



***DISEMPLOYMENT***  
**REDUCTIONS IN FORCE, LAYOFFS  
AND TERMINATIONS**

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**American Association of Port Authorities  
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## QUESTIONS IN COMMON

**1. Is there a law or applicable governmental regulation that addresses the contemplated action?**

Does state law, such as the port's enabling legislation, address the contemplated employment action? Does it address criteria to be used in evaluating employees for possible layoff or termination? Does it provide a procedure to be followed?

**2. Is there a contract, personnel manual, resolution or policy that addresses the contemplated action?**

Statements in an employee handbook may be treated as terms of a contract between the employer and its employees. See, e.g., *Rowe v. Vaagen Bros. Lumber, Inc.*, 100 Wn. App. 268 (2000) (Whether a handbook provision constitutes a promise of specific treatment in specific situations that was justifiably relied on by the employee and breached by the employer is a question of fact: factors to be considered include the statement, the alleged understanding and intent of the parties, business custom and usage, nature of the employment, situation of the parties and particular circumstances of the case.)

Collective bargaining agreements very often have provisions that govern the choice of employees for layoff and require that termination of an employee be for "just cause," as determined by an arbitrator or arbitration panel. Many contracts require that employee layoffs be by "inverse seniority," with the most recently hired employees subject to layoff or seniority before those with greater seniority. Some contracts provide that an employer's assessment of the relative capabilities of employees may be used in determining which employee(s) to layoff and which to keep, with the caveat that the employer's determination may be subject to review by an arbitrator. See, e.g.:

**6.1 Employment Termination.** An employee may be terminated only for just cause or lack of work. It is understood and agreed that merit and ability being equal, length of service shall govern layoffs and rehiring. The Employer shall be the judge of the competency of its employees. It is understood, however, in any case when an employee is terminated because of incompetence and/or inefficiency and there is reasonable doubt that such termination was made solely on the grounds of incompetence and/or inefficiency, it may be submitted to the Joint Conference Committee in accordance with Article III, Section 3.2. Seniority preference shall not apply to any employee with less than one year's continuous employment with the Employer.

## SPECIFIC TYPES OF EMPLOYMENT ACTION

### **1. REDUCTIONS IN FORCE (a.k.a. “RIFs”, “downsizing” or “right-sizing”)**

#### **a. Is there a law that requires an employer to give employees advance notice of a reduction in force?**

Federal Worker Adjustment and Retaining Notification Act (“WARN”), 29 U.S.C. §2101 et seq., covers “business enterprises” but not governmental bodies. 20 CFR §639.3(a)(1). “However, the term ‘employer’ includes public and quasi-public entities which engage in business (i.e., take part in a commercial or industrial enterprise, supply a service or good on a mercantile basis, or provide independent management of public assets, raising revenue and making desired investments), and which are separately organized from the regular governing bodies and which have independent authority to manage their personnel and assets.” *Id.* Some states and a few municipalities have laws relating to plant closings and mass layoffs of employees. Most cover business enterprises in a manner similar to WARN’s coverage, but with various minimums for the size of the employer’s work force and other criteria for coverage. Applicable state law should be checked.

#### **b. Severance pay obligations.**

Are employees entitled to severance pay? Severance obligations arise by contract or past practice, and state statutes may address severance pay.

#### **c. Voluntary severance pay.**

Does the port wish to make voluntary payments to employees who are being laid off? Compensation may be, or include, payment of the employee’s COBRA health insurance premiums until the employee obtains other employment or for a fixed term, whichever comes first.

### **2. TERMINATIONS**

#### **a. Evaluate the reasons for termination.**

Before terminating an employee, port management needs to assure itself that not only is termination warranted, it will survive any legal challenge. In making the assessment, the following questions should be considered, and documentary evidence evaluated:

- (1) Why does the port wish to terminate the employee?
- (2) What information and, most importantly, records substantiate termination?

- (3) Review the personnel file, particularly performance reviews, disciplinary actions, commendations and history of promotions.

**WARNING:** Watch out for good evaluations followed by a change in the rating supervisor/manager. Even if termination is deserved, the employee may claim it results from illegal personal animosity of the supervisor/manager.

**b. Is there a statute, governmental regulation, contract, personnel manual, resolution or policy that limits the port's right to terminate?**

As previously stated, statements in an employee handbook may be treated as terms of a contract between the port and its employees. Are disciplinary policies and procedures set forth in the document? Does it define the types of conduct for which an employee may be terminated? Does it provide for progressive discipline? Was it brought to the attention of the employee? Does it provide a procedure that must be followed?

You should assume that the port is required to follow its own written policies. See, *Punton v. Seattle Public Safety Commission*, 32 Wn. App. 959, 968-69, 650 P.2d 1138 (1982) (due process may require); *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984); *Swanson v. Liquid Air Corporation*, 118 Wn.2d 512, 826 P.2d 664 (1992) (written policies may constitute contract terms.)

**c. Public employees rights of due process, and free speech considerations.**

(1) **Due process.** If the employee is other than clearly employed "at will," has he/she received due process? If not, can you assure that due process will be accorded?

Public employees may be entitled to due process rights. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) ("The essential requirements of due process . . . are notice and the opportunity to respond"); *Danielson v. Seattle*, 108 Wn.2d 788, 742 P.2d 717 (1987). *But, see Jordan v. Oakville*, 106 Wn.2d 122, 130, 720 P.2d 824 (1987) (an "at will" public employee has no property interest in his employment, and thus may be terminated without due process procedures.)

An informal pre-termination conference will satisfy the employee's Loudermill due process right if the employee is given notice of the charges and the right to explain his/her actions and respond to the evidence against him/her. *Danielson, supra*; *Fuller v. Dept. of Employment Security*, 52 Wn. App. 603, 762 P.2d 367 (1988); *Gibson v. Auburn*, 50 Wn. App. 661, 748 P.2d 673 (1988).

(2) **Free speech.**

(a) Public employees enjoy a limited right of free speech, the exercise of which is protected. See, e.g., *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983); *Dicomes v. State*, 113 Wn.2d 613, 782 P.2d 1002 (1989) (free speech requires the balancing of the employee's interest as a citizen in commenting on matters of public concern

with the public employer's interest in providing effective and efficient public service). Not all speech activity by a public employee is protected. See, e.g., *Meyer v. University of Washington*, 105 Wn.2d 847, 851, 719 P.2d 98 (1986) (professor's dispute with colleagues did not become public concerns by the professor's "invoking a supposed popular interest in all aspects of the way public institutions are run"); *Connick v. Myers, supra* (assistant district attorney's circulation of questionnaire among co-employees, because of her dissatisfaction with an impending transfer, not a matter of public concern, and thus not protected free speech.)

(b) Higher-level employees — "policy makers" — have more limited free-speech rights than do lower-level employees. *Dicomes, supra*. A "policy maker" is one who "establishes priorities, develops programs, procures funding, conducts studies, controls a budget or prepares budget requests, and . . . is given broad discretion and is relatively unsupervised in carrying out these responsibilities." 113 Wn.2d 626. "There is a governmental interest in securing those unique relationships between certain high level executives and the elected officials at whose grace they serve. . . . [A] public employee's interest in freedom of speech may be overridden where the State shows a need for political loyalty and confidentiality of its employees who are vested with discretionary authority and policy-making responsibilities." 113 Wn.2d 627-27.

(c) Courts grant a limited deference to the employer's investigation and evaluation of the employee's speech. See, *Waters v. Churchill*, 511 U.S. 661, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994) ("If an employment action is based on what an employee said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, the manager must tread with a certain amount of care. This need not be the care with which trials, with their rules of evidence and procedure, are conducted. It should, however, be the care that a reasonable manager would use before making an employment decision — discharge, suspension, reprimand, or whatever else — of the sort involved in the particular case"); *Jeffries v. Harleston*, 52 F.3d 9 (2d Cir. 1995) (professor's removal from ministerial position of department head upheld — a majority of the college's board of trustees reasonably believed the professor's off-campus speech, in which he made ethnic remarks, would be disruptive to the operation of the college.)

**d. Impermissible reasons for termination of employees, even those who are "at will."**

Even when employed "at will," an employee may not be terminated for

- refusing to violate a criminal statute;
- exercising a statutory right;
- reasons constituting illegal discrimination;
- "whistle-blowing" — reporting or disclosing alleged violations of law for the public good;

- engaging in conduct protected by a legislatively or judicially recognized stated public policy.

**e. Examples of terminations found to violate “public policy.”**

The Washington Supreme Court has identified four circumstances in which a suit claiming wrongful discharge in violation of public policy would be allowed: “(1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or obligation, such as serving jury duty; (3) where employees are fired for exercising a legal right or privilege, such as filing workers’ compensation claims; and (4) where employees are fired in retaliation for reporting employer misconduct, i.e., ‘whistleblowing.’” *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 936, 913 P.2d 377 (1996) (armored-car company could not terminate a driver for violating an other-wise valid work rule prohibiting drivers from leaving their trucks, when driver had left truck to rescue a person in danger of being murdered); *Roberts v. Dudley*, 140 Wn.2d. 58 (2000) (sex discrimination violates public policy; individual employer may be sued even if not subject to RCW 49.60, the Washington Law Against Discrimination)<sup>1</sup>; *Smith v. Bates Technical College*, 139 Wn.2d. 793 (2000) (union-represented employee allowed to pursue civil suit claiming that her discharge violated her right to file grievances under the applicable collective bargaining agreement and to file unfair labor practice complaints).

A case of interest to public entities, such as port authorities, is *Hubbard v. Spokane County*, 146 Wn.2d 699, 50 P.3d 602 (2002), where a former county planning department was allowed to sue the county commissioners on a claim of wrongful discharge in violation of public policy, where the plaintiff claimed he had been fired because he had told the commissioners, before his termination, that the project they wished to approve violated the local zoning code and a statutory ethical requirement applying to the commissioners.

**f. Protected conduct does not insulate an employee from deserved termination.**

If the employee’s non-protected conduct would have resulted in termination, irrespective of his/her protected conduct, the port may still terminate the employee. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). The historic rule has been a “but for” test, with the burden on the employer to prove, as an affirmative defense, that termination would have taken place had the protected activity or status not occurred. *See, Vancouver School District No. 37 v. Service Employees Int’l. Union, Local 92*, 79 Wn. App. 905, 916, 906 P.2d 945 (1995), *rev. denied*, 129 Wn.2d 1019 (1996). However, under some statutes

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<sup>1</sup> The employer, a veterinarian, did not employ at least eight employees, the minimum necessary to be subject to suit under RCW 49.60. *See, Griffin v. Etter*, 130 Wn.2d 58 (1996). In *Dudley*, the court’s extrapolation of the conduct prohibited by RCW 49.60 to be conduct prohibited as a matter of “public policy” not only effectively negates the statute’s threshold for coverage, i.e., its exclusion of small employers, the decision also raises a question about the continued need of the statute providing protection that is otherwise provided as a matter of “public policy” to employees of all employers, great and small.

the employee need prove only that the protected activity or status was a “substantial factor” in the decision to terminate. See, *Allison v. Housing Authority*, 118 Wn.2d 79, 821 P.2d 34 (1991) (age discrimination claim); *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991) (claim of retaliatory treatment for having pursued workers’ compensation benefits); *City of Federal Way v. PERC*, 93 Wn. App. 509, 970 P.2d 752 (1999) (claim of retaliatory discharge for union activity); *Capers v. Bon Marche*, 91 Wn. App. 138 (1998) (claim of race discrimination.)<sup>2</sup> In these circumstances, the port will have to be prepared to show that the employee’s protected conduct was not a “substantial factor” in the termination decision, even if the employee’s conduct would otherwise have merited termination.

#### **4. COULD YOU DEFEND A CLAIM OF ILLEGAL DISCRIMINATION?**

Consider the employee’s age, sex, race, creed, color, national origin, etc. Are you certain that none of these factors played a role in the decision to terminate or to choose the particular employee for layoff? Do you feel comfortable that you can defend any assertion of improper motive?

Disparate treatment. Have other employees in similar circumstances been discharged or chosen, among others, for layoff?

If so, is there a non-discriminatory reason for the difference in treatments?

Disparate impact. Has there been the application of a facially neutral rule or procedure that is having a disparate impact on a particular demographic group?

Particularly in cases of layoffs or other cutbacks, i.e., non-disciplinary reductions, consider if the group to be laid-off reflects a cross-section of the work force and, if not, whether there is a legitimate, non-discriminatory, reason for the disparate impact.

#### **5. HOW WOULD A JURY VIEW THE PORT’S ACTION?**

Always keep in mind the potential for a lawsuit challenging the port’s action. How would a jury consider the termination or the selection of the particular employee for layoff?

**Juries are interested in whether the employee was treated fairly.** Whether or not the employee is covered by a collective bargaining agreement, a written contract or an established

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<sup>2</sup> In *Capers*, the plaintiffs attorney’s argument to the jury reflects how little evidence may be necessary to meet the legal requirement of intentional discrimination under the “substantial factor” test: “[the plaintiff] can prove intentional discrimination based on race against The Bon by showing by a preponderance of the evidence, something more than 50 percent, that race was a substantial factor in the decision to terminate her. That’s it. That’s all she has to show; it was a substantial factor. She doesn’t have to show - it doesn’t say the substantial factor — it doesn’t have to be the only factor. It has to be just a substantial factor. There can be ten substantial factors. There can be two. It’s whatever it is . . .” 91 Wn. App. at 141.

personnel policy requiring the port to have “just cause” for termination, you should keep in mind the concept of “just cause” in evaluating the termination.

“Just cause,” as defined in *Baldwin v. Sisters of Providence*, 112 Wn.2d 127, 139, 769 P.2d 298 (1989), results when the employee has been terminated for:

- “a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power.”