

Hiring

or

Firing?



Know the Basics of At-Will Employment

by Curtis Rostad, CFSP

One of the most basic and widely held employment practices in the country is called “at-will” employment. At-will employment simply means that the relationship between employer and employee can be terminated at any time, by either party, for any reason. An employer can fire an employee without giving a reason and, likewise, the employee can quit for any reason or no reason at all. In addition, the employer is free to change any terms of employment, including pay, benefits, and working hours.

While many believe this to be arbitrary and unfair, no employees would want to be in a position where they must work at a firm they do not like or cannot accept another job offer because they are obligated to continue to work where they are for some period of weeks or months.

The opposite of an “at-will” termination, is called “for cause,” when the employer documents a valid reason to fire an employee.

Employment relationships in the United States are presumed to be at-will except in the state of Montana—the only state that following a probationary period, prohibits discharge without good cause. Still, if employers intend for the employment relationship to be at-will, they should make that clear to employees at the time of hiring as well as restating it in the employee handbook.

But there are exceptions that employers and employees should be aware of.

Statutory Exceptions

Federal and state discriminatory statutes prohibit employers from basing employment decisions, including termination decisions, on an employee’s race, color, sex, national origin, age, disability, veteran status, and other protected classes.

In addition, a few states protect employees against adverse employment action based on legal off-duty activities. For instance, CO, IN, NJ, OR, and SD specifically prohibit

discrimination against smokers. Finally, in addition to the Public Policy exception noted below, specific federal and state laws prohibit employers from firing employees in retaliation for engaging in legal, proper, or desirable activities, such as claiming overtime compensation; engaging in union activities; or reporting illegal discriminatory practices, or other illegal activities—commonly referred to as “whistleblowing.”

Modification by Contract

Some companies use employment contracts, especially for higher level and management employees. Some clauses within the contract could intentionally or unintentionally limit the ability of the employer to terminate employment without cause. For instance, a six-month probationary period could be interpreted to mean that employment for that period of time is guaranteed.

If the contract is intended to require just cause to terminate an employee, it should clearly outline what actions constitute just cause, which might include documented poor performance, employee misconduct, illegal acts, absenteeism, failure to retain necessary licenses, etc. For the benefit of both the employer and employee, the contract should be specific. Rather than saying “excessive absenteeism” for instance, the contract should specify a certain number of days within a certain time frame.



By issuing warnings, the employer has an opportunity to steer an employee in the right direction and give that person a chance to modify behavior, attitude, or work ethic.

have a job here for as long as you want it,” could be considered an implied contract. The burden of proof in disputes of this nature fall to the employee.

Implied Covenant of Good Faith

This exception is recognized in a minority of states and prohibits termination in bad faith or with malice. Examples would be firing someone just before a retirement plan is fully vested or firing a salesperson just before a large commission is due to be paid. This exception is recognized in AL, AK, AZ, CA, DE, ID, MA, MT, NV, UT, and WY. Again, the burden of proof is on the employee.

Statement of Acknowledgment

Both employers and employees should know that the presumption under the law (except in Montana) is that employment is at-will. Still, employers should be certain they do not make any verbal or written statements that could be interpreted as a modification of at-will employment. They should clearly state the at-will nature of employment on job applications, job offers, employment contracts, and in their employee handbook.

Having employees sign a statement of their understanding of the at-will nature of their job is also a good practice. This can be incorporated in their signed receipt for the employee handbook that contains the at-will policy. When employees are asked to sign such a statement, they are not required to sign it, but the potential employer can decide not to hire them, or fire them if they do not.

Bypass Procedures

If there is some form of progressive discipline outlined in the employee handbook, it should reiterate that the employer can bypass this procedure and terminate an employee at any time. For instance, the employer would not want to be required to just issue a written warning

Otherwise, the contract should clearly state that none of terms of the contract modifies or negates the at-will employment relationship.

Public Policy

This exception protects employees in 42 states and the District of Columbia from termination that violates a public interest. AL, FL, GA, LA, ME, NE, NY, and RI do not have this provision. This would include termination for refusing to violate a law when ordered to do so by the employer; reporting a violation of the law such as fraudulent accounting practices; or engaging in acts of public interest such as performing jury duty.

Implied Contract

This exception is recognized in 36 states and the District of Columbia. States that do not recognize this are AZ, DE, FL, GA, IN, LA, MA, MO, MT, NC, PA, RI, TX, and VA. For instance, the employee handbook may outline a specific series of disciplinary actions that are to be followed. Without a statement that the employer can bypass any or all of these steps, the employee could claim this to be an implied contract if each step is not followed prior to termination. Even a statement from the employer saying, “We never fire anyone without a good reason,” or an exuberant employer saying, “you’ll

to an employee who has stolen money from them or has assaulted another employee. It should be made clear that at-will supersedes the discipline policy, meaning that any employee can be fired immediately without verbal or written warnings.

But a progressive discipline policy is still useful. By issuing warnings, the employer has an opportunity to steer an employee in the right direction and give that person a chance to modify behavior, attitude, or work ethic. No employees should be fired by surprise. They may be shocked that the employer actually fired them, but they should already know that their performance (or lack thereof) has not been acceptable and that their job was at risk before they were terminated.

Potential Contradictions

Employees should be cautious if they made promises along the way that implied some term of guaranteed employment and yet the employer has at-will employment statements in their documents. For instance, if the employer promises some type of training and yet says employment is at-will, the employees should seek clarification as to whether they could be terminated prior to completion of the promised training. Assume the answer will be yes, the employee can be terminated regardless. No employer would want to be saddled with an employee who knows they cannot be fired.

Also remember that in any dispute in which employees feel they were fired unjustly, they must prove that any of the exceptions to at-will employment outlined above apply.

Notice Following Resignation


If an employee decides to voluntarily leave a current position for a better opportunity, the traditional two weeks' or 30-day notice is not a legal requirement and does not place any obligation on the employer. Employers should not require or suggest such a period of notice in their employee handbook because it would suggest that even this short period is a guaranteed term of employment and limits the employer's options when an employee resigns. While many employers will appreciate the time to adjust schedules accordingly, they are not obligated to retain the employee for that or any other notice period.

The employer may choose to terminate employment immediately at the time of notice. Sometimes this decision will be purely an emotional response by the employer. Other times, it may be based on the assumption that the employee's mind will not be on the current job and may be more of a liability than an asset during that time.

Especially if the employee is going to work for a direct competitor, there might be a perception that continued employment would be an opportunity for the employee to recruit other employees to make a move or to collect information that could be of value in the new position.

Even though the employee is leaving voluntarily, employment is still at-will and the employer has the right to terminate it regardless of any notice given. Financially, the employee should be prepared for that possibility.

As with many issues, communication is the key. Employers should make it clear in the job description and from the time of the initial interview that the position is at-will, and make sure that they do not do or say anything that might be construed as a modification of that position.

Curtis Rostad, CFSP, is a licensed funeral director and embalmer with over 50 years in funeral service. He served for 12 years as executive director of the Indiana Funeral Directors Association before retiring at the end of 2016. He now serves as director of compliance for the Foresight Companies of Phoenix. He can be reached at 1-800-426-0165. 

This article is meant to be a general discussion on the topic presented. It is not meant to be legal advice. Human resource issues are especially subject to changes in the law on a federal, state, and local level. Consult an HR professional or your attorney before implementing any personnel policies in your firm.


© Copyright 2022, The Foresight Companies. All rights reserved. Permission is hereby granted to funeral service associations to reprint this article with attribution and disclaimer.



SEARCH WITH A PURPOSE.

Connect with the supplier network of the ICCFA with the ICCFA Supply Link, a powerful search engine featuring only companies within our industry. All the products and services you need, all within a dynamic supplier network of the association you trust.

Start your search at our homepage: iccfa.com.

 **MULTIVIEW**
A STAGWELL COMPANY