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LEGAL

How At-Will Employment Is Changing

More workplace litigation and other factors are challenging at-will employment. The trend puts into peril the employer’s right to hire and fire “at will” in the absence of contractual or other limitations.

What is happening, and how can HR professionals help their organizations to protect the at-will employment relationship? Good HR practices are just the beginning. It also is helpful to review what is involved in at-will employment as well as to be informed about the trends in lawsuits and how to deflect such situations in your organization’s terminations.

AT-WILL, DEFINED

Employment at will is the “default” legal rule of the employment relationship. That is, it generally applies to any private-sector employee who is not covered by a collective bargaining agreement and who does not have an enforceable contract of employment. Employees retained at will may be discharged for any legal reason.

At-will employment frequently is challenged on various allegations that it is an “excuse” for unfair termination. Despite regular attacks, the courts usually uphold the concept, noted Samuel Estreicher, a labor law professor at New York University Law School. Estreicher also is an attorney with Jones Day in New York and serves as editor of the American Law Institute’s ongoing restatement panel considering at-will employment. “It’s the law of the land,” Estreicher said. “I don’t see this being changed.”

There are some restrictions at the state level on at-will employment. Montana abolished at-will employment through legislation, while Puerto Rico and the Virgin Islands have

Make Online Systems Offer More Than 'Just' Benefits to Employees

Online self-service is becoming a common tool for employee benefits. However, organizations can do more with self-service than “just” benefits administration.

USAA, an insurance and financial products company that serves members of the U.S. military and their families, is expanding its online instrument into new areas. USAA's Web-based employee self-service service, Personal Balance Tool (PBT), includes both traditional self-service activities—such as checking on benefits and payroll information—plus personal and work/life assistance.

PBT has increased employees' awareness of their benefits, expanded the use of USAA financial products for employees, empowered employees to solve problems on their own, and addressed the needs of a diverse, geographically dispersed worker population, James Moon, USAA work/life director, said in a presentation at WorldatWork's Work-Life 2007 Conference & Exhibition in Phoenix. During its first seven and one-half months in operation, PBT received 15,264 visits, Moon said.

REACHING OUT ONLINE

A solution that was far-reaching

is especially important for USAA, which serves 22,000 employees, both military and nonmilitary, in many locations. PBT brings together information and resources in an easily accessible, central location, Moon said.

USAA wanted a Web-based product that would promote work/life resources and its employee assistance program, according to Moon. USAA had vendors ValueOptions and Harris, Rothenberg International assist in developing the system. USAA asked for input and conducted hands-on testing to ensure the look and feel of PBT aligned with the USAA intranet and Internet site.

The system launch was followed by a communications campaign, including announcements and discussions at meetings, to inform employees and solicit input. USAA posted timely messages on the site about issues such as the start of the school year, dealing with holiday stress, and retirement planning, along with messages aligned with employee survey results.

WHAT EMPLOYEES SEE

The main screen on PBT contains three menus:

1. “My Self-Assessments”: How

employees relate to others. One of the most common issues for which employees ask for help here is assertiveness, Moon said.

2. “My Life”: Covers more traditional self-service topics such as retirement planning, job changes, marriages and divorces, having a baby, and military deployment.

3. “Today, I'm Feeling ...”: This functions as an automated employee assistance tool. The menu employs a choice of words such as stressed, frustrated, tired, distracted, worried, overloaded, angry, unhappy, grieving, and motivated.

After selecting the appropriate word, employees are taken to a self-assessment page that allows them to further define their feelings. For example, selecting “stressed” brings the employee to more questions that help define the source of the stress, such as caring for others or work issues.

Choosing “caring for others” and identifying the stress as “My child is behaving badly” takes the user to another screen that presents a personal action plan, “Guide to Addressing Child Behavior Problems.” The plan offers specific actions. At the bottom of the personal action plan is a link to “Additional Resources.” □

LEGAL (cont'd from page 1)

“just cause” statutes requiring that employers identify the cause and reasoning behind terminations subject to scrutiny by the courts. In Colorado, workers enjoy a “rebuttal presumption,” where the courts have held that if an employee works for an indefinite period without a contract spelling out terms and conditions,

he or she is presumed to have rights against termination.

And South Dakota has a statute stipulating that a “hiring at a yearly rate is presumed to be for one year” and requires the employer to prove sufficient grounds for termination before the end of that year. (The accompanying table provides informa-

tion on how states approach at-will employment.)

WHAT'S CHANGING

The effect of exceptions to the at-will rule is what is changing and what HR professionals need to watch, explained Mark Mallery, chairman of the American Bar Association's

Employment Rights and Responsibilities Subcommittee of the Special Subcommittee on Employment. “The practical truth is that the exceptions—the statutory and public policy provisions—have swallowed up the rule.”

Your organization’s perceived motivations for a firing may be even more important than the firing itself—at least in the eyes of the law. “Today, employers need to think always of why you’re terminating an employee and ... how you’ll make sure that it’s not an illegal reason,” said Mallery, who also specializes in employment law at Kiesewetter Wise Kaplan Prather (New Orleans).

In response, employers are “better training their human resources departments to be more careful,” said Barry Roseman, partner in Roseman & Kazmierski (Denver). Employers increasingly need to operate under the premise that they have to “prove” that an employee’s conduct or action warrants termination “if they hope to prevail in court,” he said.

Employees, for their part, are obliged “to find the cracks” in the employer’s reasoning for discharging them in light of the changing legal landscape, said Roseman, “and prove that the discharge is not viable in today’s world of employment law.”

EXCEPTIONS TO THE RULE

The public policy exception is the most widespread exception to at-will terminations. Violations of public policy laws and protections are not just a reason to throw out a termination; they can cause awards of punitive damages to be paid by an employer.

Examples of public policy exceptions to at-will terminations include employees who report or testify about the employer’s illegal activity, refuse to commit crimes on behalf of the employer, decline to work in

unsafe conditions or request safety inspections of the workplace, or need leave to perform legal duties such as jury duty and military service.

In many states, courts are ruling against employers when workers demonstrate they were discharged for exercising a right clearly established under such laws as the Family and Medical Leave Act, the Civil Rights Act, the Americans with Disabilities Act, the Fair Labor Standards Act, and Sarbanes-Oxley.

Workers also have raised causes of action in some states for wrongful discharge where they are terminated for refusing to violate professional codes of ethics, especially if these are legislatively endorsed.

In many jurisdictions, it also is against public policy to discharge an employee not only for filing a workers’ compensation claim, but also for intending to file one or for filing a claim against a former employer.

Whistleblowing is protected by legislation in many states—under certain conditions. Often the infraction reported must be serious and involve regulations or laws pertaining to public health, safety, or general welfare—and the whistleblowing must be done out of a good-faith concern over the wrongful activity, rather than from a motive such as malice, spite, jealousy, or personal gain. Nuclear safety, Medicare fraud, falsification of medical records, and misuse of public funds have been found to be sufficient public-policy concerns to invoke the protection of whistleblower laws.

Retaliatory discharge claims are a second exception to at-will terminations. States use different criteria to determine whether a retaliatory discharge claim is sufficient to offset employment at will. In some jurisdictions, the public policy needed to support a claim must be based on constitutional or statutory provisions.

A third exception is where a contract of employment is implied by

statements or actions by the organization or its managers. Such actions include oral promises made to employees or statements made in company policies and employee handbooks.

Vague and general terms are usually too indefinite to create an implied contract. Offers of “permanent” or “lifetime” employment, for example, promises of a position “as long as performance is satisfactory” are not enough to create an employment contract.

In most states, the receipt of an annual or monthly salary does not provide a definite term of employment. An economically motivated reduction in force is just cause for termination even if an employee has an implied contract of lifetime employment.

HANDBOOK CHALLENGES

Courts in most states have taken the position that company manuals or handbooks—even promises made during employment interviews—may constitute “implied contracts.” Both substantive and procedural contractual protections have been implied from manuals.

Where this rule has been adopted, employers can structure handbooks and manuals to accomplish their objectives, but they cannot defeat legitimate employee expectations by arbitrarily departing from announced policies even though they were under no obligation to institute the policies in the first place.

If the provisions in a manual or personnel policy guide are indefinite, vague, or lack specific contractual terms, however, the manual will not establish contractual rights. The same is true if the language merely declares the employer’s general approach to the issues addressed.

An employee’s subjective understanding or mere expectation is insufficient to create a binding term of employment. The employee must

At-Will Employment Cases: How the States React

State	Implied Contract	Public Policy	Good Faith
Alabama	Yes	No	No
Alaska	Yes	Yes	Yes
Arizona	Yes	Yes	Yes
Arkansas	No	Yes	No
California	Yes	Yes	Yes
Colorado	Yes	Yes	No
Connecticut	Yes	Yes	Yes
Delaware	Yes	Yes	Yes
D.C.	Yes	Yes	No
Florida	No	No	No
Georgia	No	No	No
Hawaii	Yes	Yes	No
Idaho	Yes	Yes	Yes
Illinois	Yes	Yes	No
Indiana	Yes	Yes	No
Iowa	Yes	Yes	No
Kansas	Yes	Yes	No
Kentucky	Yes	Yes	No
Louisiana	No	No	No
Maine	Yes	No	No
Maryland	Yes	Yes	No
Massachusetts	Yes	Yes	Yes
Michigan	Yes	Yes	No
Minnesota	Yes	Yes	No
Mississippi	No	Yes	No
Missouri	No	Yes	No
Montana	Yes	Yes	Yes
Nebraska	Yes	Yes	No
Nevada	Yes	Yes	No
New Hampshire	Yes	Yes	Yes
New Jersey	Yes	Yes	Yes
New Mexico	Yes	Yes	No
New York	Yes	No	No
North Carolina	Yes	Yes	No
North Dakota	Yes	Yes	No
Ohio	Yes	Yes	No
Oklahoma	Yes	Yes	No
Oregon	Yes	Yes	No
Pennsylvania	Yes	Yes	No
Rhode Island	No	No	No
South Carolina	Yes	Yes	No
South Dakota	Yes	Yes	No
Tennessee	Yes	Yes	No
Texas	Yes	Yes	No
Utah	Yes	Yes	Yes
Vermont	Yes	Yes	No
Virginia	Yes	Yes	No
Washington	Yes	Yes	No
West Virginia	Yes	Yes	No
Wisconsin	Yes	Yes	No
Wyoming	Yes	Yes	Yes

Note: North Carolina: No cases or clear expression.

(Source: BNA)

still identify an oral or written assurance of job security or procedural protection. The court will look to the totality of the circumstances to aid in determining whether a contract exists.

GOOD-FAITH COVENANT

The implied covenant of “good faith and fair dealing” applicable to at-will employment is recognized by many states. The covenant provides that neither party will do anything that would injure the right of the other to receive the benefits of the arrangement.

Whether the covenant is implied in a particular case depends on the existence of employer representations that have caused employees to reasonably believe they have job security and will be treated fairly. Implied contractual obligations may even coexist with express provisions that seem to negate them where the common expectations of the parties’ relationship dictate.

A covenant of good faith and fair dealing does not create a duty on behalf of an employer to terminate its employees only for just cause, however, or to otherwise modify the employment-at-will arrangement.

Courts that decline to recognize contract actions for breach of an implied covenant of good faith and fair dealing reason that such covenants would be wholly inconsistent with the very nature of at-will employment. Some of those courts, however, concede that there could be a cause of action where the employee is deprived of constitutional or statutory rights contrary to public policy or where contractual agreements guarantee the employees may not be fired without “just cause.”

State court decisions are aligning more with the just-cause provisions hammered out over the past half century of litigation and arbitration in the unionized workplace.

PRESERVING AT-WILL

In light of these challenges, what can employers do to preserve at-will status? An employer generally can protect its right to discharge at will by stating in its hiring application that employment can be terminated with or without cause or notice at any time and disavowing any representation to the contrary made by anyone other than designated top company officials.

An employer also can clearly and prominently state in its personnel manual that the handbook does not constitute an express or implied contract or reserve either the right to unilaterally review and change policies and procedures or the right to terminate employees at will.

Which of these formulas a court will accept varies from state to state. The greatest challenge may be making sure that old manuals are properly updated. A periodic review is always a good idea.

Other steps to consider:

- Make sure the handbook reaches all employees. Consider having them sign an acknowledgement that they have received and read the handbook, or at least the at-will waivers.

- Consider having an attorney familiar with your jurisdiction review your application and handbook.

Good HR practices are always helpful for retaining at-will employment. "Companies that invest a lot of time and effort in a good human resources department and carefully construct corporate practices can help themselves not only in at-will situations but throughout the business," observed Mallery.

What's needed, Mallery said, is a culture of checks and balances within management and the human resources department. In light of the complexity and the changing nature of public policy at the state and federal levels, the potential for violating the law in discharge cases "is not to be dismissed." Consider,

too, the effects of how your organization handles performance appraisals and evaluations. Proper procedures and record keeping can help your organization to defend itself in the event that you have to terminate an employee.

You will also help your organization to avoid termination lawsuits if you start on the right foot with employment interviews that are "fair and equitable," Mallery said. □

When hiring, it's best to explain the at-will nature of the job, "but it's OK if an employer views the interview as an opportunity to sell your company, to convince the employee that this is a good place to work and make a career," Mallery continued. "The key is to be honest about the at-will nature of the job and avoid making any specific promises about things as they might be rather than as they are." □

HRfocus CALENDAR

Chief Learning Officer Symposium Fall 2007, Tucson, Ariz., Oct. 1-3. Contact: *Chief Learning Officer* magazine, www.cloevents.com

Northwest HR Management Association (NHRMA) Annual Conference & Trade show, Bellevue, Wash., Oct. 3-5. Contact: NHRMA, 503-244-4294; conference.nhrma.org or www.nhrma.org

HRTechnology Conference and Exposition, Chicago, Oct. 10-12. Contact: Human Resource Executive, www.hrtechnologyconference.com

Strategic HR Conference, Tampa, Fla., Oct. 10-12. Contact: Society for Human Resource Management, 800-283-7476; shrm@shrm.org; www.shrm.org

Fall Executive Forum: Leading the Talent Development Lifecycle—Strategy, Leadership & Innovation, Chicago, Oct. 14-16. Contact: Human Resource Planning Society, 212-490-6387; www.hrps.org

Health Care Cost Management, Providence, R.I., Oct. 15. Contact: International Foundation of Employee Benefit Plans, 888-33-IFEBCP, option 2; fax: 262-786-8670; edreg@ifebp.org; www.ifebp.org

10th Annual Talent Management Seminar, Tucson, Oct. 15-18. Contact: IQPC/HR, 800-882-8684; info@iqpc.com; www.iqpc.com

Northeast Human Resources Association (NEHRA) Conference 2007, Providence, R.I., Oct. 17-19. Contact: NEHRA, 781-235-2900; www.nehra.org

Workplace Diversity Conference & Exposition, Philadelphia, Oct. 17-19. Contact: Society for Human Resource Management, 800-283-7476; shrm@shrm.org; www.shrm.org

Succession Management Conference, Chicago, Oct. 18-19. Contact: The Conference Board, 212-339-0345, www.conference-board.org

Employers of Excellence National Conference 2007, Las Vegas, Oct. 22-24. Contact: HR.com, www.hr.com

HR Southwest 2007, Fort Worth, Texas, Oct. 23-26. Contact: HR Southwest, 214-631-7476; www.hrsouthwest.org

Organizational Design and Renewal Conference, New York City, Oct. 25-26. Contact: The Conference Board, 212-339-0345; www.conference-board.org

ASTD Leaders Conference, Alexandria, Va., Oct. 26-27. Contact: ASTD, 703-683-8100, www.astd.org

IFEBCP U.S. Annual Employee Benefits Conference, Anaheim, Calif., Nov. 4-7. Contact: International Foundation for Education Benefits & Compensation, www.ifebp.org

Change Management Conference, New York City, Nov. 6-7. Contact: The Conference Board, 212-339-0345, www.conference-board.org

Best of Talent Management Summit, San Francisco, Nov. 12-14. Contact: Linkage Inc., 781-402-5555; www.linkageinc.com

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