Questioning At-Will Employment

Food Justice standards, co-op practices diverge on HR policy

BY CAROLEE COLTER

In the previous edition of this magazine (*CG* #151, November–December 2010) we read about the progress of the Domestic Fair Trade Association in establishing principles for domestic fair trade. While the DFTA is not itself a certifier, one of the major players in the association, the Agricultural Justice Project (AJP), recently debuted its new Food Justice Certified label.

Food Justice certification sets standards for food business responsibilities to farmers, farmer responsibilities to buyers, farmer responsibilities to employees, food business responsibilities to employees, and grower group responsibilities.

As with organic certification, some co-ops may simply promote and sell Food Justice Certified products in their stores while others may choose to become certified organizations themselves. For those contemplating certification, a potential sticking point is the requirement that employers terminate for cause only and give up the status of being employers at will.

From: Agricultural Justice Project's standards for Food Justice Certified

4.0 Food Business Responsibilities to Employees and 4.1.13. Termination

a. No worker will be disciplined or terminated *without just cause*. The enterprise has a documented disciplinary procedure with a system of warnings before any dismissal, and employees must be given full details on why they are being dismissed.

...

g. In the case of food businesses that have at-will status, *employers must eliminate at-will status* within two years of initially applying for certification. Even during this transition period, employers will abide by all employee policies and personnel manual provisions and discharge employees only for just cause. (Emphasis added.)

At-will employment defined

The legal doctrine of employment at will holds that, in the absence of a contract that specifies otherwise, both employer and employee can end the employment relationship at any time for any reason that is not in violation of a law. Employees working under a contract, such as a labor agreement, are not at-will employees and may only be terminated for cause as defined in the contract. For co-ops with unions, at-will is still an issue for employees outside the bargaining unit.

ILLUSTRATION BY KEN DAVIS

"The bottom line is how you treat people. I don't think that domestic fair trade and a co-op being an at-will employer are at odds with each other."

Critics of the at-will doctrine point out that employer and employee are not truly equal parties in this relationship. In terms of the financial impact of losing a job, certainly the individual employee is at a disadvantage when employment is at will. At the same time, employees really do have the right to walk away from a job without notice or consequence, while employers have some significant limits on their absolute right to take that job away.

First of all, employers can't violate other laws when terminating workers. For example, an employer may not fire someone on the basis of that person's sex, race, age, religion, national origin, mental or physical disability, marital status, veteran's status or, in some jurisdictions, sexual orientation. Nor may an employer fire someone for exercising her legal rights, such as filing a workers' compensation claim, filing a claim of discrimination or harassment with the EEOC, or trying to organize a union. Employers may not fire an employee for refusing to carry out an illegal act. Whistleblower laws protect employees who claim their company is breaking a law.

In some wrongful discharge lawsuits, courts have accepted "the handbook exception" in allowing a case to go to trial. In these cases, the company's employee handbook, while containing a disclaimer of employment at-will, also contained provisions for progressive disciplinary action that the employer did not follow when terminating the plaintiff. The plaintiff asserted that he was forced to enter into a unilateral contract in which he was expected to follow the rules in the handbook, while his employer didn't have to. Few such lawsuits are successful in the end, but they are yet another limitation on employment at will.

Lawsuit deterrent

In spite of the many exceptions to this doctrine, co-ops that retain attorneys routinely are advised to state that they are employers at will in their employee handbooks (personnel policy manuals) and to require all employees to sign statements acknowledging the at-will relationship. This legal advice is based on the belief that being an at-will employer still deters lawsuits for wrongful discharge.

As with any deterrent, its efficacy is hard to prove; but the stakes are high. Attorneys seek to protect their co-op clients from getting involved in lawsuits that could force the co-op to demonstrate to a jury that management had cause to fire and took all the appropriate steps before resorting to termination. Such a lawsuit, even if the co-op wins, would be extremely costly—so costly that most companies without deep pockets choose to pay out a settlement to the plaintiff rather than attempt to prove their innocence.

To protect the owners' assets, some co-op boards have adopted policies like those from the Cooperative Board Leadership Development template.

From: Cooperative Board Leadership Development's policy register template

B3—Asset Protection

The general manager (GM) shall not allow assets to be unprotected, unreasonably risked, or inadequately maintained.

The GM will not:

2. Allow unnecessary exposure to liability or lack of insurance protection from claims of liability.

B6—Staff Treatment

The GM will not treat staff in any way that is unfair, unsafe, or unclear.

The GM will not:

1. Operate without written personnel policies that:

...d. Inform staff that employment is neither permanent nor guaranteed.

Protection of the members' assets is one reason why Sean Doyle, general manager of Seward Co-op Grocery & Deli in Minneapolis, has chosen not to pursue the AJP's Food Justice certification. "At-will is about individual rights," he explains. "The main issue in fair trade is concentration of wealth in the hands of a few. In a co-op, profit is democratized. The impact of a frivolous lawsuit could harm others."

The same motivation drives Jim DeLuca, general manager of Abundance Cooperative Market in Rochester, N.Y. "As a manager, I feel responsible to think about the co-op as a whole. I don't care for the [at-will] concept, but in the end I have to come down to a place of less risk [of lawsuits.]"

Not a warm fuzzy feeling

DeLuca expresses something that I suspect a lot of co-op managers feel—distaste for a tool they nevertheless believe they need to protect the good of the whole. Staking out the right to fire any employee any time for any reason isn't an uplifting task. Co-op workers with previous job experience are no doubt used to signing statements recognizing their at-will status when they receive their employee handbooks. Still, there's no way to soften that harsh language, and it grates against the unspoken expectation of many employees that a co-op should be different, should be better than other employers.

And it's not an easy case to make in terms of public relations. Probably a lot of co-op members would agree with Elizabeth Henderson, longtime organic farmer and one of the founders of the AJP, when she states, "To claim to be a socially just business or farm, you can't fire people without just cause. You must have a reason."

Montana's example

There is a jurisdiction in which Henderson's prescription is in fact the law. In 1987, the Montana Legislature passed the Wrongful Discharge from Employment Act (WDEA). This law covers all employees who aren't working under an employment contract for a set term, and who have passed their probationary period. The employer can set the length of probation, but the default is six months. The WDEA prohibits discharge for other than "good cause," and it gives the employee the right to challenge a termination in court or before an arbitrator.

The Montana Supreme Court has defined "good cause" as a performance deficiency attributable to the employee and not due to the failure of the employer to properly train, supervise, evaluate or warn the employee. (I could not find a definition for "just cause" in the AJP standards, but the WDEA's "good cause" seems to express the same general idea.)

At the Good Food Store, a nonprofit corporation in Missoula, Mont., Human Resources Director Adina Roe reflects on working in a termination-for-good-cause environment. "It's not an arrangement you'd want if you like to avoid conflict and feedback." She takes the probation period very seriously. The Good Food Store also invests in regular training for supervisors at all levels in prompt identification of and response to performance problems.

Could co-ops in other states follow Montana's example? It turns out that Montana employers accepted a trade-off: by giving up their right to offer employment at will, they received a limit on the risk to their owners' assets. In passing the WDEA, the Montana Legislature capped the damages that a wrongfully discharged employee can recover. The maximum award is four years of lost wages, minus any income earned since the termination, and verdicts seldom reach that cap. There are no such limits on potential awards in other states.

Common ground

Despite their disagreements over the value of at-will status, when I spoke with Henderson, Doyle, and DeLuca, I heard a remarkable amount of agreement on how an employer should act. I was reminded of advice that I heard an attorney give to a meeting of the Northwest Human Resource Management Association: "Say you're at-will but act like you're not." He went on to recommend having a meaningful trial period, carefully documenting conversations about performance problems, following progressive discipline and doing everything possible to maintain the dignity of the employee if termination became necessary.

Except for the "say you're at-will" part, his advice accords with Henderson's thinking. "A good employer sets goals, evaluates employees, helps them develop, and would only fire them if they just can't do the job or committed some ethical violation," she says. "You can have a probation period to see if the employee is a good fit."

DeLuca (whose co-op buys Henderson's vegetables and provides the pick-up point for her CSA) recounts, "I've fired quite a few people in my career, but I've never done it without documenting the series of steps I took first. I always made an effort to work with them first. I've even had people come back to me later to say, 'Thank you for firing me. I needed to leave but I couldn't.' " ▶

Doyle thinks Seward's staff treatment policies—and having to prove compliance with them every year to his board—set a higher standard than AJP's. "The bottom line is how you treat people. I don't think that domestic fair trade and a co-op being an at-will employer are at odds with each other. Instead I would ask, 'Is there a living wage? Good benefits? Opportunities for participation in the business? Some form of democratizing of wealth creation?'"

If abandoning at-will status causes some retail co-ops not to seek the Food Justice certification, they can still support the label by carrying certified products. And, perhaps, over time, other forms of certification will be developed that set different standards for co-ops in recognition of their unique ownership structure.

Ultimately, outside of Montana, the decision about whether to be an at-will employer or not comes down to risk assessment. Claiming to be an at-will employer does not guarantee that a co-op will never be sued, and it will do nothing to protect against a claim of discrimination or other violation of the law.

A lawyer consulted by the AJP wrote, "An employer who reliably followed disciplinary procedures as set out in policy manuals will likely boost employee morale and reduce the risk of litigation." Based on my own experience in consulting with food co-ops, I believe that co-op managers strive to "reliably follow" their written disciplinary procedures. In doing so, they may be reducing their risk of litigation. But if they're not comfortable with any amount of risk above zero, I'd echo the attorney's advice—say that you're at-will but act like you're not. ■

Sources

Northeast Organic Farmers Association of New York, "Food Justice Label Launches Nationwide: Bringing Fairness to the Food System," www.nofany.org/node/3265

Agricultural Justice Project standards: www.agriculturaljusticeproject.org/standards.html

Glenn M Solomon's blog, www.glennsolomonblog.com/Post.shtml: "The Montana Wrongful Discharge from Employment Act, Twenty Years Later"

ADVERTISING INDEX