

SMWIA CODE OF EXCELLENCE RAISES QUESTIONS FOR CONSIDERATION WHEN TERMINATING EMPLOYEES FOR CAUSE

With adoption of the Code of Excellence by the Sheet Metal Workers International Association (“SMWIA”), many contractors are asking whether they should terminate an employee for cause and whether doing so increases the contractor’s exposure to employment based lawsuits by terminated employees. Contrary to popular belief, terminating an employee for cause when done right may actually reduce the risk a contractor may be successfully sued. Terminating employees subject to a collective bargaining agreement for cause need not be difficult. For the most part, it involves similar principles involved in termination of non-collectively bargained employees: clear work rules, open and consistent communication and timely action.

This paper is intended to lay out recommended considerations when terminating an employee for cause. Of course, this paper can only provide general guidance and does not address local or state laws. It is always a good idea to consult with local legal counsel where there are questions regarding the appropriateness of termination.

Why Termination for Cause

The general rule is that employment is “at-will,” unless there is an employment contract which limits the employer’s right to terminate the employee. However, this general rule has been riddled with numerous exceptions under state and federal law. For example, there are a number of laws which prohibit discrimination in the work place. Such laws prohibit discrimination on the basis of sex; race, religion, color, or national origin; age; or on the basis of physical or mental handicaps. Other laws prohibit employers from taking adverse action against employees because of, for example, union activities, because they have served as “whistleblowers,” or they have contacted OSHA over safety violations.

Contrary to popular belief, simply laying off an employee does not insulate an employer from discrimination or wrongful termination lawsuits. It is critically important to understand that it is extremely easy for an employee that is a member of a protected class to make out a prima facie case of illegal discrimination. Under many of the employment laws prohibiting discrimination, an employee who sues for discrimination must initially only show that (1) he/she is part of protected class and (2) was subject to an adverse employment action by his/her employer. A lay off of an employee may constitute adverse employment action.

Once the employee has made a prima facie case, the burden then shifts to the employer to show that the adverse action was taken for a legitimate, non-discriminatory reason. Laying off an employee for lack of work, if that is true, is certainly a legitimate reason. However, once the employer has come forth with such a reason, the burden then shift back to the employee to show that the cited reason was a “pretext” for discrimination. And here is where the problems arise for employers who place employees on “lay-off,” which has the implication that the underlying reason is a lack of work. Obviously, laying an employee off for “lack of work” looks pretextual, if the very next day, the employer is requesting additional employees from the hall. To avoid such a risk, it is better to terminate an employee for cause where cause exists.

The Meaning of Just Cause

There is no legal definition for what constitutes “just cause” for termination. Some collective bargaining agreement attempt to define what is cause for termination. However, no collective bargaining agreement can possibly cover all possible situations that may constitute cause for termination.

The Code of Excellence gives some idea as to what will be viewed as just cause by the SMWIA, but does not provide an exhaustive list of offenses that constitute cause under the Code.

According to the SMWIA’s Code of Excellence, an employer should terminate an employee when that employee has “demonstrated that they are either unwilling, or incapable of, meeting acceptable standards for workplace behavior.” The SMWIA termination form attached to the Code of Excellence, gives some specific examples of cause in providing the following grounds for termination: not qualified; absenteeism, not productive; insubordination; and misconduct.

Some guidance can also be gleaned from the treatment of the issue by arbitrators faced with cases involving the question of whether there is just cause termination. In reaching their decisions, arbitrators have looked generally at whether certain procedural and substantive standards were met. Procedurally, arbitrators tend to look at the timelines of the employer’s action; whether a fair investigation was conducted and whether the employee was given a chance to explain his/her conduct prior to discipline being imposed. Substantively, arbitrators look at the forewarning of consequences for the alleged behavior; reasonableness of the rule; reasonableness of the discipline; and the consistency of the enforcement of the rule. While such principles are not necessarily applicable under labor agreements in our industry, they are instructive in terms of issues that may arise if the employee is terminated for cause.

Before Termination

Conduct an investigation before taking action. Thoroughly investigate and review the facts. An investigation should be conducted as soon as reasonable after the incident, or when the employer learns of the incident. The investigation may be conducted by the foreman, job superintendent or other managerial staff. If suspension of the employee is necessary to allow time for the investigation, then consider that alternative. Don’t act in haste without the facts.

In most cases, an investigation doesn’t have to be long or complicated. It may be as simple as speaking with the employee’s supervisor and then the employee to determine the who, what, when, where and why of the incident. In conducting an investigation:

- Find out the facts of the most recent situation.
- Obtain statements from witnesses, if applicable.
- Talk with the employee to get his or her perspective.
- Obtain and review all relevant current and prior documentation, if any.
- Examine the employee's previous disciplinary history.

Some terminations may be less about one given incident and more about overall poor job performance. For this reason, it is important to have systematic employee job reviews and clear

communicate with the employee about performance expectations and areas where improvement is needed.

Determine whether the punishment is reasonable and proportionate to the offense.

Consider whether someone else would agree that the termination was fair, given the nature of the conduct, or the seriousness of the performance problems. For example, termination of a long term employee, with a good performance history, for one incidence of tardiness may be viewed as unreasonable and disproportionate discipline. In contrast, termination of an employee who shows up late to a jobsite on their second day may be viewed as reasonable.

Determine if the employee had adequate notice of the work rule violated and its consequences.

Would the average employee in this position with his/her training know that the conduct in question was prohibited and could lead to termination? Some work rules are common sense and don't need to be explicitly spelled out, such as the fact an employee could be terminated for theft. However, other work rules may need to be communicated to employees if a termination for violating the rule is to be considered just cause.

Determine whether this discipline is consistent with the manner similar offenses by other employees were handled.

If they are dissimilar, can you provide a reasonable explanation why? Ensure that members of a protected class are treated the same as employees outside the protected class who engaged in similar conduct, under similar circumstances in terms of severity of conduct, prior offenses, length of employment, etc.

Act in a timely manner. An employee should be notified of his/her discipline as soon as reasonable after an investigation is completed and discipline is determined. Likewise, it is best to address performance problems as they arise, rather than waiting until they reach the point of possible termination.

Document Everything. Keep a record of your investigation, the actions that led up to the investigation, the evidence received during the investigation including any witness statements. Also, you should keep a record of performance reviews with employees including any counseling about areas where improvement is needed and any improvement plans you may have implemented with that employee.

Termination

Be candid with the employee. Be honest with the employee about the reason for termination. If the real reason isn't good enough, think carefully before finalizing any termination decision.

Treat the employee with respect. Do not do anything deliberately to embarrass the employee during the termination process. If you've already done an investigation, the employee's already had an opportunity to tell his/her side of the story, allowing for the actual termination to be short and to the point.

Document the termination accurately. Whether it's the notice of termination you provide to the union or your own personnel file, be sure the reason given to the employee for termination is the same as what is documented. Don't include extraneous comments about the employee or

his/her work habits which did not factor into the termination decision. Use care and be consistent when filling out the notice of termination to the union.

Post Termination

Respect the employee's privacy. After termination, advise only those who have a need to know the reason for the termination.

Avoid inconsistent post-termination statements. Do not make post termination statements in a termination notice, reference letter or response to the state unemployment compensation office that are inconsistent with or contradict the reason for termination. Such written statements, like comments to the former employee, could create credibility problems for the contractor.

Maintain relevant documents. A contractor should secure the employee's personnel file and retain all documents that support the decision to terminate the employee.