that you have taken all of the required and prescribed actions in the organization's termination process. When legal challenges arise, one of the first questions typically asked is “*did the employer follow its own handbook?*”
- *Review any statements made to the employee.* Review written memos or notes on verbal conversations that have taken place with the employee. Ensure that oral statements have not contradicted your policies or written statements. Ensure that nothing has been said that could be construed as harassment or discrimination.
- *Examine treatment of other employees.* Make sure that you treat all employees fairly and equally. If you have treated other employees differently for engaging in the same conduct, can you defend this? That is, is there a genuine legal justification for disparate treatment?
- *Consider the possibility of a lawsuit.* Based on your knowledge of the employee do you feel that he or she might consider litigation? This may be a factor in deciding whether to offer a severance package.
- *Consider alternatives.* Ask yourself if there are any other options short of termination. Can the employee improve his or her performance? Has he or she been given ample opportunity to do so? Is there a different position that is better suited for the employee's skills? Can an accommodation be

made on the employee's working arrangements or supervision?

- *Get a second opinion.* It may be helpful to obtain a second opinion from an unbiased person within the company, or from an outside source (i.e. legal advice). Along these same lines, when appropriate, ask another manager to review the situation and your documentation.
- *Document the reasons for terminating the employee.* Document your reasoning for ending the individual's employment and the factors and reasons that support this decision. Document clearly, unemotionally, and factually. Use the tone of a newspaper article when drafting these documents. Specify the policy violation or the failure of the employee to achieve the minimum performance expectations agreed upon in the meetings and coaching sessions leading up to this point. Summarize warnings, conversations, and disciplinary meetings that have occurred.
- *Plan ahead for possible consequences.* Be careful with whom and how you discuss the employee's termination to avoid a defamation lawsuit. The best answer to any questions about an individual's termination is simply, "John is no longer with the company." Also adopt a neutral reference policy, which only includes the employee's title, salary, and dates of employment, should a future potential employer inquire, and let that person know that it is the policy of the company to only release those specific pieces of information.
- *Unemployment compensation.* Employees may ask you about their eligibility for unemployment compensation and whether you will contest such a claim. If the reason for termination is due to poor job fit or an isolated, minor or unintentional infraction, the employee may be eligible for unemployment compensation. Rules vary from state to state, so be familiar with the rules in your state. Remember, misconduct (willfully performing an action that harms the business) is open to interpretation. You may choose to waive your right to contest unemployment as part of an employee's severance package. Moreover, you should contest unemployment only if you have

*"If the reason for termination is due to poor job fit or an isolated, minor or unintentional infraction, the employee may be eligible for unemployment compensation."*

sufficient reason because contesting unemployment benefits usually results in angry and combative former employees.

- *Severance packages.* If you have a severance policy in place, you should treat all employees who qualify for it in the same manner. The package should be based on objective criteria. This should include the time of service and level in the organization, rather than personal or subjective factors, such as the spouse's income, the employee's ability to quickly get employment elsewhere, or the employee's perceived financial needs. The severance package should be—whenever possible—conditioned on the employee signing a release from subsequent legal claims. Nonetheless, a release does not guarantee that an employee will not try to sue. A release should: 1) offer sufficient cash payment to ease the transition for the employee; 2) avoid imposing too many future responsibilities on the employee; and 3) contain language that effectively discourages or removes the potential for future litigation.
- *During the actual meeting to terminate an individual's employment,- use objective language and provide the employee with a letter that gives a truthful and brief explanation as to why he or she is being fired.* Watch the language. Do not use any language that could be construed as biased or discriminatory. Explain clearly the reasons for the termination, such as specific behavior or actions, policy violations, and/or any discipline and the schedule agreed upon for the individual's improvement that was received prior to termination. For example, you might reference the following: "On May 1, 2013, you agreed to achieve minimum standards for your position by July 1st as indicated in my memo to you dated 04/28/2013. We have not seen that improvement within that time period." Keep a copy of this document for yourself, give one to the employee, and place one copy in the employee's file.

Plan ahead for the termination meeting. Prior to this meeting, discuss with your manager and/or Human Resources who should be present, their roles, and what should be stated. Plan who will have the conversation in which the employee is terminated. (Ideally it should be

someone in personnel or Human Resources and not someone with whom the employee has a poor or antagonistic relationship). The person who terminates should not be an unknown to the employee. This meeting should be well documented. Choose a private and comfortable location. Be firm and professional, and keep the meeting short and to the point. Do not become engaged in an argument or in any discussion about specific incidents or a defense of the action. If available, assign the Human Resources representative to explain the severance package (if offered) and to review any responsibilities that the employee must fulfill (return of equipment, etc.), as well as the company's position regarding future references. Most importantly, this brief meeting should be kept confidential. Escort the individual to his or her area to gather any personal items and then escort him or her to the exit. (Arrange for assistance from security in advance if you think the individual may not go without disrupting the work area.)

#### *Reduction in Force*

A reduction in force (RIF) is the elimination of multiple positions due to a business slow down or re-structuring. A RIF may be voluntary (voluntary separation or incentive program) or involuntary. There are advantages and disadvantages to each. Employees who leave voluntarily in exchange for immediate compensation may be less inclined to sue and may be required to sign an agreement; however, too many or not enough employees may choose this route, and you must be prepared to lose good employees who are valuable assets to your company. Typically the employees with the greatest marketability are those who take the cash and run. So, in contrast to a voluntary or incentive program, an involuntary RIF offers the employer complete control.

There are a few things that employers must keep in mind when planning a reduction in force:

- Develop unbiased and uniform selection criteria when deciding which employees are to be laid off.
- Conduct a layoff analysis. Ensure that you are not disproportionately affecting certain groups, such as older employees or members of a protected class.
- Worker's Adjustment Retraining and Notification ACT (WARN) - Federal and state laws require that a certain time period must be adhered to in noti-

*“Plan ahead for the termination meeting. Prior to this meeting, discuss with your manager and/or Human Resources who should be present, their roles, and what should be stated.”*

fyng employees that they may be laid off (NOTE: this law often affects employers with large numbers of employees; check the laws in your state).

- Create a plan that lays out eligibility for severance.
- Ask employees to sign a release. A valid release should be obtained from workers over age 40 under the Older Workers Benefit Protection ACT (OWBPA).

- Keep immigration implications in mind if you lay off sponsored foreign workers and be sure you are aware of your legal and contractual obligations to them.

Because a reduction in force can undermine morale for all remaining employees, it's a good idea to first exhaust all alternatives to a RIF including hiring freezes, reduction/elimination of performance bonuses, reduced hours of work, engaging in selected performance-based reductions, selectively not re-hiring for positions lost to normal attrition, and postponing wage or benefit increases. Understanding that a temporary downturn is likely affecting other health care providers, employees who are content in their positions and want to keep their jobs are often willing to compromise in order to do so. "It's better to give up a little than to be seeking another job," is their rationale.

#### **Conclusion**

Letting an employee go is never an easy decision. It involves (or should involve) much forethought and planning in order to ensure that you have covered all the bases to protect your business. This article is not meant in any way to substitute for legal advice, but rather to provide "food for thought" if you should find yourself in the position of having to let an employee go. When in doubt it is always wise to seek competent legal counsel to protect your business and yourself. And remember to document everything! ■

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