

How to Legally -- and Humanely -- Dismiss Nonprofit Employees

By Alicia Abell

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In her 10 years at the East Bay Community Foundation in Oakland, Calif., Maggie Parente has had to fire only one employee. Ms. Parente, who serves as the foundation's vice president of administration, says she and her colleagues have had so few major personnel problems because they take the preventive measures of counseling difficult workers -- and consulting lawyers about them -- instead of simply swinging the ax. "It's not as cut and dried as in for-profits," she says. "We really try to make it work."

But her one experience with outright firing, she says, left a lasting impression: "It's just the hardest part of the job."

Dismissing employees can be particularly tough for nonprofit organizations, most of which don't have human-resources professionals or lawyers on their staffs to guide them. And because charities often pride themselves on maintaining an employee-friendly work culture, termination can be a guilt-laden process. Perhaps one side effect of this culture is that many nonprofit employees do not feel that their bosses deal effectively with inadequate workers: In a [survey](#) of 1,140 nonprofit workers, released last fall by the Brookings Institution, a public-policy think tank in Washington, 44 percent of respondents said their organizations do not do a good job of disciplining poor performers.

But responsible nonprofit managers know that, sometimes, an employee must be fired for the good of the organization. Furthermore, some charities have been forced to lay off employees over the past year because of budget cuts. For those employers faced with the unpleasant task of lowering the boom, here's a guide to doing it legally -- and humanely.

Keeping It Legal

The first step in any termination is making sure the employees are considered "at will," which means they can be fired at any time, with or without cause. One indication that a worker holds something other than at-will status is a written employment agreement stating that they can be fired only for just cause or after prior notice. Most employees are hired on an at-will basis, but sometimes employers create employment agreements without knowing it: Letters, personnel manuals, and even oral statements ("You'll be here forever," for example) can constitute employment contracts, so it's best to have a lawyer review such potential agreements .

Even at-will employees, however, cannot be fired for what has been legally designated an improper reason. Under federal antidiscrimination laws, a person cannot be fired on the basis of gender, race, religion, age, national origin, pregnancy, marital status, or disability. State laws sometimes add other protections; the most common one prohibits firing on the basis of sexual orientation.

Many employers believe -- incorrectly -- that they can't dismiss people in legally protected categories, says Heather Gatley, vice chairwoman of the labor and employment department at Steel Hector & Davis, a Miami law firm that works with some nonprofit clients. "The law has made people so scared to run their own businesses," she says. "None of these laws requires *preferential* treatment." An employer can, for instance, fire a poor performer who is black, gay, and female, Ms. Gatley says, but needs to be extra careful in such cases. If employees fall under one or more protected categories, make sure that their performance problems are well-documented and that other employees in protected categories have been treated similarly in the past. If the troublesome employees' problems have not been well documented, Ms. Gatley advises putting them on probation, which will buy time to document their performance.

Make sure that an employee is not being fired for personal revenge or other reasons unrelated to job performance -- such as refusing a superior's sexual advances or blowing the whistle on illegal activity, says Ruth Eisenberg, a partner at Harmon, Curran, Spielberg & Eisenberg, a law firm in Washington that specializes in nonprofit clients. Terminations for these reasons won't hold up in court.

Doing the Deed

When it comes to the firing itself, charity managers and lawyers have one main piece of advice: Treat departing employees with dignity. Tell them face-to-face that they will have to leave, rather than by phone, letter, or e-mail message, and assure them that the termination is an entirely private matter. Departing employees may also have dissatisfaction to express, nonprofit managers say, and exit interviews can be another way to make workers feel respected -- and to allow them to vent any anger.

It's best to keep dismissal meetings short, honest, and to the point. It's not a time for negotiation, says William P. Flanagan, a partner in the labor and employment-law practice of the McLean, Va., office of Hogan & Hartson. Don't sugarcoat the facts, he adds. In his experience with nonprofit clients, he has found that charity managers sometimes say things like "this has nothing to do with you" when firing an employee in an effort to be nice. Such well-intended words can backfire, Mr. Flanagan says: "Then the person sues you, and in litigation you say you fired him because he was a bad worker."

Craig Shniderman, executive director of Food & Friends, a charity in Washington that delivers food to clients with AIDS and other serious illnesses, advises being as specific as possible about the reasons the person is being fired. In a performance-related firing, he recommends talking only about how the employees have performed on the job, not about their personality. "Do not say, 'Well, you're not a very pleasant person to work with,'" he says. "Also, when you talk about performance, you're less likely to gratuitously injure someone."

He says that employers should be specific during layoffs as well. When there's no employee fault -- when a charity's budget has fallen short, for example -- workers feel better when they are presented with the facts, he says.

Charity managers also recommend having two people other than the employee present during the dismissal meeting, so one can serve as a witness. If the person being fired is hostile, make sure a lawyer is present at every meeting along the way, not just the termination itself, says Ms. Parente. It's also helpful to have the same person who hired the employee do the firing, says Ms. Gately. If the employee is in a legally protected category, try to have someone in the same category participate in the dismissal meeting, she adds. Those measures will help in the event of a discrimination claim.

Certain financial issues must be resolved during the termination as well. Because requirements differ from state to state, employers should consult local law about when fired employees must receive their last paycheck. In some cases, the check must be available at the termination meeting itself. In addition, employers should determine the impact of the firing on the employee's benefits and present that information at the meeting, says Mr. Flanagan.

Severance, contrary to popular belief, is an option, not a requirement. Charity managers and lawyers agree that it's good business practice to pay employees a severance equal to two weeks' salary -- but only if they sign a release of future legal claims. It's best not to have employees sign a separation agreement at the termination meeting, however. If given to employees then, says Mr. Flanagan, "they're so angry that the document is going to be forever tainted." Instead, allow them to look it over for a few days and then return it.

Unless there's a compelling reason to do so, most lawyers and nonprofit managers recommend not escorting the fired employee out of the building. The same goes for supervising people while they pack up their desks: Unless there's a real danger of data or equipment being stolen, let them do it themselves, out of respect for their dignity. The gesture can also help lessen legal risk for an employer: The vast majority of terminated workers who sue, Mr. Flanagan says, do so because they feel they weren't treated professionally.

Then there's the question of timing. Most human-resource professionals advise firing people at the end of the day, to spare them embarrassment. Some advise against terminating employees on Fridays. Firing on a day other than Friday allows an employer to short-circuit the rumor mill instead of letting it build over the weekend, says Jill Solder, co-owner of ManagEase, a company in Orange, Calif., that provides human-resources services to nonprofit and other organizations that lack their own human-resources staff. It also allows managers to reassure remaining employees by telling them how the firing will affect them right away, instead of waiting until Monday.

Preventing Problems

Because no employer relishes the idea of a dismissal -- or the prospect of a lawsuit -- it's best to establish

preventive policies, charity managers say. For small nonprofit organizations, this usually means consulting an outside human-resources company or law firm.

Most of the preventive measures that charity managers recommend involve personnel policies. A nonprofit employer should develop an employee handbook and make sure the staff understands what's in it, says Vicky DiProva, executive director of the Rape Victim Advocates, in Chicago. One way to do this is to take time during employee orientations to thoroughly discuss the organization's policies, she says.

However, lawyers aren't always keen on the personnel-manual solution. "In some ways, it can hurt you more than help you," says Mr. Flanagan. In court, he says, an employee can hold a former employer to what's in the manual -- for example, "Generally, we terminate employees only after five written warnings." If a charity does use a personnel manual, the lawyer says, it should include a disclaimer stating that it is not an employment contract.

Well-documented, accurate employee files are another prudent precaution. Good managers engage in regular evaluation of their employees anyway, says Ms. DiProva, but personnel files can also serve as a paper trail in case of litigation. Although you're not legally required to have a reason for firing someone, lawyers say it's best to have one -- and what's in the personnel file should support that reason.

Although it's a myth that employers must engage in "progressive discipline" -- an oral warning followed by a written warning, then suspension, and finally termination -- documenting the issues, talking to employees, and warning them over and over gives employers a "safety belt," says Ms. Solder. If employers haven't documented issues along the way, they should compile a written history of problems with the employee that includes a description of the event that led to a dismissal, lawyers say. In most legal cases brought by fired employees, says Ms. Gately, the evidence jurors value most is what was written down close to the termination date.

It's vital to give realistic performance evaluations to every employee, says Ms. Eisenberg. Often, nonprofit managers "want to be nice guys, and so they don't give employees a true assessment of weaknesses and strengths," she says. This causes problems when a terminated employee decides to sue and is able to show a jury several different evaluations with nothing negative in them, she says.

Nonprofit organizations' tendency to give poor performers too many second chances can also make it harder to fire people later on, Ms. Eisenberg says. This is not only because the employees become attached to the organization, but also because their managers feel increasingly guilty at the thought of termination. In addition, she says, delaying termination allows more time for an incident to occur -- for instance, an injury that leads to a workers' compensation claim -- that makes it more difficult to fire the person.

Last but not least, says Ms. DiProva, consider that overlooking poor performance is more than just legally risky: "It's not necessarily a fair or compassionate thing to do." It's unfair to employees, who don't get accurate assessments of their performance, but most of all, it's unfair to a charity's constituency, who would

be better served by more able employees.

As Mr. Shniderman puts it, "If people think they need to be 'charitable' toward employees, they're being uncharitable to their clients."

What strategies work best when a nonprofit employer must fire someone? Share your thoughts in the [Job Market](#) online forum.