

LEGALities

F R O M M I K E F A R H I

A NEWSLETTER FOR CLIENTS AND COLLEAGUES

OCTOBER 2006

FAQs: You're Fired!

Is there a good way to fire or to be fired from a job?

Firing an employee is usually not easy, for a boss or for an employee. It's stressful, but may be necessary, based on financial circumstances or performance issues. In the case of deficiencies, a firing shouldn't be a surprise to the person being let go, if he or she has been counseled, warned, disciplined or given an honest performance evaluation about problems. Unless the problem involves dishonesty, violence or similar infractions, the employee will have been given a chance to correct his or her performance. And if the firing is done carefully, with dignity and not humiliation, it lessens the chances of any problems in the future.

Is there a wrong way to fire someone?

Firing an employee without telling him/her beforehand about performance problems, firing out of anger or plain nastiness, or based on incorrect information can create bitterness, resentment and a desire to "get back" at a supervisor. With our large immigrant workforce, a fired worker may automatically assume that his "American" or "white"

supervisor is discriminating against him or her. The next step may be a visit to a lawyer: all the more reason to be sure the firing was proper and the procedure handled appropriately.

What are grounds for immediate termination?

A serious violation of company policy, or of the law is a valid reason for immediate termination. Both employer and employee have a responsibility for the worker to know what to do and what not to do on the job. Both should be pro-active in communicating or learning company policies and a supervisor's expectations. Of course, a knowledge that theft, property damage, violence, or sexual harassment is wrong is assumed. Both New Jersey and New York at "at-will" employment states. Unless a company policy provides for a specific procedure, firing on those grounds can be immediate and without notice. Of course, "at-will" employment means that a worker can be let go at any time, for any reason not based on discrimination, unlawful retaliation or other action prohibited by law.

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What if an employee has a written contract, or there is a written policy providing for steps to be taken before a firing?

It depends on the terms of the contract, which should be made as specific as possible before it is signed. For example, is it clear to both sides what "just cause" means? An employee handbook or manual can be enforceable, if: (1) it is widely circulated in the workplace, (2) the language is "explicit and clear," (3) there is no "clear and prominent disclaimer" which states that the employer is not making any promises or creating a contract, is free to change to change terms and conditions of employment and holds the power to fire employees with or without good cause. A collective bargaining agreement covering union members usually provides an appeal and arbitration process for terminated employees.

What are some other reasons that an employee can't be fired?

They include retaliation for using family medical leave, for filing a workers' compensation claim, for reporting illegal or illegal-like activities of an employer or supervisor, or health hazards on the job ("whistleblowing"), or assisting a co-employee with a discrimination claim. Other reasons include bringing a wage claim or going to Court for jury duty.

If a firing is not for a serious violation, can an employer make it easier on the employee and protect him/herself?

One way is to offer the employee a severance payment. He or she gets money, called severance, in return for a promise not to sue the employer or bring any employment-related claims against it. The agreement is put in writing and the employee is given time, usually 21 days, to consider it and have an attorney take a look. In addition, there's a period, usually 7 days, to revoke the severance agreement. Getting full salary for even a short period can help ease the employee's financial strain. And there's still usually a right to collect unemployment benefits. One benefit to the employer is the knowledge that there will be no

future lawsuit, including expensive legal fees. Another is a guarantee that the employee will not "badmouth" it to hurt its business. There can be other promises, too, depending on the type of business and the position that the employee held.

What about references?

The days of a "good" or "bad" reference are over. With lawsuits claiming that references are false, discriminatory or retaliatory, employers must be very careful. What is done in most cases is to give a "neutral reference," which provides a former employee's dates of employment, job title and job duties. If a human resources person or supervisor is asked for the reason the employee is no longer employed, he or she should answer "that's all I'm authorized to provide." But a possible exception to the "neutral reference" is if an employer does not disclose a former employee's violent tendencies in the workplace. That may make it liable to a new employer, or to its employees, if someone is injured by an act of violence.

In The News . . .

Nashel Kates partner **Michael Kates** was recently appointed as Borough Attorney of Fair Lawn. He also serves as Zoning Board Attorney in Alpine, Englewood Cliffs (and also Planning Board Attorney there) and Closter.

Jack Zakim, of counsel to the firm, finished in first place at the YMCA National Masters Short Course Swimming Championship meet in Ft. Lauderdale, Florida, in the 500 yard freestyle (60 to 64 age group) and took 2nd and 3rd place in 4 other events there. A few weeks later, he traveled to Stanford University in Palo Alto, California and came in 9th of 80 in the 200 meter freestyle at the World Masters Long Course Swimming Championships. He also finished 11th and 14th in two other events. Over 6000 swimmers from 73 countries participated in the event. Jack took some time off to be honored with his wife Lydia for their contributions to Temple Beth Rishon in Wyckoff. The High Holiday ad journal was dedicated in their honor.

Mike Farhi, also of counsel to Nashel Kates, was recently admitted to practice in both the Southern District and Eastern District Federal Courts of New York.

Associate **Carter Reich** announced his engagement to Lauren Banyar, senior publicist for Jane Wesman Public Relations in New York City.

Experts in Mediation

Nashel,
Kates, Nussman,
Rapone & Ellis LLP

Many employment, business and even marital disputes can be resolved by Mediation. This is a process where the two sides agree to meet with a neutral, trained mediator who tries to settle the matter. Mediation has become more popular because of concerns about the costly and time-consuming nature of litigation. Any recommendations of a mediator are not binding and either side can choose not to settle. But a good mediator can produce results, which can be as broad and creative as the parties choose. For example, in an employment dispute, in addition to the payment or non-payment of money, a settlement through mediation can include a letter of apology, changing a termination to a resignation, or giving an employee a “last chance” to correct problems. One of the biggest advantages is that mediation is inexpensive. In certain situations, a government agency pays for the mediator’s time. Even in a “private” mediation, the cost for one day or one-half day of mediation can be far less than the expenses for bringing or defending a lawsuit. Please call or e-mail mediator and Nashel Kates partner **Joel Ellis** (jellis@nklaw.com) if you have any questions about this process.

**We mourn the passing of our
senior partner and friend,
Howard M. Nashel,
a “Lawyer’s Lawyer.”**

**Howard M. Nashel
(1936 – 2006)**

Hiring Immigrants:

What Every Employer Should Know About I-9 Employee Forms

By Martin F. Breznick, Esq.

Every employer must have an I-9 form with information on each of its employees, alien and otherwise. A review of what is required is important since more companies, large and small, are hiring more immigrants seeking jobs in the United States. Here are 5 of the most important:

1. Keep proper records. Don’t knowingly hire or continue to employ unauthorized aliens. All employees hired after November 6, 1986 must be verified.

2. Remember that there are three types of aliens authorized to work: one who is a lawful permanent resident, one who has an employment authorization document and one who is eligible under a lawful non-immigrant status (called H, I, L, E, O, P or R).

3. Understand that an alien must complete his/her part of the form (Section 1) and the employer cannot question any documents presented if the form seems to be filled out correctly. This protects an employer from a charge of hiring an illegal alien.

4. Don’t forget that an employer hiring aliens has a balancing act to perform. S/He cannot request more documents than required by the form, because doing so may invite a claim of discrimination. S/He cannot pre-screen a potential worker for documents – employment cannot be denied because there is too much paperwork involved. However, *not* having a fully completed form can result in a “paperwork violation.” Finally, not investigating something that seems suspicious can result in a serious violation.

5. Always keep your I-9 records separate from an alien’s employment file.

The law firm of Breznick & Cavallo was founded in 1987 with the mission of providing reasonably priced legal services in the areas of immigration and nationality law. It has successfully represented small and medium-sized companies, as well as multi-national firms and individuals. The firm provides its clients with keen insight into employment and family based immigration, immigrant issues and strategies, representation in removal proceedings, naturalization, diversity, political asylum and employer sanctions. It has offices in Norwood, New Jersey and New York City. Please call 201-750-7623 or 212-581-4700 for information.

Since 1913, the members of Nashel, Kates, Nussman, Rapone & Ellis, LLP, have served as outstanding litigators, legal advisors and valued members of their communities. The firm's attorneys believe that the practice of law requires an unstinting dedication to their clients and the legal matters for which they are retained. The firm provides legal representation of the highest caliber in the areas of:

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| * Business and Corporate Law | * Municipal Law and Land Use |
| * Complex Litigation and Appeals | * Condominium Associations and Co-op Corporations |
| * Probate Estate Administration and Tax Planning | * Alternate Dispute Resolution |
| * Commercial and Residential Real Estate | * Professional Licensing |
| * Entertainment Law | * General & Commercial Litigation |
| * Real Estate Tax Appeals | * Employment & Discrimination Law |
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To learn more about Nashel, Kates, Nussman, Rapone & Ellis, visit the website at <http://nashelkates.lawoffice.com>.
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This issue of Legal-ities focuses on another important issue in the workplace for Employers and Employees - Terminations. The information contained in this issue is intended to help you or someone you know keep abreast of developments in the ever-changing work place.