

3. If you intend to reserve the right to terminate any employee "at will," make sure this condition is stated explicitly in the company's personnel manual or in the employment contract itself. Do not make the personnel manual the subject of the hiring interview or negotiations and do not make promises you do not intend to keep.
4. Distribute or post required notices of the laws against employment discrimination and hold training sessions for all company managers and supervisors.
5. Document all discipline and performance issues. Make sure performance evaluations are done in a timely manner, are accurate, honest and in writing. Inform employees where improvement is needed.
6. Thoroughly review the facts and circumstances leading to a possible termination decision and make sure all of the factors that could give rise to wrongful termination claims have been considered. Only discuss the termination with employees that have a need to know. If needed, consult employment counsel.
7. Even if you have reserved the right to terminate employment at will, don't. There should always be a documented bona fide business reason for terminating employment.
8. Make sure your absenteeism rules do not run counter to the Family and Medical Leave Act.

Resources

For more information, or to obtain legal assistance regarding a wrongful termination claim, contact:

Mass. Commission Against Discrimination

(617) 727-3990 or (413) 739-2145

Equal Employment Opportunity Commission

(617) 565-3200

National Labor Relations Board

(617) 565-6700

Mass. Labor Relations Commission

(617) 727-3505

This pamphlet is issued as a public service and does not constitute legal advice, which can only be given by an attorney. The contents of this pamphlet pertain only to the laws of Massachusetts at the time of publication.

If you would like to hire an attorney and don't know one, call the Massachusetts Bar Association Lawyer Referral Service at (617) 654-0400, (800) 392-6164 or TTY: (617) 338-0585. There is no charge to call the Lawyer Referral Service and your first, half-hour consultation with an attorney will be no more than \$25.



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Employment Termination and the Law: A Guide for Employers and Employees



**Public Service Information
Provided by the
Massachusetts Bar Association**

Employment Termination and the Law: A Guide for Employers and Employees

In the United States, most private sector, non-union employees are employees at will. This means that they are not hired for a specific length of time but rather are hired for an indefinite period of time. Either the employer or the employee can terminate the employment relationship at any time, without notice, for almost any reason or no reason at all. In recent years, however, the ability of an employer to terminate employment at will has been affected by laws and court decisions giving increased protection to employees.

Even if employment appears to be at will, employment cannot be lawfully terminated if:

♦ *the termination is the result of discrimination or a violation of statute*

Under federal statutes such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act and the Americans with Disabilities Act, employees are protected from discrimination on the basis of race, color, religion, national origin, sex, age (40 and older) and disability or handicap. In addition to the above protected classifications, the Massachusetts Fair Employment Practices Law (G.L. c. 151B) protects employees from discrimination on the basis of sexual orientation, and other state statutes, such as the Massachusetts Equal Rights Act may provide remedies for a terminated employee. Other statutes, such as the Family and Medical Leave Act, Fair Labor Standards Act, Employment Retirement Income Security Act, National Labor Relations Act, Workers' Compensation Act and Occupational Safety and Health Act, if applicable, may also provide remedies for a terminated employee.

♦ *the termination is in violation of the terms of an implied contract of employment*

An implied or express contract not to terminate employment except for cause or until certain steps are taken (that is, not at will) may exist where the terms of a personnel manual or employee handbook limit the reasons for termination or where an employer has promised to follow certain procedures before termination. Promises or assurances of long-term employment may also eliminate or limit the employer's right to terminate at will.

♦ *the termination prevents the employee from receiving a benefit, such as a bonus or commission, that has been earned or is about to be earned*

The employment relationship includes an implied covenant of good faith and fair dealing, and the termination of an employee to avoid paying the employee what he or she has earned or is on the verge of earning, or to prevent a benefit from vesting, or a termination which has any of these results, may breach this covenant.

♦ *the termination is under circumstances that violate public policy*

This may occur, for example, if the employee is terminated for refusing to do something at the request of the employer that public policy forbids (i.e., committing perjury or violating the law), or for doing something that public policy encourages or permits (i.e., taking time off for jury duty, or cooperating with a law enforcement authority's investigation of the employer). However, an employee who is terminated for refusing to carry out the employer's internal policy decisions may not have a wrongful termination claim.

♦ *the termination punishes an employee for having joined with other employees in trying to improve their wages or working conditions*

Under laws enforced by the National Labor Relations Board and the Massachusetts Labor Relations Commission, public employees and non-supervisory private employees (unionized or not) have certain rights to join together to try to improve working conditions or compensation. However, employee group protest activities are not protected if they constitute an illegal type of strike or if employees violate other legitimate work rules.

Employees may have other claims arising out of their termination, including breach of contract, defamation (the written or verbal communication of false information about the employee), invasion of privacy (i.e., the communication of private information, such as medical status, to unauthorized persons), intentional infliction of emotional distress (where the employer acts in an outrageous manner; Note: workers'

compensation may provide the exclusive remedy for such a claim) and unlawful interference with employment.

If successful on these claims, an employee may recover, depending on the case, back pay, front pay or reinstatement of employment, emotional distress damages, punitive damages and attorneys' fees.

What you can do as an employee

If you believe that you have been, or are about to be, wrongfully terminated from your job, there are a number of steps you can take:

1. Make a contemporaneous record of events, including interviews or conversations regarding your termination. Make a list of witnesses who may be helpful in supporting your case.
2. Consult a lawyer. Employment law is a complex and ever-changing field. Don't try and go it alone. There are very short complaint filing periods for some statutory claims, i.e., six months in the case of the Massachusetts discrimination statute.
3. Consult a state or federal agency for advice. The Massachusetts Commission Against Discrimination or the Federal Equal Employment Opportunity Commission are good places to start if you believe you have been the victim of discrimination. They can advise you on whether you should and when you must file. Refer to the resources at the end of this pamphlet.
4. Obtain a copy of your company's written personnel policies. These may contain valuable information about your employer's hiring and firing practices.
5. Obtain a complete copy of your personnel file. You are entitled to this under Massachusetts G.L. c. 149, § 52C.

What you can do as an employer

The most effective way to protect yourself and your company from claims of wrongful termination is to prevent such terminations from taking place.

1. Establish formal personnel policies with the assistance of employment counsel. Know and follow your policies.
2. Though it may sound obvious, treat your employees fairly and be consistent in your employment practices, including termination practices.

