

4.4: Firing

Learning Objectives

1. Define legal guidelines on firing employees.
2. Elaborate justifiable reasons for deciding to fire.
3. Set standards for the actual firing process.
4. Consider ways of limiting the need to terminate employees.

Optimal Level Firing

A study funded by the CATO Institute and titled “The Federal Government Should Increase Firing Rate” concludes this way: “The rate of ‘involuntary separations’ is only about one-fourth as high in the federal government as in the private sector. No doubt private-sector firing is *below optimal* as well since firms are under threat of expensive wrongful discharge lawsuits.” Chris Edwards and Tad DeHaven, “Federal Government Should Increase Firing Rate,” Cato Institute, *Tax and Budget*, no. 10 (November 2002), accessed May 24, 2011, <http://www.cato.org/pubs/tbb/tbb-0211-10.pdf>.

There is, in other words, an *optimal level* for firing, and in both the public and private sectors it’s not being met. People aren’t being fired enough.

The strictly economic question here is, “What is the optimal firing level?” No matter the answer, there’s an ethical implication for the workplace: firing workers is a positive skill. For managers to perform well—for them to serve the interest of their enterprise by maximizing workplace performance—the skills of discharging employees must be honed and applied just like those of hiring and promoting.

On the ethical front, these are the basic questions:

- When *can* an employee be fired?
- When *should* an employee be fired?
- *How* should an employee be fired once the decision’s been made?
- What steps can management take to support workers in a world where firing is inevitable?

When Can an Employee Be Fired?

In the world of for-profit companies, most work contracts offer **at-will employment**. Within this scheme, a clause is written into the contract offering employment only as long as the employer desires. Stated more aggressively, managers may discharge an employee whenever they wish and for whatever reason. Here’s a standard version of the contractual language:

This is an “At Will” employment agreement. Nothing in Employer’s policies, actions, or this document shall be construed to alter the “At Will” nature of Employee’s status with Employer, and Employee understands that Employer may terminate his/her employment at any time for any reason or for no reason, provided it is not terminated in violation of state or federal law.

The legal parameters for firing seem clear.

Things blur, however, once reality hits. As the Cato study authors note, simply the fear of a possible lawsuit does impinge to some extent on the freedom to fire, especially when the discharged worker fits into a protected group. This means older workers, foreigners, or disabled workers may protest that no matter what reasons are *given* for termination—assuming some are given—the *real* reason is their age, nationality, or disability. Further, gender protection may be claimed by women fired from largely male companies and vice versa.

Another round of blurring occurs on the state level where legislation sometimes adds specific employee protections, and so curtails employers’ rights. In Minnesota, for example, firing may not be based on a worker’s participation in union activities or the performance of jury duty.

These varied and frequently changing legal protections are the reason managers are typically instructed to keep detailed records of employee performance. If those can be produced to show a pattern of incompetence or simply inadequate results, they can justify a dismissal before a judge, if it ever comes to that.

Even though legal complexities mean managers are well advised to be careful about firing workers, and it’s prudent to be sure that there are directly work-related reasons for the dismissal, none of that changes the fact that at-will hiring gives wide latitude to the

company, and fired workers are typically left with few good avenues of protest. One way to see how tilted the table is toward the employer and away from the employee is to compare the American at-will firing system with the European model, where a reasonable cause for termination must be demonstrated. In the United States, employers may more or less fire anyone for any reason, and the burden of showing the termination was illegal or unfair falls entirely on the worker. In Europe, by contrast, the legal burden falls largely on the *employer*. Instead of the worker having to show the firing was wrong, now the company has to show the firing was right. This is a big deal. It's like the difference between innocent until proven guilty and guilty until proven innocent. **Just cause firing** means the company holds the burden of proof: it must demonstrate that the worker wasn't holding up his or her end of the employment contract. That's a lot harder to do than just producing some work evaluations to buttress the claim that she wasn't fired because she's Jewish or he wasn't let go because he's Asian. As opposed to the European reality, the conclusion is, employees in the United States hired at will have few recourses against a company that wants them out.

Finally, it's worth noting that elements of just cause law have been working their way into the American legal system in recent years.

When Should an Employee Be Fired?

Because the legal footing is usually more or less solid for American managers, the real hard questions about terminating employees aren't legal ones about what can't be done but ethical ones about what should be done.

Sometimes firing is unavoidable. **Economic slowdowns** frequently bring furloughs and terminations. When the company's books turn red, and after all the easy cost cutting has been done, people need to be cut. Who? There are three broad philosophies:

1. Inverted seniority
2. Workload
3. Recovery preparation

Inverted Seniority occurs when the last worker hired is the first released. This works especially well for assembly-line-type labor where one worker can replace another easily. As long as replacement is possible, dismissing the most recently hired allows clear and impersonal rules to make downsizing orderly.

Workload firings focus the pain of job cuts on that part of the company suffering most directly from a falloff in business. An office furniture supply company may find its line of hospital products unaffected by an economic downturn (people keep getting sick even if they don't have a job) so layoffs are taken from other divisions. This may mean losing workers with higher seniority or better job performance, but it minimizes cash-flow disruption.

Recovery preparation takes the long view on an economic slowdown: firings and layoffs are executed not so much to compensate for the present downturn but to sharpen the company for success when the economy bounces back. Staying with the office furniture supply company, the owner may see better long-term opportunities for profits in the nonhospital units, so the downsizing may occur across the board. The idea is to keep those slow-moving units at least minimally prepared to meet new demand when it eventually comes.

Sometimes economic slowdowns don't reflect a problem with the larger economy, they're the result of **fundamental changes in the market**, frequently brought on by technological advance. For example, the popularization of digital photography has shrunk the market for old fashioned film. Seeing this coming, what can a company like Kodak do? They're probably going to let workers from the old film side go to create room for new hires in the digital division. This is potentially unfair to terminated workers because they may be doing exemplary work. Still, it would be unfair—and financially disastrous—to the company as a whole to not change with the times.

Rank and yank is a management philosophy promoted by former General Electric Company CEO Jack Welch. Every year, he counsels, the entire workforce should be ranked and the bottom 10 percent ("There's no way to sugarcoat this," he says) should be fired to make room for new employees who may be able to perform at a higher level. Here, the responsibility to the company is being weighed far heavier than the one to the employee because, theoretically at least, those in the bottom 10 percent may be doing fine on the job—fulfilling their responsibilities adequately—it's just that others out there who could be hired to replace them *may* do it better. In the hope they will, workers who've done nothing wrong are sacrificed. Allan Murray, "Should I Rank My Employees?," *Wall Street Journal*, accessed May 24, 2011, <http://guides.wsj.com/management/recruiting-hiring-and-firing/should-i-rank-my-employees>.

There are two main criticisms of this practice. First, it's a betrayal of employees who are fulfilling their contractual obligations (they're just not overperforming as well as others). Second, it's counterproductive because it lowers morale by drowning workers in

the fear that even though they're doing what's being asked, they may end up in that dreaded bottom 10 percent.

Employee misbehavior is the least controversial reason to fire a worker. Here, the ethics are relatively clear. Employees aren't being mistreated when they're dismissed because it's their own actions that lead to their end. Standard definitions of misbehavior include

- rudeness toward clients or customers,
- drinking or drugs on the job,
- theft of company property or using company property for personal business,
- frequent and unexplained absences from work,
- entering false information on records,
- gross insubordination,
- fighting or other physical aggression,
- harassment of others (sexual, sexual orientation, religious, racial, and similar).

How Should an Employee Be Fired Once the Decision's Been Made?

At the Friday all-staff meeting the office manager stands up to announce, "The good news is the following people have *not* been fired!" He reads a list of seventeen names. There are nineteen people at the meeting.

That's from a (perhaps unemployed) comic's stand-up routine. Unfortunately, people have written into the *CNNMoney.com* with real stories that aren't so far removed:

- An employee received news of her firing in a curt letter delivered to her home by FedEx.
- A man tells of being halted at the building door by security and being humiliatingly sent away.
- People report that they arrived at their office to find the lock changed and their stuff thrown in a box sitting on the floor. "Worst Ways to Get Fired," *CNNMoney.com*, September 6, 2006, accessed May 24, 2011, <http://money.cnn.com/blogs/yourturn/2006/09/worst-ways-to-get-fired.html>.

All these are inhumane firings in the sense that no flesh and blood person took the trouble to present the bad news.

It's easy to understand why inhumane firings occur: not many people enjoy sitting down with someone and telling them they're out. So it's tempting to yield to cowardice. Instead of facing the worker you've fired, just drop a note, change the lock, talk to security. On the ethical level, however, firing an employee is no different from working with an employee: as a manager, you must balance your duties to the company and the worker.

How can the **manager's duty to the organization** be satisfied when terminating a worker? First, to the extent possible, the fired person should leave with a positive impression of the organization. That means treating the employee with respect. No mailed notices of termination, no embarrassing lockouts, just a direct, eye-to-eye explanation is probably the most reliable rule of thumb.

Second, the terminated employee should not be allowed to disrupt the continued work of those who remain. If deemed necessary, security personnel should be present to ensure the ex-worker leaves the premises promptly. Also, if the worker is involved in larger projects, a time for severance should be found when their contribution is minimal so that other members of the team will be able to carry on near normally. (It may be recommendable to arrange the termination to coincide with the finishing of a larger project so that everyone may start fresh with the new, substitute employee.)

Third, the financial costs of the termination should be minimized. This means having clear reasons for the termination and documents (pertaining to worker performance or behavior) supporting the reasons to guard against lawsuits. Also, there should be clear understandings and prompt payment of wages for work done, as well as reimbursements for travel expenses and the full satisfaction of all monetary obligations to the employee. This will allow the human resources department to close the file.

With duties to the company covered, how can the **manager's duty to the employee** be satisfied? Consultants—both legal and ethical—typically share some bullet-point answers. First, the employee should be addressed honestly and directly with a clear explanation for termination. Speak firmly, the advice is; don't waver or provide any kind of false hope. Further, the termination should not come as a total surprise. Previous and clear indications should have been given concerning employee performance along with specific directions as to what areas require improvement. Many companies institute a structure of written warnings that clearly explain what the employee's job is and why their work is not meeting expectations.

Second, getting fired is embarrassing, and steps should be taken to minimize the humiliation. The employee should be the first to know about the discharge. Also, the severance should occur in a private meeting, not in view of other workers. To the extent

possible, the employee should have an opportunity to say good-bye to workmates or, if this is the preference, to leave discreetly. For this reason, a meeting late in the day may be chosen as the appropriate time for notice to be given.

Third, to the extent possible and within the boundaries of the truth, an offer should be extended to provide a recommendation for another job.

Fourth, make sure the employee gets all the money coming for work done, without having to jump through hoops.

What Steps Can Management Take to Support Workers in a World Where Firing Is Inevitable?

One response to the inescapable reality that firing happens is preemptive; it's to reduce the moral uncertainty and hardship *before* they arise. Two strategies serve this purpose: actions can be implemented to minimize the occasions when firing will be necessary, and steps can be taken to reduce the severity of the firing experience for employees when it happens.

In her book *Men and Women of the Corporation*, Rosabeth Moss Kanter generates a list of measures that corporations use to diminish firings, and reduce the professional impact for those who are let go. Here's an abbreviated selection of her recommendations, along with a few additions:

- Recruit for the potential to increase competence, not simply for narrow skills to fill today's slots.
 - Rotate assignments: allow workers to expand their competence.
 - Retrain employees instead of firing them.
 - Offer learning opportunities and seminars in work-related fields.
 - Subsidize employee trips to work-related conferences and meetings.
 - Provide educational sabbaticals for employees who want to return to school.
 - Encourage independence and entrepreneurship: turn every employee into a self-guided professional.
 - Keep employees informed of management decisions concerning the direction of the company: What units are more and less profitable? Which ones will grow? Which may shrink?
 - Ensure that pensions and benefits are portable.
- List adapted from Rosabeth Moss Kanter, *Men and Women of the Corporation* (New York: Basic Books, 1993), 330–31.

Key Takeaways

- At-will firing grants employers broad legal latitude to discharge employees, but it does not erase ethical concerns.
- Justifiable worker firings include cases where workers bear none, some, or all of the blame for the discharge.
- The act of firing a worker requires managers to weigh responsibilities to the organization and to the ex-employee.
- Steps can be taken to limit the need for, and effects of, employee discharge.

Exercises 4.4.1

1. What's the difference between at-will and just cause firing?
2. How might fundamental changes in the marketplace require a company to fire workers?
3. What is *rank and yank*?
4. When managers fire employees, what duties do they hold to the organization, and what are the duties to the dismissed worker?
5. What are some steps organizations can take to protect their workers from the effects of discharge if firing becomes necessary?

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