

# Avoiding The Most Common Employee-Termination Mistake

By **Kenneth Winkler** (January 24, 2022, 3:05 PM EST)

There were once again NFL head coach terminations[1] on Black Monday, Jan. 10 — the Monday following the end of the regular professional football season. It is common for NFL teams to fire underperforming coaches after the end of the regular season and this year is no different.

This news cycle, however, brings awareness to the importance of the termination process.

## Avoid the Blindside

The head coaches let go on this year's day of reckoning include Chicago Bears head coach Matt Nagey; Miami Dolphins head coach Brian Flores; and Minnesota Vikings head coach Mike Zimmer.

Nagey and Zimmer's terminations were expected, but the Dolphins' decision to terminate Flores was somewhat surprising. The Dolphins won eight of their last nine games and the team seemed to be moving in the right direction, despite not making the playoffs.

As I reflect on Flores' termination, I wonder whether he saw it coming. There is a particular reason why I ask this question as an employment attorney: Blindsiding employees is the most common mistake I see employers make when terminating an employee for performance.

If management properly does its job, an employee should never be surprised for being terminated for lack of performance or being a poor performer. The employee will almost always disagree with the decision, but that does not mean that the termination should come out of nowhere. Employees deserve to be treated fairly — even bad employees.

## Be a Good Coach

Clear and consistent communication is critical to performance improvement. In the sports world, players typically don't end up on the bench without knowing why. Coaches review game film with players, give constructive criticism and provide instruction through hours of practice drills.

Managing performance in the workplace also requires effort. To make a difference and treat employees fairly, managers must analyze performance, give feedback and provide tools to improve performance. After all, you can't expect an employee to fix an unknown problem or do so without support.

Active coaching is not only the right thing to do, it also reduces liability. Serious legal risks arise when management drops the ball.

The U.S. Equal Employment Opportunity Commission's annual charge filing data[2] shows we live in a litigious society. I believe what drives most employees to file discrimination charges is a perceived lack of due process. It is not uncommon for a charging party to claim that they were never told there was a performance problem.

If managers are upfront about performance issues and provide the employee with a genuine



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opportunity to improve, then they can avoid a surprise termination and reduce the likelihood that the employee will cry foul.

In the event a discrimination claim is asserted, it is important for the employer to show that the employee was responsible for the lack of performance. Evidence that the employee was notified about performance deficiencies helps solidify the employer's narrative. On the other hand, evidence that performance issues were not raised prior to the termination can undermine the legitimacy of the employer's decision.

## **Blocking and Tackling**

Fundamentals are important in football; they are also important in human resources. Below are some fundamental steps employers can take to effectively manage performance and support a termination decision:

### ***Analyze Performance***

Like watching game film, managers should analyze an employee's performance on an ongoing basis. Pay attention to particular strengths and weaknesses. Take notes, document issues and be ready to give constructive feedback.

### ***Conduct Performance Evaluations***

Be honest. Do not over inflate an employee's rating. Give concrete examples of performance problems including dates and detailed facts. Clearly define expectations and explain the consequences if expectations are not met. Allow the employee to give feedback and offer tools to help the employee succeed.

### ***Don't Drop the Ball***

Communicate with employees about their performance throughout the year — not just at a formal evaluation or at the end of the fiscal year. The evaluation should not be the first time an employee receives a compliment or learns of a serious performance problem.

Follow up with an employee after a performance evaluation if performance dips or does not improve. If necessary, place the employee on a performance improvement plan that clearly outlines goals, expectations and consequences.

### ***Document Steps Taken***

Terminating employment creates a litigation risk. It is important to have documentation that supports the legitimacy of the decision, such as records of performance problems, counseling sessions, written warnings and other efforts made to improve performance.

After a counseling meeting, have the employee acknowledge in writing that the employee met to discuss performance, understands the performance problem and knows what is expected going forward.

### ***Call an Audible if Necessary***

Carefully evaluate the facts and documentation to ensure that the termination will not be a surprise. Specifically, look for evidence that shows:

- The employee was not meeting expectations;

- The employee was notified about a performance problem;
- The employee understood expectations and consequences;
- The employee was given a fair opportunity to improve; and
- The employer followed its policies dealing with performance and discipline. If something was skipped or does not look correct, reevaluate the decision and take steps necessary to correct the deficiency.

## **A New Season**

Employers begin 2022 with the same hope and optimism as NFL teams entering a new football season. Despite best-made plans, however, things do not always work out as anticipated. External factors, such as COVID-19, can create unexpected challenges.

So too, can employees who fail to perform as expected. To remain competitive and move the organization forward, personnel changes may be necessary.

Terminating an employee for performance is not without risk. This is especially true when employees are surprised by the decision and do not see it coming. Employees who feel blindsided are more likely to seek an attorney and file a lawsuit.

It is important, therefore, that managers actively coach their employees on performance. Key steps include providing notice, defining expectations, explaining consequences and giving a fair chance to improve. By following these steps an employer will go a long way to avoiding a surprise termination and reduce legal exposure.

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[1] <https://www.reuters.com/lifestyle/sports/black-monday-sees-coaches-fired-after-disappointing-seasons-2022-01-10/>.

[2] <https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2020-enforcement-and-litigation-data>.