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The Basics of the Colorado Premise Liability Statute

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The following analysis focuses primarily upon the evolution of premises liability law and how the statute applies to accidents in Colorado. Those most likely to find themselves defending these lawsuits are businesses regularly visited by members of the public, including: supermarkets, hotels, apartment buildings, shopping malls, sports facilities, movie theaters, restaurants, and bars.

Historical Evolution of Premises Liability in Colorado

Before the enactment of the 1990 Premises Liability Statute, premises liability was a creature of common law. During these earlier times, a landowner could be held liable for injuries to a trespasser only if the landowner created a danger on the property and somehow caused the trespasser's injuries through willful and wanton conduct. For business invitees (such as business patrons), one needed only prove that a dangerous condition existed on the premises, and that the landowner was negligent for failing to warn or protect the invitee from a foreseeable danger. Licensees (such as social guests) were afforded greater protection than trespassers, but less than business invitees.

In 1990, the Colorado legislature found a need to codify the old common law concepts. It enacted the Colorado Premises Liability Statute § 13-21-115, C.R.S. The statute resurrected the old common law classification system, requiring the plaintiff's status as an invitee, licensee, or trespasser to be determined before assessing which standard of care the landowner owed to the plaintiff at the time of injury.

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Defensible Termination Decisions

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In recent years, more employers have begun purchasing Employment Practice Liability Insurance (EPLI) to provide coverage for increasingly-common employment claims. Both employers and EPLI carriers should consider general "best practices" standards to assess whether a particular termination decision will trigger problematic employment claims and liability. Most legally-defensible termination decisions usually follow the three "Golden Rules."

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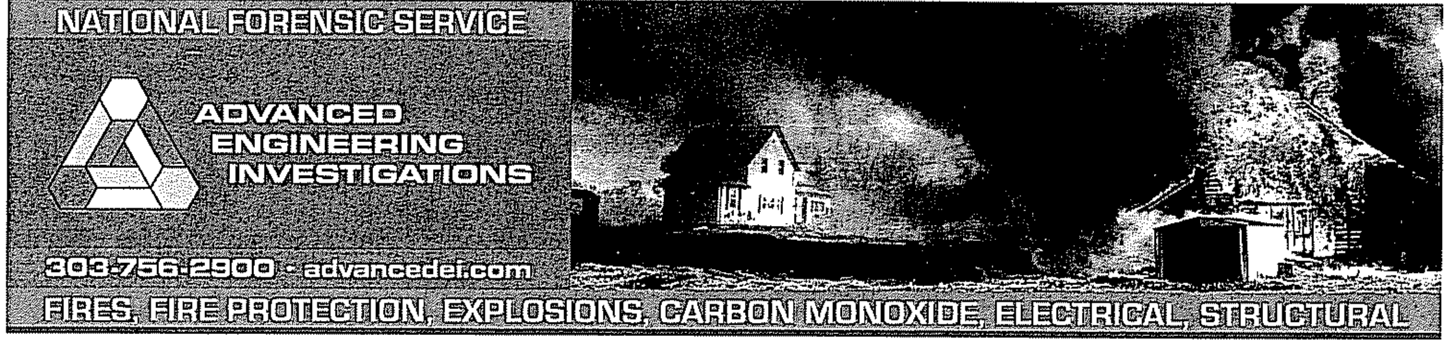

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Rule 1: The Myth of Employment At-Will

The "at-will" employment doctrine permits an employer to terminate any "at-will" employee at any time, with or without notice, and with or without cause. Yet, the "at-will" doctrine has seen erosion from employee protections under the Colorado Anti-Discrimination Act (CADA), the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Family Medical Leave Act (FMLA), and many other employment statutes. The "at-will" doctrine has seen erosion from various statutes that give employees "whistle-blower" status for certain good-faith tattling on their employers to governmental entities. Similarly, the "at-will" doctrine has seen erosion from common law theories of employment law such as terminations that violate an established "public policy."

Although the at-will doctrine theoretically continues to exist, employers should rarely terminate an employee unless the decision appears fair under objective standards. Ultimately, all termination decisions may be judged against an unwritten "fairness" standard by a judge or jury

Rule 2: "Three Strikes" before an Employee is "Out"

An employer should usually permit employees meaningful "opportunities to improve" that reasonably provide two warnings before the "third strike" leads to termination. Accordingly, employers should clearly and repeatedly communicate any unsatisfactory performance to their employees. Employers should also insist that their managers and supervisors provide meaningful performance reviews for all employees.

Employers should not terminate employees for subjective and ambiguous infractions such as "having a bad attitude" or "not working well with the team." Those rationales for personnel actions could easily become later allegations against employers for employment discrimination based upon an actual or perceived disability. Employers should focus personnel actions on objective conduct and the impact of the conduct on job performance by all employees. The stated grounds for a disciplinary action should focus on the fact that the employee did not meet schedules; the employee did not complete work timely or accurately; or the employee became insubordinate or violent, et cetera.

Rule 3: Proper Written Documentation Must Support the Termination

To document the "strikes" of each employee properly, employers must remember that there is no such thing as a verbal warning in employment law. Without contemporaneous written documentation, a verbal warning invites a later "swearing contest" between the employee and the supervisor or manager. If a warning ever relates to a problem which, if not corrected, could lead to the employee's termination, an employer should carefully document the warning.

Before a termination decision, the decision maker should review the employee's entire personnel file to gather all documentation of prior counseling and discipline. If the documentation of past disciplinary actions remains lacking, the employer may decide to postpone the termination decision until proper documentation exists for three strikes. All prior warnings should have communicated, in specific and objective terms, the expectations for future performance and the potential consequences for failing to meet those expectations.

The decision maker should verify that the employee's performance problems fall within the essential functions of the job at issue. If the alleged violation appears trivial or had no impact on the essential functions of the job, a jury could remain skeptical about the employer's justification for termination.

The decision maker should investigate whether the employee previously made allegations of activities such as (a) discrimination or workplace harassment; (b) insurance fraud; (c) submitting false claims for payments from governmental entities; (d) financial accounting practices that misled investors; or (e) improper overtime accounting. The decision maker should also investigate whether the employee participated as a witness in a prior workplace investigation of such allegations.

The decision maker should verify that the conduct at issue violated a policy that existed at the time of the conduct. The decision maker should verify that evidence exists regarding the employee's receipt of the policy that the employee has allegedly violated. Finally, if the employer has adopted written provisions that control the manner in which employers will process discipline or implement discharge decisions, then the decision maker should follow those provisions

The decision maker should always investigate first and take action last. The employer should conduct a meaningful and neutral investigation designed to uncover the truth and to deal with the actual facts. In all cases, the investigation should focus on what conduct occurred and how it impacted the workplace. The investigation should eschew references to the characteristics of the employee who committed the conduct or the subjective motivations for the conduct. In some circumstances, the employer may want to obtain objective assistance from someone outside the organization to conduct the investigation.

The manner in which employers handled particular job performance problems in the past will provide the yardstick for how employees will measure new disciplinary actions. Likewise, employers should recognize that disciplinary decisions today will likely become the yardstick to measure tomorrow's discipline decisions. In other words, inconsistent or disproportionate disciplinary decisions by employers invite allegations of discriminatory treatment from disciplined employees.

Certain conduct involving safety violations or dishonesty, if the conduct truly and objectively exists, may constitute exceptions to the "three strikes" rule and justify immediate termination. Employers should not overstate their reasons for those terminations, however. For example, employers should not make accusations using emotionally-charged terms such as "theft" when termination for "failure to follow accounting controls" will suffice. If an employee commits a demonstrable safety violation, or causes an injury to a coworker or customer, the employer's reasons for termination gain the most immediacy and credibility.

Paul Godec advises clients on employment law and employment contracting issues. Mr Godec represents clients in complex civil litigation matters including employment law, covenant not to compete and unfair competition claims, insurance defense, construction defect, civil rights, and health care cases