Guidelines For Employment At-Will

Many employers think they can hide behind an “at-will” policy statement and handle terminations any way they want. This cavalier approach, however, can result in discrimination claims. Most employers are familiar with the “at-will” concept that, simply put, allows employers to terminate employees at any time, for any legal reason, or for no reason at all. Courts generally have upheld the right to terminate at will, but this right does not mean that employers should blithely terminate without giving a reason or without following normal policies and procedures. In fact, if you try to fire an employee by simply citing to the at-will clause, you could find yourself defending against a discrimination or wrongful termination claim. This possibility does not mean that the at-will clause is useless. The real reason most lawyers recommend including an at-will clause in personnel policies is to give the employer flexibility in applying its policies so that they will not become rigid contractual obligations. That said, to help avoid discrimination claims, it is important that employers follow their discipline and termination procedures in a consistent manner.

WHAT DOES “AT-WILL” MEAN?

To use the at-will relationship most effectively, you need to understand what it means.

Generally, employees who do not have contracts guaranteeing employment for a specific period of time (such as one year) are considered to be at-will employees. Under the at-will doctrine, employers have the right to terminate employees without these types of contracts at any time and for any legally permissible reason. Employees also have a similar right to resign whenever they want. Plainly stated, it is a legal concept that says both parties can terminate the relationship at any time.

However, an at-will statement does not really give employers free reign to terminate employees for no reason. There are two reasons for this. First, most states that recognize the at-will employment relationship either by court decision or by statute, also restrict it in some way. Courts in a majority of states have limited its application by allowing the at-will relationship to be restricted under several legal theories. For example, employees have claimed that their employer’s policies were contracts that the employer breached; that their termination violated some public policy; that their termination violated a “whistleblower” statute or statutory anti-retaliation provision; or that the

employer's action constituted a wrongful act (or, in legal jargon, a "tort"). The result is a patchwork of case law that varies from state to state, making it difficult for employers to know when, or if, they can rely on the at-will nature of the relationship.

The second reason for caution is that many employees are specially protected under federal or state discrimination laws that must be complied with regardless of at-will status. Therefore, if you terminate a protected employee for "no reason" or without following your normal disciplinary process, you are raising a red flag that the termination was for improper or even discriminatory reasons. Thus, you may be provoking a challenge to the termination that otherwise might not have occurred.

WHAT DOES "AT-WILL" EMPLOYMENT REALLY PROTECT?

Based on the above discussion, it might seem that the at-will concept has little value. However, a clearly written at-will statement is still a valuable tool to protect your policies and procedures so that they are not interpreted as contracts that must be followed exactly.

Several courts have ruled that in the absence of an employment at-will statement, employers may be legally required to follow policies uniformly, without regard to individualized circumstances. For example, imagine an employee handbook that does not have an at-will statement but includes a disciplinary policy that states the employer will follow certain steps before terminating an employee. A court may conclude that the disciplinary policy is a contract and that the employer must follow each step precisely before it can fire anyone. Or, consider a policy that lists specific work rule violations that will result in immediate termination. Without including an at-will reference or a

statement that the list is not all inclusive, a court could find that the employer may only terminate based on one of the listed reasons.

DON'T TERMINATE FOR "NO REASON"

If an employer should not terminate an employee based solely on the fact that an employee is atwill then how do you terminate a problem employee when a manager has not properly documented performance deficiencies? Your best bet is to follow your normal disciplinary process, even if that means taking extra time before you terminate the employee. For most employers this includes:

- Giving notice to the employee of the specific performance problems and the consequences of not improving;
- Establishing goals for improvement;
- Setting a reasonable time frame for meeting the goals (normally two weeks to thirty days, but without communicating any specific timeframe commitment to the employee);
- Following up to see if there is improvement; and
- Terminating the employee if performance and conduct goals have not been met.

In addition to the above guidelines, you should document the performance issues and the steps taken before terminating the employee. This record can help you defend against any subsequent discrimination or wrongful discharge claims.

Of course, there may be circumstances when you feel you cannot take the time to follow your normal disciplinary procedure. In these cases, it is still better to discuss the specific problems with the employee and explain that these problems are the reason for the termination. If you simply invoke the at-will relationship and give no reason for the termination, the employee may assume that the true motive is related to discrimination or some other illegal act and thus seek legal recourse.

AT-WILL EMPLOYMENT IS NO SUBSTITUTE FOR FOLLOWING POLICIES AND PROCEDURES

An at-will clause is a valid, but harsh, legal tool that grants employers some flexibility in applying their personnel policies. It should not be used, however, as a substitute for sound disciplinary and termination procedures. Faulty discipline and termination procedures can provoke unwarranted suspicions of discrimination and thus create unnecessary legal exposure. The at-will clause may not prevent you from being sued, but it can be helpful as a legal defense when policies were not, or could not, be followed. Therefore, you are best advised to conduct your personnel affairs so that legal theories are your last line of defense, not a substitute for sound operating procedures.

WHAT THE AT-WILL STATEMENT SHOULD INCLUDE?

Most courts will find a valid at-will relationship if the following criteria are met:

- The at-will statement is written in clear, understandable language, not legalese.
- It thoroughly explains what the at-will relationship means.
- It clearly states that no company representative may change the at-will relationship through oral or written promises.
- It explains that the organization’s policies and practices are not intended to create a contract.
- It is prominently displayed, such as in bold type, a separate introductory policy, or set apart in other policies.
- It is repeated where appropriate in other policies, particularly those outlining work rules and disciplinary procedures.
- It is included in other employment documents, such as application forms and offer letters.