



Employment Myths and Misconceptions: Employer Tricks

Most workers in California are employed “at-will.” This generally means that your employer can fire you without notice and without any reason at all. However, during the course of the last 25 years, the courts and the legislature have made so many exceptions to the at-will doctrine that employers, in practice, almost always provide some reason for the termination. There is good reason to believe that you have a wrongful termination case if your employer feels that it is

necessary to invent a false explanation for the termination decision. This situation arises when the employer’s motives are wrongful, which forces a dishonest explanation or “pretext” to be used as the supposed grounds for the termination decision. Listed below are some of the most common employer excuses we encounter in wrongful termination cases:

- Minor violations of attendance or tardiness policies that were not enforced until the employee made a complaint about illegal or hostile working conditions.
- The employer constructs a paper trail of nitpicking criticisms, culminating in a termination. The paper trail begins soon after the employee complains about working conditions, and the criticisms are often subjective and difficult to back up. Nevertheless, the employer uses the paper trail to justify the termination.
- The fake layoff. In this situation, the employer claims that an economic downturn in business forced it to layoff the employee. These claims are often suspect, particularly when the “layoff” only impacts a few employees. Employers, in our experience, will use a fake “layoff,” to get rid of a group of employees who have raised complaints with management, or are considered problematic in some other respect.
- The passive-aggressive approach. In this situation, the employer badly wants to get rid of the employee, usually for some prohibited reasons, but is afraid to go forward with the termination, perhaps fearing a lawsuit. The employer will try to make work so miserable, or so unrewarding that the employee has no choice but to quit and move on to a new job. Even in these circumstances, however, the employee can sometimes make out a claim of wrongful “constructive” termination if the workplace was so intolerable that anyone in the employee’s position would feel compelled to resign.
- The fake manager trick. Employers will often label certain employees as “managers,” in order to avoid paying overtime wages. However, the label doesn’t control whether an employee is exempt or non-exempt from the overtime laws. Employee exemption status depends on the duties the employee performs. If you are labeled as a “manager,” but earn a salary less than \$28,800, then you have almost certainly been misclassified and may be entitled to unpaid overtime.
- Off-the-clock work. Many employers ask their employees to “clock out” at a certain time, but then have the employee continue to work for a short while. It is illegal not to compensate a non-exempt employee for this time, regardless of how much time is involved.
- Another employer trick is the timely termination. In this situation, the employer finds a reason to layoff or terminate an employee who is on the verge of obtaining a substantial bonus or commission payment. The goal is for the employer to keep the bonus or commission rather than pay it out to the employee who earned it.
- The quick trigger termination. In this situation, the employer terminates an employee immediately at the expiration of a medical leave taken under the California Family Rights Act or the Family Medical Leave Act. Many times this will result in a wrongful termination because the employer failed to interact with the employee to explore other options short of termination (such as extended medical leave or reassignment).
- Employers will often discriminate against disabled employees by claiming that the employee is *too* disabled to work, and thus cannot perform the essential functions of his or her position. The employer in this case often opens itself up to liability by failing to consider whether the employee is able to perform the essential functions of any other vacant job within the organization. The goal, in many cases, is for the company to rid itself of a seriously injured worker.
- The slap on the wrist defense. In this case, the employer is aware that one of its supervisors is behaving in a grossly inappropriate manner, such as making racial slurs, sexual advances, or other harassing conduct. However, the supervisor is financially important to the enterprise, which places him or her in a safe harbor. As a result, the employer fails to take appropriate corrective action against the misbehaving supervisor, and instead gives a slap on the wrist warning. The complaining employees, in such circumstances, are often deterred from making further complaints.