the need to specifically refer to "the construct validity of a test." In fact, reference to all "types" or "strategies" of test validation is eliminated in favor of citing the five "sources of validity evidence" included in the Standards (test content; internal structure of the test; relationships of test scores to other variables; evidence based on response processes; and the consequences of testing).

These Principles refer to the "validation effort" as building a logical, well-founded argument for the use of a specific test in a specific situation for a specific purpose in contrast with their predecessors' emphasis on "conducting a validation study." The topics of transportability, synthetic validity/job component validity, and meta-analysis comprise a segment on generalizing validity evidence. At long last, it seems, the profession is recognizing that sound employment testing practices are based on a cumulative body of knowledge.

After what has been over a two-year revision process, let's hope the final reviews proceed expeditiously so that the final version will be in our hands to use soon!—ACN

Technical Affairs

This month's column includes an answer to a reader's question about terminating employees as well as a piece of HR humor.

Question

Why is it so difficult to fire an employee? It seems that our department could be so much more productive if we didn't have to keep the "dead weight."

Answer

There is a big difference between terminating an employee in the public sector versus the private sector. In the private sector, the employment-at-will doctrine in most states allows employers freedom to fire an employee without a reason—at-will. The idea behind employment at will is that because employees are free to quit their jobs at will, so too are organizations free to terminate an employee at will. There are, however, some limitations to this doctrine.

- **State law.** Some states such as California and New York have laws that an employee can only be fired for cause—breaking a rule or an inability to perform.
- **Provisions of federal or state law.** Employees cannot be fired for reasons protected by federal or state law. For example, an employer could not fire an employee solely because she was a female, pregnant, nonwhite, or over the age of 40.
- **Public policy/interest.** Employers cannot terminate an employee for exercising a legal duty such as jury duty or refusing to violate the law or professional ethics. For example, a large savings and loan institution ordered one of its appraisers to appraise homes higher than their actual value so that its customers could qualify to finance property. Citing federal regulations and professional ethics against inflating property values, the employee refused the company order. After being terminated, the employee successfully filed a law suit claiming that he had been fired for refusing to violate the law and the ethical standards of his profession.
- **Contracts.** Obviously, if an individual employee has a signed employment contract stipulating a particular period of employment, an organization cannot fire the employee without cause. Likewise, unions enter into collective bargaining agreements (contracts) with employers that also limit or negate employment at will.
- **Implied contracts.** Employment at will is nullified if an employer implies that an employee "has a job for life" or can only be fired for certain reasons. For example, if an interviewer tells an applicant "at this company, all you have to do is keep your nose clean to keep your job," the employer will not be able to terminate the employee for minor rules infractions or for poor performance.
- **Covenants of good faith and fair dealing.** Though employers are generally free to hire and fire at will, the courts have ruled that employers must still act in good faith and deal fairly with an employee. These rulings have been based on an item in the Uniform Commercial Code stating "Every contract...imposes an obligation of good faith in its performance or enforcement" and the fact that courts consider employment decisions to be a form of a contract.

To protect their right to use a policy of employment at will, most organizations include employment-at-will statements in their job applications and employee handbooks. These statements usually hold up in court and employees seem to not challenge them.

Legal Reasons for Terminating Employees

In situations not covered by employment at will, there are only four reasons that an employee can be legally terminated: probationary period, violation of company rules, inability to perform, and an economically caused reduction in force (layoff).

Probationary Period

In many jobs, employees are given a probationary period in which to prove that they can perform well. Though most

(continued on next page)

probationary periods last 3 to 6 months, those for police officers are usually a year (in Scotland it is 2 years) and the probationary period for professors is 6 years! Employees can be terminated more easily during the probationary period than at any other time.

Violation of Company Rules

Courts consider five factors in determining the legality of a decision to terminate an employee for violating company rules. The first factor is that a rule against a particular behavior must actually exist. Though this may seem obvious, organizations often have "unwritten" rules governing employee behavior. These unwritten rules, however, will not hold up in court. For example, a manufacturer fired an employee for wearing a gun under his jacket at work. The employee successfully appealed on the grounds that even though "common sense" would say that guns should not be brought to work, the company did not have a written rule against it.

If a rule exists, a company must prove that the employee knew the rule. Rules can be communicated orally during employee orientation and staff meetings and in writing in the handbooks, newsletters, bulletin boards, and paycheck stuffers. Rules communicated in handbooks are the most legally defensible. To prove that an employee knew a rule, organizations require employees to sign statements that they received information about the rule, read the rule, and understand the rule.

The third factor is the ability of the employer to prove that an employee actually violated the rule. Proof is accomplished through such means as witnesses, video recordings, and job samples. Human resource professionals almost have to be detectives because proving rule violations is often not easy. For example, two supervisors saw an employee stagger into work and could clearly smell alcohol on her breath. She was terminated for violating the company rule against drinking. During her appeal of the termination, she claimed that she staggered because she had the flu and what the supervisors smelled was cough syrup rather than alcohol. The employee won the appeal. As a result of this case, the company now has an on-site nurse and breathalyzer tests are administered to employees suspected of using alcohol at work.

The fourth factor considered by the courts is the extent to which the rule has been equally enforced. That is, if other employees violated the rule but they were not terminated, terminating an employee for a particular rule violation may not be legal. This factor poses a dilemma for many organizations. Because courts look at consistency, lawyers advise organizations to fire any employee who violates a rule. To not fire a rule breaker, sets a precedent making termination of future rule breakers more difficult. There are many times when a good employee breaks a rule, a situation that normally would result in termination. However, because the employee is highly valued, the organization does not want to fire the employee.

The fifth and final factor is the extent to which the punishment fits the crime. Employees in their probationary period (usually their first six months) can be immediately fired for a rule infraction. For more tenured employees, however, the organization must make a reasonable attempt to change the person's behavior through progressive discipline. The longer an employee has been with an organization, the greater the number of steps that must be taken to correct her behavior. Discipline can begin with something simple such as counseling or an oral warning, progress to a written warning or probation, and end with steps such as reductions in pay, demotions, or terminations.

For violations of some rules, progressive discipline is not always necessary. It is probably safe to say that an employer can terminate an employee who steals money or shoots someone at work.

Inability to Perform

Employees can also be terminated for an inability to perform the job. To do so though, an organization will need to prove that the employee could not perform the job and that progressive discipline was taken to give the employee an opportunity to improve. For an employer to survive a court challenge to terminating a poor performing employee, it must first demonstrate that there was a reasonable standard of performance that was communicated to the employee. The organization must next demonstrate that there was a documented failure to meet the standard. Such documentation can include critical incident logs and work samples (e.g., poorly typed letters for a secretary, improperly hemmed pants for a tailor).

A properly designed performance appraisal system is the key to legally terminating an employee. Legal performance appraisal systems:

- Are based on a job analysis
- Have concrete, relevant standards that have been communicated to employees
- Involve multiple behavioral measures of performance
- Include several raters, each of whom has received training
- Are standardized and formal
- Provide the opportunity for an employee to appeal

Reduction in Force (Layoff)

Employees can be terminated if it is in the best economic interests of a organization to do so. Reductions in force, more commonly called layoffs, have been used by the vast majority of Fortune 500 companies in the past decade. In cases of large layoffs or plant closings, the Worker Adjustment and Retraining Notification Act (WARN) requires that organizations provide workers with at least 60 days notice. Though layoffs are designed to save money, research indicates that not only do force reductions have a devastating effect on employees, but they often do not result in the desired financial savings.

HR HUMOR

The following piece of HR Humor was sent in by *ACN* Reader Mitch Stein.

Human Resources: Thinking Outside the Box

The tribal wisdom of the American Indians, passed on from generation to generation, says that when you discover that you are riding a dead horse the best strategy is to dismount. In human resources, however, a whole range of far more advanced strategies are often employed, such as:

1. Buying a stronger whip
2. Changing riders
3. Threatening the horse with termination
4. Appointing a committee to study the horse
5. Arranging to visit other countries to see how others ride a dead horse
6. Lowering the minimum qualifications so that dead horses can be included
7. Reclassifying the dead horse as living impaired
8. Harnessing several dead horses together as a team to increase the speed
9. Providing additional funding and/or training to increase the dead horse's performance
10. Doing a productivity study to see if lighter riders would improve the dead horse's performance
11. Declaring that as the dead horse does not have to be fed, it is less costly and carries lower overhead, and therefore contributes substantially more to the bottom line of the organization than do live horses
12. Rewriting the expected performance requirements for all horses
13. Promoting the dead horse to a supervisory position