Terminating an employee's employment ('termination') is also called 'dismissing' an employee. Termination is stressful for all concerned and involves legal obligations and requirements.

If you are thinking about terminating an employee, your organisation must consider:

- whether termination is appropriate, and why
- how to terminate fairly, and
- how to terminate lawfully.

This fact sheet is designed to highlight the main legal issues that arise in termination of employment situations so that your organisation:

- is fair to everyone
- acts legally, and
- reduces the prospects of an unfair dismissal claim being made against it.

For more information, a useful starting point is the website of the NSW Business Chamber.

For detailed information about termination of employment, go to the website of the Fair Work Ombudsman.

Legal obligations when terminating employees

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When is termination appropriate?

It is generally appropriate for an employer to terminate an employee for:

- consistent poor performance
- misconduct
- putting another worker, or themselves, in danger
- not following the employer's policies and procedures
- refusing to follow reasonable and lawful instructions, or
- when there is no longer a need for the position ('redundancy').

A court will uphold the termination of an employee if:

- there is a genuine need for redundancy (see below under 'What is redundancy?)
- the dismissal cannot be considered harsh, unjust or unreasonable,
- the dismissal is not unlawful, or
- your organisation is a small business and the dismissal is consistent with the Small Business Fair Dismissal Code.

All employees must be given:

- a chance to perform to the standards expected by the employer
- a reason for their dismissal,
- a fair hearing, including an opportunity to respond to the proposed reason for dismissal before they are terminated, and a chance to have a support person present for any discussion relating to the dismissal.

Make sure your organisation has a policy that sets out clear procedures for discipline and dismissal, and that you follow them in dismissing any employee from their employment.

Does an employer have to give three warnings before dismissing an employee?

Employees must be given fair warning to improve their performance and help if required (like training or mentoring) before termination. However, a 'three-strikes policy' isn't a legal requirement. You must still give them a fair hearing and every opportunity to improve their performance, or explain their conduct, before moving to termination.

If an employee has committed serious misconduct (such as theft, fraud, assault, or engaging in behaviour that creates a serious and imminent risk to safety) you don't have to give any warnings or any opportunity to improve, and the employee can be instantly (summarily) dismissed. However, the employee should still be given a chance, or requested to explain their misconduct before a decision is made to dismiss them. If an employee is summarily dismissed, you will not need to pay out their
notice period. Note that where summary dismissal has occurred the terminated employee is entitled to some payments - see ‘What is a termination payment?’ below.

What is unfair dismissal?

Unfair dismissal occurs when an employee who has been dismissed applies to the Fair Work Commission and the Fair Work Commission finds that:

- the employee was dismissed
- the dismissal was harsh, unjust or unreasonable, and
- the dismissal was not a case of genuine redundancy.

When the Fair Work Commission decides if a dismissal was harsh, unjust or unreasonable, it considers several factors, including:

- whether there is a valid reason for the dismissal
- whether the employee was notified about the reason and allowed to respond (procedural fairness), and
- if the dismissal was for unsatisfactory performance, whether the employee was warned about their performance before the dismissal.

Your organisation should seek legal advice before you dismiss an employee

The Fair Work Commission won't find that unfair dismissal has occurred if your organisation is a small business employer (less than 15 employees) and followed the Small Business Fair Dismissal Code.

FURTHER READING

For more information on the Small Business Fair Dismissal Code, see Fair Work Commission checklist which is designed to help organisations comply with the Code.
For more information on unfair dismissal, go to the Fair Work Ombudsman website.

What is unlawful termination?

Unlawful termination is different from unfair dismissal. It only arises where the termination occurred for an unlawful or prohibited reason, as opposed to the termination being 'unfair'. These unlawful or prohibited reasons include dismissal based on discrimination grounds, such as a person's race, sexuality or disability, or dismissal based on the employee exercising a workplace right to seek compliance by the employer, for example such as making a complaint or making a request for entitlements.

The Fair Work Ombudsman deals with unlawful termination issues and may seek penalties against an employer for breach of the Fair Work Act 2009 (Cth).

For more information go to the Fair Work Ombudsman's information on unlawful termination and discrimination.
What is redundancy?

If your organisation has 15 or more employees and dismisses an employee (who has been working for your organisation for at least one year) because it:

- no longer requires that employee's job to be done by anyone, or
- has become insolvent or bankrupt,

your organisation can make that employee redundant and terminate their employment. Termination for redundancy will generally require the employer to pay the employee redundancy entitlements on their dismissal. These entitlements will vary based on the employee's length of service and the employer's agreements and policies regarding redundancy.

The law focuses on whether a redundancy is genuine or not. A redundancy will not be an unfair dismissal if it is genuine. A genuine redundancy occurs where:

- the organisation no longer needs the job to be done because of changes in operational requirements, and
- the organisation follows the requirements in the relevant award, agreement or industrial instrument to consult with the employee prior to making any decision to make them redundant.

A redundancy is not genuine if:

- the operational requirements of the organisation have not changed and your organisation still needs the employee's job to be done by someone
- it would have been reasonable in the circumstances for the employee to be redeployed within the organisation or an associated entity, and
- your organisation has not followed requirements under the applicable award, agreement or contract to consult with the employee about the redundancy.

CAUTION

This is a complex area so if your organisation is considering making an employee redundant you should seek legal advice to ensure no unfair dismissal claim can be made against you.

For more information, go to the website of the Fair Work Ombudsman.

What is a termination payment?

When dismissed, an employee is entitled to a final 'termination payment'. This will generally be comprised of a payment in lieu of untaken annual leave, any outstanding wages owing, and pro-rata long service leave where applicable.

In the case of redundancy, the final termination payment may also include redundancy entitlements owing to the employee. Check how much your employee is owed with the Fair Work Ombudsman to make sure you get it right. Final termination payments are also taxable as an 'employment
termination payment’. Check with the Australian Tax Office to ensure you apply the correct tax treatment to the final termination payment.

What are your notice obligations?

The obligation to provide an employee with notice of termination varies depending on the employee’s status. Generally speaking, most full-time and part-time employees are entitled to some period of notice prior to termination. If you are terminating a casual employee then generally there is no notice requirement.

If your employee is covered by a modern award or enterprise agreement or has a written contract of employment, that award, agreement or contract will generally specify a period of notice that you must provide to the employee prior to termination. Alternatively, you can pay the employee in lieu of notice and add this into their final termination payment (see ‘What is a termination payment?’ above).

If you are summarily dismissing the employee for serious misconduct, there is no requirement to provide the employee with notice of their termination, or to make any payment in lieu of notice.

For more information, go to the website of the Fair Work Ombudsman.

What happens if an employee objects to the termination?

If an employee objects to their termination they can complain to the Fair Work Commission.

If the Fair Work Commission decides that your organisation has dismissed the employee for an unlawful reason, or that the termination was ‘harsh, unjust or unreasonable’, the employee may have successfully made a case of unlawful termination or unfair dismissal against your organisation. This can result in your organisation being liable to reinstating the individual to their employment, making payments of compensation to the employee and/or paying civil penalties for breaches of the legislation.

For more information on the steps an employee might follow if they feel they have been unfairly or unlawfully dismissed, go to the Fair Work Commission website.
Related Not-for-profit Law Resources

The Not-for-profit Law Information Hub (www.nfplaw.org.au) has lots of information for not-for-profits about the relationship with their employees

- Employees
- Changing or ending an organisation

Other Related Resources

- Fair Work Commission
- Fair Work Ombudsman

A Not-for-profit Law Information Hub resource. Access more resources at www.nfplaw.org.au

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