



In The Trenches

By Thomas R. Barton

Practical Answers to Your HR Questions

Q *I am the personnel manager for a medium-sized Utah company. I need to terminate an employee for poor performance. Is there a procedure I have to follow?*

A No. There are techniques that you may want to implement, but neither Utah state law nor federal law imposes a termination procedure in this situation. However, if your company has a policy regarding how it discharges employees, you should follow that policy. Also, if your company has a contract with the employee (including a collective bargaining contract with a union that represents the employee) you must adhere to the provisions of the contract. That said, here are some pointers that should help:

- **Termination memo.** Once the Company has conducted an investigation and reached a decision to terminate, the next step should be to put the results of your investigation and the decision in writing. This should not be a lengthy document. It should state the reason for discharge and explain, briefly, how and why the company reached its decision. If you have not already done so, you should review the company's policies and/or handbook to make sure that the memo is consistent with these documents. The memo should be placed in the employee's personnel file. Any document you create could be used in litigation, so be careful what you say. As a general rule, the less said, the better.
- **Termination interview.** Decide who is going to terminate the employee. That person should call the employee into a closed office with one witness present. The witness should be someone who would later be able to clearly articulate what happened, if need be—i.e., a supervisor or someone from the human resources department. Tell the employee that he/she is being discharged and state the reason. Use the termination memo to make sure that what you tell the employee is consistent with the memo. Don't give the employee the termination memo. Be polite and respectful. You may choose to answer questions or discuss the situation, but only to a degree. Do not argue with the employee.

- **Final check.** If the termination is to be effective immediately, you should give the employee his/her final check at end of the termination interview. The check should be payment for the employee's unpaid wages, up through and including the day of termination. Utah law requires that discharged employees be paid at the time of termination, and the employer is subject to monetary penalties for wages that are not paid within 24 hours.
- **Exit.** After the termination interview, you should allow the employee some time to gather his/her things, and then escort him/her from the premises. Make sure the employee turns in all property of the company. You should immediately change or delete any codes or passwords applicable to the employee. Finally, you should document what happened in one last brief memo to the file: date, time, place, paycheck, those present, and any notable statements or actions by the employee.

There is no right way to terminate an employee. If you have a procedure in advance, however, it can make the process easier and smoother. Just as importantly, if you stick to your procedure, you may reduce your chances of getting sued.

Q *I am the human resource manager at a manufacturing company in Utah. We would like to terminate an at-will employee. However, this employee claims his supervisor promised him that, even though he was having performance problems, the company would not let him go before the Christmas holiday. The supervisor denies that he said this. Do we have a problem?*

A You may. In Utah, the general rule is that an employer can discharge an employee at-will at any time for any reason. However, one of the exceptions to this rule is the existence of a contract (express or implied) that restricts the employer's ability to terminate. Verbal statements can constitute enforceable contracts. However, general

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statements of fairness and encouragement—like, “we want you to have a long career with the company”—are not enforceable. An oral promise can be enforceable if the employee can show that the statement was sufficiently definite, and that a reasonable person would conclude that the employer was offering to vary the at-will basis of employment. Following are some of the first steps you should take in evaluating the situation.

First, find out from the employee exactly what he claims was said. Have him write it down, including date and who else was present. It may be that the supervisor’s statements were unenforceable statements of fairness, or the like.

Second, find out if the supervisor actually had actual or apparent authority to alter the terms and conditions of the employee’s employment. If he did not, then the statement could not have been reasonably relied on by the employee to alter the at-will presumption.

Third, review your employee handbook and other policies. Simply having an at-will statement in a handbook may not solve

the problem because the at-will status can be modified by subsequent oral promises. However, if the employee received a handbook after the alleged statement was made, the statement may not be binding. Also, look for a provision in the handbook that expressly limits the way in which the at-will status (or other terms of the handbook) can be modified. Sometimes, handbooks include a provision stating that any alterations or changes to the policies therein can only be made by the president or another specified company officer.

All of these considerations go to the strength of the employee’s claim—assuming that what he says is true. Of course, the supervisor has a different story, and the company has the discretion to take his word over that of the employee. Even if none of the above considerations are helpful, the company may justifiably choose to discharge the employee anyway. If it does so, it should be aware that it could face a lawsuit which, because of factual dispute about what the supervisor said, may not be subject to summary dismissal. ■

In the Trenches is provided courtesy of the Labor and Employment Law Group of VanCott, Bagley, Cornwall & McCarthy, P.C., and is authored this month by Thomas R. Barton, a litigation shareholder at VanCott and a member of VanCott’s Labor and Employment Law Group. You can reach Mr. Barton at 801.532.3333. If you have questions you would like considered for publication in future issues of *HR Views*, please send them to pamgunnell@plwi.net.

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