

How to fire a remote employee: legal considerations



Terminating employees is never easy. With a nation still in the grips of the COVID-19 pandemic, carrying out terminations may have to happen remotely. Discharging employees one-by-one in a conference room or office where a six-foot distance can't be maintained is risky. Calling a large group of workers together to announce a mass layoff is even more problematic. Thus, for the time being, employers will have to terminate employees remotely. And that carries with it some unique legal risks and technical challenges. If you must remotely terminate employees, you need a plan that minimizes risk and doesn't spur a social media crisis.

First, the virtual investigation

If you're still depending on employees telework, you may have employees located anywhere, far from your headquarters. Of course, if you have production lines or operate in a retail setting, employees are physically present. Either way, chances are that if you plan a disciplinary or other investigation, you want to investigate virtually. That way, investigators and those being interviewed can keep their distance. In fact, if you use an outside firm or professional investigator, it's likely they will insist on remote investigations. The CDC and state guidelines still suggesting employers restrict travel and encourage telework. A virtual investigation is in line with that guidance.

Fortunately, there are some real advantages to virtual investigations. They can take place quickly, while those interviewed still have events fresh in their minds. Plus, in most cases, using remote meeting software like Zoom or Microsoft Teams allows HR to save the meeting. That creates a far more accurate record than transcribed notes or a tape recorder. For other aspects of the investigation, you may have to rely on an onsite employee. He or she can retrieve paper records or conduct a desk/locker search, then forward the results to the investigator.

Once you have talked to witnesses, examined documents and reached a conclusion, follow your usual disciplinary process. This is no different than if you conducted all interviews in person.

Why terminate remotely?

Before the pandemic, the almost universal recommendation for terminating employees was to do so in person. That was true for both individual disciplinary terminations and mass reductions-in-force. Doing otherwise was seen as a serious faux pas, frequently accompanied by widespread scorn and ridicule. Some employers even discovered that the move led to lost business as the news spread.

That's all changed now. If an employer called together 100 workers in a meeting room and announced their termination, the condemnation would be swift. Allegations would fly that the employer ignored worker safety, adding potential COVID-19 infection to the misery of lost jobs and insurance.

However, terminating employees remotely doesn't mean you ignore the usual rules for terminations. Discharges

should still be conducted with dignity, with an eye towards not creating angry ex-workers. Yes, a socially distanced termination is less likely to trigger immediate anger and possible violence. But that's not your only concern. You also have to make sure that the setup you use for the meeting is secure and private to assure dignity.

How to remotely fire

As with any individual termination, you should schedule a meeting, albeit a virtual one. This can range from a scheduled phone call to a formal meeting using appropriate software. It should **never** be conducted via text, Twitter or other social media. Generally, the best approach is one where you are able to see and speak with the employee. In all likelihood, the employee you are about to remotely terminate knows that she's facing discipline or discharge for other reasons. Let her know that the meeting is mandatory and concerns the future of the company and her role in it. That's part of maintaining dignity and a business-like approach to a process that can be highly emotional. You should also let the employee know up-front that you are saving the virtual meeting session.

Here's how to set up the meeting:

- **Pick your platform:** You should pick a platform that lets you control the meeting as the host. WebEx, Zoom, Skype and Microsoft Teams all have that ability.
- **Set yourself as the host:** Make sure you designate yourself as the host and have taken the time to set up a password and a "room" for the meeting. Then familiarize yourself with how you can "lock" the door to the meeting room once the invited guests have logged in. This is crucial to block anyone not invited from joining in, either accidentally or with mischief in mind. You may have seen media reports of uninvited participants posting inappropriate content, a phenomenon known as "Zoom bombing." Don't let that happen. In addition, do not reuse the room later. It's then possible for earlier participants to log in under some systems. That would be a major privacy violation.
- **Invite only essential individuals:** Keep the group small. It ideally should include the employee and two company representatives (to back each other up later if needed).
- **Understand critical features:** For example, practice before the meeting so you know how to share your screen when you need to. More importantly, make sure you don't inadvertently share information you don't want to share.
- **Duration:** Conduct a short but complete meeting. Make sure that the employee received any final pay she is due according to your state's final paycheck rules. That may mean arranging an immediate direct deposit or sending a check to the employee via courier. You must also make sure she receives a copy of any employment agreements she's bound by like an arbitration agreement. Since you aren't meeting in person, time the delivery of the packet to arrive the same day.

Mass layoffs virtually

What if you are planning to lay off more than one or two workers? Even if those workers regularly work on a production line or on the sales floor, don't gather them together. Instead, prepare ahead of time for a mass virtual meeting. But instead of Zoom or other software-facilitated virtual meetings, consider a live online address.

Prepare any termination packets ahead of time as you would for an individual discharge. You may be able to deliver the packets via email, but don't do so until *after* the address. Otherwise, workers may be distracted by their newly arrived email and miss important information.

Remember that for layoffs or plant closings, the [federal WARN Act](#) may apply. It covers employers with 100 or more workers who are going to terminate 50 or more workers at one site. Those workers must receive 60 days' notice unless exigent circumstances prevent notice. Most states have similar rules, called mini-WARN acts,

which apply to smaller employers and fewer affected employees. Consult counsel to know which WARN laws apply to your locations.

What about severance?

Anytime you discharge an employee – even for disciplinary reasons – you face a potential lawsuit. It's no different for a remote termination. Assume every discharge may precipitate litigation.

One way to lower the risk is to offer a severance payment in exchange for a promise not to litigate. But you must make sure the severance agreement the employee signs is binding. Always have the agreement prepared by your counsel, who can best advise on what your state requires. You will need to do this well ahead of the remote termination, especially if you are discharging older workers.

Be especially careful if you are discharging someone older than 40. Those employees are protected by the Older Worker Benefits Protection Act (**OWBPA**). The federal law prohibits you from using age as grounds for termination and targeting older workers for a reduction-in-force. The OWBPA sets out exactly how you must structure a severance agreement. Any release must include some form of consideration like extra pay and:

- Be knowing and voluntary;
- Be written in plain language;
- Provide accurate information;
- Mention the Age Discrimination in Employment Act (ADEA);
- Advise the worker to consult counsel; and
- Provide at least 21 days to consider the offer and 7 days to revoke signature.

Final notes on how to fire a remote employee

After remotely terminating an employee, employers must be ready to immediately secure their systems from access. However, since newly terminated workers may still need some limited access to HR records such as pay stubs and tax information, tailor access. For example, access to shared files should be terminated immediately to prevent unauthorized access and downloading. You will also need a way to retrieve any company equipment and technology. Sending a courier for pickup is an option. That courier can also deliver any of the worker's personal possessions still in his office.