

When Can You Fire Someone?

by Quenda Behler Story

Recently, my little town hit the big time. It has been talked about on television and radio, and written about in newspapers and thousands of blogs. Why? Because a local employer fired four employees who would not quit smoking in the privacy of their own homes. How did he know they were smoking when they weren't at work? Random blood tests. This is a pretty extreme case, but it does point to an issue that contractors should know about — specifically, what you can and can't fire people for.

The basic starting place for employment law in this country is that employees have no property interest in their jobs. This means that when an employer wants to fire an employee, he can. The law does not say that the employer has to have a good reason, but the law does say he can't do it for an unlawful reason. Got that?

So you can fire anybody for any reason (including smoking in their homes) *unless* there is a law on the books that specifically says you *can't* fire people for that reason.

Employment Contracts

The first and most important reason an employer might not be able to fire an employee whenever he feels like it is that the employee has an employment contract. An employee with an employment contract can't be fired unless he breaks the contract.

How does an employee get a contract? An employee can sign a personal employment contract, work under a union-negotiated contract, or work for a company that has a handbook written in such a way that it creates an implied contract (see "Writing an Employee Manual," 1/04).

To fire an employee with a contract,

the employer has to show that the employee doesn't meet the requirements of the contract or the company handbook — for example, that the employee didn't follow the rules in the handbook. This is one of the reasons I'm always preaching that you should put exactly what you expect from your employees in your handbook: Stay sober on the job site. Be ready to work. Handle tools safely. Treat the homeowners with courtesy and respect. That kind of thing.

Could you put a no-smoking clause in the company handbook? In most states, you could if you wanted to.

Watch Out for Protected Categories

Most construction workers do not have an employment contract of any kind, so that makes them "at-will" employees — meaning they can be fired at the will of the employer, anytime he wants.

But is that always true? Can all at-will employees be fired anytime? No, not all of them. (Don't you hate it when I give you a general rule and then immediately start pointing to exceptions?) The exception has to do with protected categories, which exist by federal or state law to protect

classes of employees such as handicapped persons, older workers, certain minorities, veterans, women, or some other group. Protected groups and the rules that apply vary by state.

None of those federal or state laws about protected categories says that people with these legal protections can never be fired. What those laws say is that employees in these categories can't be fired for having a handicap, or for being a veteran or part of another protected group. There has to be another reason.

Difficult burden of proof. Here's how it works: If someone who is *not* in a protected category is fired and then sues for wrongful discharge, that former employee has to prove he was fired for the wrong reason, which can be difficult.

But it's the other way around for people in a protected category. Here's an example: Suppose I sue my former employer, claiming that he fired me because I'm more than 50 years old, when the truth is that he fired me because I didn't show up for work. I'm in a protected category, so when we go to court I don't necessarily have to prove he fired me because of my age. If I can point to some kind of evidence

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that suggests it was age discrimination (no one over 50 works there or people are always fired after they turn 50), then it's up to the employer to prove that my age *wasn't* the reason.


How does he prove that? He does it by showing that he did have good reason to fire me and he has proof of it. The best and easiest way would be if his reason for firing me was described in the company handbook as a reason for termination, and there was documentation in the company records (such as in my personnel record) of the times and places I violated that policy.

Avoiding Trouble

So, if you're an employer, what should you take away from this column?

First, how important it is to document in your employee handbook exactly what you expect from employees. Second, how important it is to document exactly how and when an unsatisfactory employee is unsatisfactory.

Also, if you want no smoking on your job sites, you can implement that policy in most states, but you should have an employee handbook that explicitly says "no smoking" before you fire someone for smoking on the job.

How about firing an employee for smoking in the privacy of his home? That may be legal in your state — but if you do fire someone for that reason, you'll still have to pay unemployment benefits. That's because, legally, unemployment benefits are "just cause" benefits, meaning they can't be denied unless someone is fired for cause — which does not include smoking at home. 

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