

Firing an Employee

By Nancy Chillag

Construction is one of the industries that has a constant turnover of employees. Usually you can't tell how a new employee will work out until he or she has been on the job for a while. No matter how carefully you screen new hires, not every employee is a good fit. Sometimes you will be faced with the unpleasant task of termination. Aside from the personal difficulty and the potential disruption of work, you need to limit your exposure to a wrongful termination lawsuit.

Most states consider employment to be "at will." This means that either the employer or the employee can terminate employment for any reason or no reason. In practice, of course, things are not so simple. In fact, even if your state recognizes an "at will" employment relationship, there are numerous exceptions to the rule. The following are some of those exceptions:

Express Contracts

An individual employee or a group of employees can be covered by a contract which overrides the "at will" status. If your employees are covered by a union or other collective bargaining agreement, you must refer to the agreement to determine what circumstances allow you to fire an employee and what procedures you must follow.

Some employers have written job descriptions which they set forth in a contract. A presumption may exist that as long as the employee is fulfilling the job parameters the employment will continue. If that is your intention, the agreement should specify the grounds for termination so there is no guessing later on.

Employee Handbooks

Many contractors use employee handbooks in which they set forth their company policies, hours of work, method of pay, rules of conduct, etc. Courts are reluctant to interpret these handbooks as contracts guaranteeing employment; however, it's important to make sure that the language



contained in the handbook clearly indicates that nothing in the document will change the "at will" employment status.

It is also important to review your discipline policies. If your handbook provides that employees will be given a warning upon an initial violation, and upon a second violation the employee will be put on probation, you may be prevented from firing an employee prior to using the warning and probation procedures. In essence, the discipline policy may become a guarantee of employment through certain stages of discipline.

Implied Agreement

Even if you do not have a written agreement or an employee handbook, a terminated employee can try to argue that there was an implied agreement guaranteeing employment for a specific period or under certain circumstances. In some states, oral assurances that an employee has "job security" may mean that the employee can only be fired for cause.

In evaluating a claim that job security was guaranteed, there are four main factors that a

court will consider: 1) the employer's personnel policies (whether written or unwritten), 2) the length of service of the employee, 3) the employer's actions or communications which reflect assurances of continued employment, and 4) the industry practice. Unless you intend to have a different policy, you should make it clear in your employment contracts and employee handbooks that employment remains at will.

While not a perfect protection, putting the "at-will" status clearly in writing is your best defense against this type of claim. Furthermore, you should not say anything or take any action which would contradict such a policy.

Violation of Public Policy

An exception to the "at will" status of employment is when the termination violates public policy. The claim is usually based on a protection provided by statute, the Constitution or common law. Examples of public policy violations would be termination for "whistle-blowing," or refusing to do illegal acts, or refusing to drive an excessive number of hours absent sleep, or making a workers' compensation claim.

Implied Covenant of Good Faith and Fair Dealing

This exception to the "at will" employment recognizes that the employer must deal fairly with his employee. This is a difficult concept because what might be fair to one person may not seem fair to another. Examples of this exception are firing an employee just as he is about to become eligible to participate in a profit-sharing plan or other employment-related benefit. (Many state courts do not recognize this doctrine in employment cases.)

Discrimination

It is also illegal to fire an employee based on race, gender, religion and other protected qualities.

Numerous statutory limitations to "at will" employment exist, including discharge due to pregnancy, bankruptcy, serving as an elected official, etc. Some of these statutes apply only to certain employers, so you should seek advice regarding your specific situation.

While there are ways to defend against a wrongful termination claim, your best defense begins with a good offense. Put the following procedures into place in your company today:

1. Prepare Written Policies. You may think you have certain policies in place, but it will be difficult to prove what those policies are without having them written down. Prepare an employee handbook which sets forth your company policies and make sure it contains language that states all employees are considered "at will." Have the handbook reviewed by your attorney to see if it complies with all the local laws.

2. Write It Down. Protection against wrongful termination claims begins with proper documentation. It is much easier to show that a firing decision was based on the employee's performance (and not a prohibited reason, i.e. discrimination), if you have a paper trail showing poor evaluations, failed attempts to remedy the problem and discussions with the employee. Even though you do not need "cause" to terminate, it is always better to document things when cause exists.

3. Train Your Supervisors. An employee's supervisor is usually considered to be management and thus is responsible for implementing the policies of the company. Make sure that supervisors are accurate in their communications with employees, that they do not make statements which would indicate that an employee has job security and that they base their decisions on rules which apply equally to all employees.

4. Review Application. Many companies use form applications for potential employees to complete. Review these forms to make sure they do not contain any language that could imply guaranteed employment.

These are just a few ideas for limiting your exposure to a wrongful discharge claim. Many others can be part of your overall management plan, both as protection against lawsuits and as part of a professional management system. While most dismissals do not result in a lawsuit, a little effort up front can help protect you down the road. **QR**

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