

## Termination



Employee termination is often the last step in an unsuccessful attempt to help a worker meet work standards. Clear management implications include the cost associated with the selection and training of a new employee; the effect the termination may have on the morale of the discharged employee as well as those who remain; and the consequences on unemployment insurance costs.

Terminating personnel has been called the “death penalty of employment.” Employees readily accept an employer’s right to choose who to hire (as long as no illegal discrimination takes place). Once hired, however, most workers feel an employer’s right to fire should be limited: the longer a person is permitted to stay on the job (even if not

a capable employee), the greater are her rights to the job.

Perhaps a better analogy is that of *workplace divorce*. Like in divorce, the parties involved can choose to be combative or cordial. While it is a mistake to take any analogy too far, there are other aspects of marriage that merit comparison: both parties share some responsibility for having chosen each other, and for making the relationship grow and succeed afterward.

From a legal perspective, firing an employee may lead to *wrongful termination* charges. In the past, the “at-will doctrine” controlled most terminations in the United States. For instance, the California Labor Code states, “an employment, having no

specified term, may be terminated at the will of either party ...”<sup>1</sup> Employers had the right to fire an employee at any time or for almost any reason. Likewise, the employee could quit “at will.” At-will termination rights have eroded substantially, however, as a result of both statutory provisions and court cases.

There are both management and legal implications of terminating an employee. Even when taking such drastic action, a farmer who has followed the process outlined here and in Chapter 14 can sleep better at night. Such a farmer knows the worker was fully aware of the unwanted behavior and its consequences—yet still decided to engage in it.

### Erosion of the “at-will” doctrine

Both public policy and litigation have combined to erode the “at-will” doctrine. The law prohibits the discipline and termination of employees (just as it does in other aspects of the employment relationship) based on protected factors, such as sex, race, age. Nor can employers retaliate against workers who have turned them in (whistle blowing) for violations of public policy.

In states where agricultural labor can unionize, both union and non-union workers alike are normally protected by the exercise of their rights to “protected concerted activity.” Any time employees act on behalf of two or more persons to request better working conditions or pay, they are protected from recrimination. The farmer is under no obligation to comply with the request, however.

Promises or statements made to workers when they are hired, in conversations with supervisors, and in employee handbooks have also given rise to much litigation. If farmers use the term “permanent employee,” instead of “regular” or “non-seasonal,” for instance, they may end up with the worker as a permanent fixture.

Likewise, a farm manager may also have to defend the right to fire an employee if he tells him: “as long as you do a good job we will have work for

you.” Some have taken the extreme position that even the term “probationary period” may imply a hurdle giving employees rights to permanence once it is passed. With time, however, even those employers who do not have a formal probationary period eventually come to “own” their employees. The longer an employee works for a farmer, the more the farmer has implied that this employee has “passed the test” and is able to do the required work.

Even though personnel policies were “not expressly bargained for by the employees at the time they took their jobs,” courts have reasoned “they are enforceable because they give the employer a benefit. What is the benefit? A stable, loyal work force.”<sup>2</sup>

Having a probationary period is a fine idea *if* there is a structure set up to carefully appraise the performance of the new employee before the period expires. An employer ought not feel forced to make a pass/fail decision at the time. Just as viable is to *extend* the probationary period when such a measure is warranted. Only then is a probationary period meaningful to the employee and a positive tool for management.

### “At-will” vs. “just cause” policies

Most labor attorneys and consultants are advising growers on how to guard their “at-will” rights. They suggest farm employers include “at-will” statements in job applications and employee handbooks and eliminate any reference to job security.

Typical at-will statements include: “We reserve the right to fire a worker at any time, with or without cause,” and “We reserve the right to terminate an employee at any time and for any reason, just as the employee has the right to quit at any time and for any reason.” These right-to-fire affirmations are intended to make clear to arbitrators and judges that the farmer has not given away any legal rights to terminate at-will.

To successfully defend an “at-will” policy, farmers cannot simply hide the

policy in the fine print of an application or handbook. Nor can they have it both ways by maintaining a written “at-will” policy while they contradict it verbally or in practice. The courts may construe the oral promises to be a waiver of the written policies.

Plastering “we-can-fire-you-when-we-want” statements on applications and handbooks can have a negative effect. In their zeal to protect farmers from wrongful discharge suits, attorneys may be inadvertently encouraging employers to violate management principles with serious consequences. Workers may feel subjected to arbitrary treatment and a lack of job security, the very reasons often leading workers to unionize despite good wages.<sup>3</sup> Furthermore, “union organizers sometimes say that employers’ personnel practices are the unions’ greatest organizing weapon.”<sup>4</sup>

I have for years spoken against “at-will” policies. In 1985, I predicted that these policies would have a negative effect on employee morale, and that the almost hidden one-liner would just simply not be enough.<sup>5</sup> My fears have not been without foundation. Beginning in the late 1990s many attorneys began to suggest that the one line become a paragraph. More recently, one manager explained that her lawyer had tacked on a lengthy notice (over a page) to the at-will policy, and required employees to acknowledge these changes. The

manager reported that “several employees grumbled and complained to the [owner] about being told that they could be dismissed for no reason [and that] one employee went so far as to hand out fliers which are printed from the ACLU website calling for legislation requiring for employers to have cause for all dismissals.” Soon thereafter, the owner decided to retract the policy, but much of the damage had already been done.<sup>6</sup>

In contrast, a *just-cause* approach is likely to increase fairness and thus reduce the number of wrongful termination suits. Employees do not have to be distracted by a climate of uncertainty and fear. A just-cause philosophy does not mean workers cannot be terminated. It does, however, force the grower to better manage his human resources by informing employees of sub-standard performance and, when appropriate, by giving them a chance to improve before being ousted.

A recent trend has been to establish *binding arbitration* to work out cases of worker termination. The remedies imposed by an arbiter are binding on both parties. Advantages of arbitration over judge and jury rulings include (1) faster decisions;<sup>7</sup> and (2) costs may be limited to *back pay* and *reinstatement*, while avoiding *punitive damages*.<sup>8</sup> Another very popular movement, one with a great possibility of success, is the increase in the use of *alternate dispute*

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*resolution*, where elements and strategies of mediation are used rather than those of arbitration or litigation.

One dairy farmer confided that half an hour after he had hired a milker, it was obvious this employee was the slowest one he had ever hired. This worker had sold his home elsewhere and moved to this town. The dairyman felt understandably guilty about letting the employee go. When I heard the case, the worker had already been at his dairy for three months. A simple job sample test would have shown this worker should not have been employed for the position. The dairyman shared the responsibility for having hired such an employee.

To recap, the longer an employee is permitted to stay, the greater the responsibility of the farm operator for that employee. In cases where farmers hire employees without testing them, and these workers turn out to be incapable of doing the job, it is good practice to provide such employees severance pay. This may range from a token amount for seasonal workers who have worked for less than a couple of days, to a more substantial amount for year-round employees who have been with the farm for a long time. (We are talking about employees who have never

been very effective, rather than those who used to be excellent but have slowed down for reasons other than age or sickness. The farm employer, in the latter case, would do well to find such workers jobs around the farm that they can still do.)

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## FIRING WITH DIGNITY

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The first time he fired someone, one manager<sup>9</sup> explained, it took him two hours and the process was excruciatingly painful for both himself and the affected employee. Over time, he got “so good” at dismissing employees that “somewhere between the time they entered his office and walked across to take a chair,” they were fired: “We brought you in to discuss some difficult matters. We know you are not happy here, that you are not happy with your performance ... We are not happy with it either, and feel you can do better elsewhere. So today we are going to part company and we are going to wish you good luck. Here is a severance check and a letter of recommendation we want you to have, along with what we owe you. We want you to take the rest of the day off on us, and here are twenty bucks so you can treat yourself to a nice lunch.”

What goes around comes around, and this same manager reports that when it was his time to be fired he found “the box” on his desk. Everyone knew the dreaded box was given to soon-to-be dismissed employees to fill with their personal belongings. Moments after entering his office and contemplating “the box,” he received a phone call from his supervisor: “See that box on your desk? Get your belongings, report to payroll ... We’ll give you a ride home.”

The words *firing* and *dignity* hardly belong together. Nevertheless, there are a few principles we can keep in mind that will help preserve a certain amount of dignity to that employee we are ready to let go.

Persons who suffer job loss may go through predictable emotional stages that may include lowered self-esteem, despair, shame, anger, and feelings of rejection. The greater the positive

feelings the employee held towards the supervisor, farm enterprise or job and the longer the period of employment, the more poignant these feelings may be.

Before discussing the details of the termination interview, we need to assume that the decision has already been made with much care; that it will not be a surprise to the worker (it is vital that the employee has previously received an explicit written notice that his termination is being considered); that appropriate and well documented disciplinary, counseling and coaching measures have already taken place; and that you are working with the help of a qualified labor attorney (there are legal questions to be answered at every step) and labor management specialist.

If it has become clear that the employee ought to be terminated, how and when does one best face the employee to deliver the bad news? A few decisions need to be made before actually meeting with the employee. This is one of those situations where there is no substitute for total preparation.

### **Pre-meeting decisions and preparation**

*Talking about termination after it happens.* A major concern of people who are terminated is the fear of what will be said about them behind their backs. It is a good policy to reassure workers that except for the management team involved in the termination, or others on a need-to-know basis, that the issue will not be discussed with employees. Once the decision is made to terminate an employee, those who supervise her need to be informed on a need-to-know basis. All individuals have to understand the importance of not talking about the situation with others, as well as coming across in a consistent manner (i.e., not giving mixed messages). Individual supervisors need to fight the temptation of saying things to the to-be-terminated employee that will only be understood later, in the context of the dismissal.

Telling prospective employers the reason for an employee's termination

can land a farmer in court. So can giving negative references. Workers who lose their jobs and cannot find other employment are the ones most likely to file charges. Because of this, a farmer may prefer not to disclose the reasons for the termination to others—for maximum benefit, workers need to be notified of this policy.<sup>10</sup> The terminated worker can likewise be asked not to discuss the issue with others in the community or workplace, but reassured that it is his decision to make.

After the termination, management must encourage personnel who have questions to speak directly with the employee. It is sometimes hard to resist the temptation of broadcasting management's side of the story. Employees who remain with the firm will reason that the confidentiality and dignity afforded to a co-worker is but a reflection of how they themselves may be treated in the future. The principle that "your good name is safe in my lips" needs to be followed.

One employee who could not find a new job hired a detective to determine why he had been terminated. In the interview the former boss did not spare his negative feelings toward the employee. Equipped with the tape-recorded conversation, the ex-employee took the employer to court, and the jury awarded him \$1.9 million.<sup>31</sup>

*The decision to terminate an employee should be made with much care.*



*Recommendations.* While there is a temptation to provide letters of recommendation to terminated employees, these could be used against the employer at a later date if they contradict the reasons for termination. Farmers are particularly vulnerable when they discharge an employee after making positive comments to the worker during performance appraisals or by letters of recommendation at the time of discharge. In the event an employer ends up in court, he may be asked, “Well, Mr. Grower, are you lying to us now or were you lying then?”

A letter explaining reasons for termination and problem areas that led to the dismissal may be given to the employee. The tone and content of this letter, which may serve as the employee’s termination notice, needs to be expressed with care, much like the disciplinary notice mentioned earlier. It is a good idea to mention the worker’s positive traits, and wish the worker success. Have several persons proofread the letter. A separate letter that sticks to the facts, such as the employee’s job duties and length of employment, may be of use to dismissed employees without compromising the farmer. One area of exception is that of employees who have been terminated for issues related to violence in the workplace. A former employer may be liable for not discussing such issues if the employee is hired elsewhere partly based on a reference, and later commits an act of workplace violence.

It is easy to see why in seasonal agriculture a farmer may prefer to protect a worker’s feelings and tell him he is being laid-off for lack of work. This is especially true toward the end of the season. Employers who keep the true reason for the discharge from employees may face serious problems, however. Some have suggested that workers may sue for wrongful discharge, in part, to have a chance to find out why they were terminated, and in part to get a chance to tell the employer their side of the story.<sup>12</sup> Employers who used layoffs as an excuse may be forced to explain why they did not rehire the next season; or in flagrant cases where a person was told it

was a layoff rather than a termination, why the employer hired someone else after dismissing an employee for lack of work. In contrast, employers who use the “kitchen sink approach” and mention every instance of misconduct may not fare any better. At some point they may have to prove each accusation.<sup>13</sup>

*Resignation or termination.* Some enterprises under specific conditions permit employees to resign rather than be fired. It can make it difficult for terminated employees to find employment when they have to put “fired” in job applications under “reason for leaving the last job.” When an employee is given the choice to resign or be terminated, this is considered as a case of “constructive discharge” and is no different than a termination unless accompanied by a termination agreement (see below). Employers also need to make decisions about when they will or will not contest former employees’ decisions to apply for unemployment insurance. Employees may think that the only reason the employer is suggesting their resignation is to save on unemployment insurance. Farmers who opt not to contest unemployment insurance payments should make that clear to the terminated employee. This may be done in writing when using a termination agreement.

*Termination agreement.* An excellent tool to avoid wrongful termination charges is the *termination agreement* with a *severance package*. Employers pay workers separation pay (e.g., 3 to 12 month’s wages, depending on length of employment and reasons for the termination) in exchange for the worker’s agreement to resign and not sue. These arrangements may require very specific rules to be followed, and in some circumstances may not be considered valid, so you will want to consult your attorney. Termination agreements can be an excellent device, especially for those cases related to general worker performance and productivity. If the employer did not conduct a systematic selection process when hiring this individual (including the use of validated job sample tests), then the employer shares, as we said, the

responsibility for the poor performance. The same can be true if an employee has been permitted to perform at a lower than acceptable level for some time without documented efforts to help the individual improve. Termination agreements are most likely to succeed when the employee is aware that the organization is not pleased with her past performance, and the realization does not come as a surprise. Employees may welcome the opportunity to resign now with a few months of extra pay and their self-esteem bruised but not as deeply

wounded, rather than get involved in a protracted disciplinary process.

*Separation bonus.* Employers expect workers who quit to give two-weeks notice or more. The same courtesy is owed to the worker, except that it is better to simply pay that time as a separation bonus and give the employee the time to look for another job. It is best to “relieve the employee of any further responsibility but to themselves.”<sup>14</sup> When explaining this policy to the employee, the stress needs to be placed on helping the employee

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Jack Kelly Clark

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concentrate on his future needs rather than on shuffling the person out of sight.

When giving the employee a separation bonus (or a more formal severance package mentioned above), it should be given after all appropriate papers are signed and all ranch property such as pickups, keys, two-way radios, computers, bank cards, and any pertinent passwords are returned. Having a detailed checklist ahead of time of what these items are is important.<sup>15</sup> The check, however, should be ready as the employee may be able to fulfill these requirements without delay. In some cases there may be mandated delays to the separation pay related to the termination agreement.

*Choice of meeting place.* A place of privacy where others cannot hear or observe the conversation works well. There should be absolutely no telephone or other interruptions. Although choosing a more neutral place than your

own office has some advantages in terms of getting the employee to open up, public places like restaurants should be avoided. Some employees will not be able to hold back their tears or emotions and this puts them in a very awkward position.

*Timing.* Although timing is not always within the prerogative of management, conventional wisdom suggests that employees should be fired early in the week and early in the day, and that the worst time to terminate an employee is the day before a weekend or holiday. When these principles are violated, the worker can only sit and stew and often cannot do anything proactive in terms of checking for possible unemployment benefits or looking for another job.

Termination early in the day has the additional advantage that all the parties involved are fresher and less stressed, and thus can better deal with the

emotional issues and challenging interpersonal communication.<sup>16</sup> In an informal survey, I found most workers prefer to be let go at a time they can collect personal belongings from their worksite in private, without having to face co-workers. Being able to dismiss employees earlier in the day, and privately, is generally easier to do with field rather than office personnel. With office personnel, the only practical approach is often to wait until near closing time. If this is not possible, rather than forcing employees to face their colleagues, you may give them the option of having their personal belongings mailed to them. If the employee chooses such an option, two people should be present when personal belongings are collected<sup>17</sup> to avoid charges of dishonesty.

At the time of dismissal, depending on the situation, employees who want to say good-bye to co-workers can be encouraged, within reason, to call or even arrange to visit the worksite at a later date. While few employees will take advantage of this offer, this policy can help alleviate feelings of rejection and loss to terminated personnel. Of course, there are circumstances where former workers would not be welcome (e.g., those terminated for sexual harassment, workplace threats, theft), but for most employees there is no need to create further artificial barriers by labeling them as *persona non grata*.

Once the decision to terminate has been made, it is best to proceed fairly quickly. Some employers try to justify putting the termination off until after the busy season when it will be more convenient. Yet, the longer the employee is allowed to stay on the job, the greater the implication that performance challenges have been overcome. Further, the poor performer is likely to be distracted and be involved in a costly mistake or serious workplace injury. Significant legal issues may surface when a worker is fired shortly after filing a workers' compensation claim.

*Who should terminate the employee?*

Terminating an employee is stressful and takes effective interpersonal skills. There is a temptation to delegate this

task to someone other than the direct supervisor. The ideal, however, is for the direct supervisor to speak with the employee. Having a second member of management present can serve several important purposes: (1) there is an implication of unity in the decision, (2) the second person can act as a witness, (3) in some cases a second person may possess interpersonal skills that may help in the situation, and (4) having two persons may reduce the likelihood of a violent outbreak.

After the main termination meeting, paperwork issues can be delegated if there are questions that can be best answered by someone else. Management may wish to offer counseling or placement services to some employees, depending on the situation and length of employment with the firm.

*Pay and Papers.* Pay, including any benefits and unused vacation, needs to be delivered on the spot. This is good business practice and frequently is the law. Likewise, if an employee has earned part of a bonus, this should also be paid. It is better to err on the generous side. If papers need to be signed related to any continuing benefits or other like matters, they should be available right away. Any unfinished paperwork can be taken care of by mail rather than inconveniencing the employee by requiring her presence at the job site. In the case of an investigative suspension that results in termination, the employee also needs to be paid for "reporting time"<sup>18</sup> when she comes back to work for the final termination meeting.

*Escorting the employee.* When it is time for the employee to turn in ranch property, some employers escort the worker to his workplace. When sensitive matters are involved, or the possibility of sabotage exists, such a policy not only protects the enterprise but also the employee. It is human nature to blame others, especially the terminated employee, of having caused anything that goes wrong around the period of his termination. Of course, this needs to be explained to the employee. In cases where termination decisions are being considered during an investigative

suspension, employees may also be requested to turn in sensitive company property. It can always be returned later if the decision is made not to terminate.

*Is the decision to fire final?* Be prepared for some employees who may try to convince you that they can do their jobs—that you need to give them another chance. A decision to terminate an employee is not a light one. It is important to make the decision with care and then stand by it.

*Role-play.* It is difficult to know what to say and how to react in a termination interview. The supervisor may wish to role-play and get coaching and feedback on the process. Notes may be prepared in terms of bullets and key thoughts, rather than something to be read verbatim to the employee.

*A just-cause approach (in contrast to at-will) means employees do not have to be distracted by a climate of uncertainty and fear.*



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## THE TERMINATION MEETING

The meeting tone established by management should be one of cordiality and empathy. In some cases, the best way to start the meeting is to say something like, “You will probably not be surprised to find out that things are just not working out.”

The bad news can be given next. If there is *any* chance that the employee does not understand why he is being terminated, the reasons should be explained now. Speaking to an employee about the reason for termination needs to be done calmly and with empathy, without gloating. This is not a time to go into great detail, nor should there be blaming, guilt trips, recounting everything the worker ever did wrong, or to overly dwell on the reasons for termination. Here, less is better than more. The supervisor who has followed a proper disciplinary process will have little to add at this time—but should encourage questions. If there is no one specific reason why the employee is being terminated, but rather a combination of factors, then a brief statement to that effect would be appropriate.

Two common mistakes at this stage are when the supervisor (1) is so vague that the employee does not know he has been terminated; and (2) talks too much. Silence can make interpersonal situations uncomfortable, and in an effort to fill this silence, the supervisor is likely to say more than he should.

No matter how prepared the employee is for the termination, the moment will, nevertheless, be disconcerting. The employee is likely to be torn with feelings of incredulity, numbness and various other emotions. A person is likely to tune everything else out as numerous thoughts crash against her mind. How will I tell my family, friends and acquaintances? How will I make ends meet? What will be said behind my back?

The focus of the supervisor should be to encourage the employee to verbalize any feelings, up to a point. The supervisor may encourage the employee to speak by asking questions, such as, “I

am sure you have a lot on your mind. Are there any feelings or questions you want to share or discuss with me at this time?" If the employee does not immediately answer, the supervisor should resist the temptation to jump to another subject. Even a couple of seconds will seem like an eternity to the supervisor, let alone a sufficiently long pause, yet it is important to give the employee time to formulate an answer.

If the employee does speak, the supervisor needs to fight the even greater temptation to interrupt, defend or contradict (even when the supervisor may think the perspective is twisted). While stoic silence is not what is generally called for and could easily be counter-productive, the supervisor should remember that this is the employee's chance to do most of the talking and venting. The employee should be listened to in an empathic manner and thanked for sharing her perspective.

Thanking employees for the good they have done is *always* in good taste, as well as bringing up the employee's positive contributions and qualities. The sincerity, or lack of sincerity, of these comments will be easily felt by the terminated employee. A supervisor has to find the right moment to make these positive comments, however. This should not be done when it could appear that the employee is being appeased, or while the employee is crying. Furthermore, if these things are brought up too early in the meeting, there is a danger that either the employee may misunderstand the nature of the meeting—and somehow think he is being called into the office to be commended—or think that you may be talked into giving him another chance. One supervisor reported, for instance, that the right moment for the positive comments came as he walked the employee to his pickup. Perhaps a good way to start is, "Before you leave, I did want to thank you for ... and compliment you for ...."

Some words to the effect that the terminated employee is likely to be successful elsewhere, despite the lack of match here, should be offered if it can

be done sincerely. When it is time to indicate the interview is over, the supervisor can stand and extend her hand,<sup>19</sup> and escort the employee to empty his belongings.

Anything that reduces the totality of the separation is likely to be appreciated by the terminated employee. Depending on the degree of friendship developed over time, a follow-up card or note, or a phone call from time to time may help the former employee through this difficult transition.

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## SUMMARY

Employee termination is often the last step in an unsuccessful attempt to help a worker meet work standards. There are both legal and management implications to employee termination. Two opposite approaches to terminations are "just cause" and "at will." *Just cause* requires more management preparation and control but normally has a greater potential to reduce cases of arbitrary treatment, eliminating some wrongful discharge cases before they happen.

Where the employer shares some of the fault for the employee's poor performance, a termination agreement can be a very powerful tool. Such an agreement may meet some of the needs of the employer and the terminated employee.

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