What is Employment At Will?

Employment At Will Explained

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The Commonly Used Employment At Will Defense

While employee-employer relationships are considered to be "at will" throughout the United States, with the exception of Montana, the concept of employment at will remains one of the most misunderstood terms in employment law today.

In a conversation with an employer who wished to terminate one of their employees who had a long history of poor performance and problematic behavior the employer was convinced that there would be no problems, because they could use "employment at will." However the problem in this particular case (as is the problem in many cases) is that nothing had been documented and the employee had never been formally addressed about the issues. In fact, her performance reviews ranged from fair to good.

As we discussed how to move forward with this employee in the absence of any and all documentation to substantiate her termination, the manager asked "Can't we just fire her? Our handbook says we operate under employment at will. Let's just fire her and not get into the details." Technically, yes, this is true. However, simply citing employment at will rarely makes a good termination defense.

While it's simple in theory, it's just not that simple in practice. Precaution must still prevail. Many managers feel that since their employees are under at will employment they may fire them whenever they feel like it. There is more to it than that, and this misunderstanding is where many employers get in trouble.

The next post in the series comes out in just a few days and will discuss the legal caveats and exceptions to employment at will.

What Exactly Does Employment At Will Mean?

At Will Employment Defined: At Will means that both the employer and the employee are entering the relationship by mutual agreement, but that either can end the relationship at either time without mutual consent. The employer can terminate the employee at any time for any reason, except an illegal one, or for no reason, without incurring legal liability. Similarly, an employee can leave a job at any time for any or no reason without adverse legal consequences.

However, like with anything else, there are caveats and exceptions to this rule.

1) Contracts: Union contracts typically come to mind, however, contracts may exist between employers and employees in any environment.

There are also what are considered common law exceptions to at will employment. They are public policy, implied contract, and implied covenant of good faith. The interpretation of these in real life

situations will usually fall under the "illegal reasons" why you can't terminate someone, but often in a shady area of gray. Also, while it is important to be aware of these exceptions, it is also important to be aware that they are not all recognized in every state.

(See chart -- http://www.ncsl.org/default.aspx?tabid=13339).

Of course, since so much is left up to interpretation, much depends on how well a good attorney can swing a jury.

Here are the common law exceptions:

2) Public Policy: This exception assumes that employees should be protected against termination for actions that are in the best interests of the public. For instance:

a) Refusing to perform an illegal act for the employer

b) Reporting an illegal act by the employer

c) Engaging in acts that are in the public interest (such as serving on jury duty or enlisting in the military)

d) Exercising a statutory right (such as filing for workers' compensation benefits)

3) Implied Contract: An implied contract of employment is one that is not written and not specific between the employer and the employee. An example would be a supervisor telling an employee "As long as you keep up the good work, you've got a job here for life", or even an employee handbook that guaranteed progressive discipline in every circumstance. Even in states where an implied contract is recognized, courts are slow to honor them during termination in absence of an actual written contract.

However, the fact that there is the common understanding that an "implied contract" exception exists should be enough to motivate you to caution your managers to be diligent in what they express to employees. Likewise, your employee discipline policy should state that progressive discipline is not guaranteed and that, depending on the nature and severity of the incident, discipline may be escalated accordingly.

4) Implied Covenant of Good Faith and Fair Dealing: There are a few states that recognize an implied covenant of good faith and fair dealing. An exact definition is difficult as interpretations of bad faith have depended upon judicial interpretations. Examples of bad faith would include: firing an older employee prior to retirement to avoid paying retirement benefits, firing an employee right after relocating them to a new state, or firing a sales person just before a large commission payment or bonus was to be paid.

5) Can We Defend It?: Finally, let's remember one of our number one rules for everything when it comes to dealing with employees: Let's not do it or say it if we couldn't defend it. If you can't imagine yourself sitting in front of a jury and sticking with the "at will" defense to see how long it held against accusations of wrongful termination, discrimination, and other crimes against employees, then it's best to follow Montana's lead and terminate only for good cause.

So Why Have At Will Employment at All?

Although exceptions to the rules of At Will Employment exist, it is nonetheless a very important part of the American employee-employer relationship. It is structure which makes it clear that there is no master/servant relationship and the days of indentured servitude are long behind us. It creates a respect for the freedom of the worker and the power of the employer and the balance that must be maintained so that each can be of service and mutual benefit to the other.

The balance is the key.

> *"Of all the things I've done, the most vital is coordinating those who work with me and aiming their efforts at a certain goal." - Walt Disney*

Employers must always respect this power from aspect of employee morale: If you as an employer are perceived as taking for granted and treating your employees as disposable assets at the will of your whims, your employees will turn on you. And when they turn on you, they may very well turn to unions, government agencies, or litigation attorneys for protection of their rights.

> *"Most people work just hard enough not to get fired and get paid just enough money not to quit." - George Carlin*

Employees must always respect this freedom from the aspect of job security: If you as an employee are perceived as taking for granted the benefits and stability provided to you and treat your employer as a machine held in bondage by its need for your skills and assets regardless of your behavior, your employer will turn on you. And when it turns on you, it will turn you out, and turn to the next person in line who needs a job.

Questions?

Do you have questions about Employment at Will or anything else related to HR within your company? Employee relations lawsuits are nothing to mess around with. Even settlements can sometimes be six figures. Give us a call with any questions you might have at 502.753.0970 x101. We will be happy to help.

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