

EMPLOYMENT-AT-WILL

The *employment-at-will doctrine* governs when and how an employer and employee may terminate an employment relationship having no definite term (Rand, 2007). Each state interprets this doctrine under its own laws, which creates inconsistencies in its interpretation and application across the states (Moss, 2005). We provide a very general overview of this important and complex doctrine. Readers must seek additional information to understand how the doctrine applies in each state.

In every state except Montana employment-at-will is the default rule governing private sector employment relationships. Therefore, those states presume employees are “at-will employees” unless an employment contract provides otherwise (Rand, 2007). The vast number of at-will employees, the trend of legislatures and courts to balance the employer and employee’s rights under this doctrine, and the potential for costly litigation and damage awards require that employers understand the doctrine and its exceptions.

Generally, parties to an employment relationship for a stated term may only terminate that relationship when the term expires, unless they have a valid reason to terminate it earlier. However, where the relationship has no definite term, either party may terminate it at any time, with or without a reason, and without liability; provided that employer terminations are for legal reasons (Marks & Levine, 2007).

Common definitions of the employment-at-will doctrine, including one from the seminal case, include:

“If the service is terminable at the option of either party, it is plain no action would lie even to the employe[e]; for either party may terminate the service, for any cause, good or bad, or without cause, and the other cannot complain in law.” (*Payne v. Western & Atl. RR.* 1884).

“In the United States, employees without a written employment contract generally can be fired for good cause, bad cause, or no cause at all; judicial exceptions to the rule seek to prevent wrongful terminations.” (Muhl, 2001).

Rationale for the Employment-at-Will Doctrine

There are several reasons to allow either party to terminate an employment relationship of indefinite duration with or without cause. They include fostering a free market system, allowing parties to freely contract regarding their relationship, and protecting the employer’s right to make objective decisions about employment without fear that disgruntled employees will sue for wrongful termination or courts will second-guess the employer’s decision (Rand, 2007).

Traditionally the doctrine assumed that when both parties freely enter employment relationships market forces would encourage them to fulfill their employment obligations (Epstein & Rosen, 1984, as cited in Bowman, 2007). Initially some considered this doctrine fair to both parties because each could end the employment relationship at any time without notice (Muhl, 2001). However, concerns about an employer’s economic advantage over employees and power to terminate employees for illegal reasons, like discrimination, prompted exceptions that limit an employer’s right to terminate an employee (Muhl, 2001).

There exists a steady flow of cases where at-will employees challenge terminations under exceptions to the doctrine. Additionally, law review articles continue to analyze the doctrine’s usefulness to protect employees, erosion by various exceptions, extension to new situations, and state court applications. These articles are available through databases like *LexisNexis*. The current economic climate and management strategies for employment relationships create a

climate ripe for challenges to job terminations under the doctrine's exceptions (Crain, 2010; Coley; 2010a). Therefore, today's employers must understand the doctrine and the exceptions.

Exceptions

Courts, state statutes, and federal law have carved out exceptions to the doctrine. If these apply, employers may only terminate employees for cause even absent a formal written contract for a stated term (Coley 2010a; Rand, 2007).

The exceptions generally protect activities society deems desirable, protect underrepresented populations potentially subject to an employer's unfair behavior, or imply a contract for term based on an employer's representations or actions. Some believe the exceptions are slowly eroding the doctrine; limiting an employer's right to terminate employees for valid business reasons (Rand, 2007). Regardless, since forty-nine states employ the doctrine, employers must understand it so they can structure businesses to minimize, if not avoid, lawsuits under it.

Accordingly, the following summarizes some major exceptions at-will employees use to challenge job terminations under the doctrine and related policies. The Department of Labor website (<http://www.dol.gov>) further describes these.

- 1. Public Policy Exception.** States following this exception prohibit employers from terminating at-will employees for violating policies the public deems beneficial. Although each state may define public policy differently (Muhl, 2001), this exception generally prohibits terminating employees for: (a) whistle-blowing, (b) refusing to act illegally, (c) exercising legal rights or privileges, or (d) fulfilling statutory duties (Gutman, 2003, as cited in Lichtenstein and Darrow, 2008). There are numerous federal statutes that create public policy exceptions, including The National Labor Relations Act

and Title VII of the Civil Rights Act of 1964 (Coley 2010a; Patel, 2007). Among other things, this exception prevents terminating employees who refuse to work in unsafe environments or miss work for jury duty (Institute of Management & Administration, 2007).

This exception is thought to prevent employers from leveraging employment against an at-will employee's rights (Gutman, 2003, as cited in Patel, 2007). Recent articles discuss if the freedom of speech warrants extending this exception to protect an at-will employee's right to blog about employment during non-working hours (Patel, 2007; Pham, 2005/2006).

Successful employee litigants under this exception could receive punitive damages (Institute of Management and Administration, 2007).

2. Implied Contract Exception. In states following this exception an employer's promises (oral or written) or actions that cause at-will employees to believe they can only be fired for cause, limit the employer to terminating employees for cause (Coley, 2010b; Muhl, 2001). Written statements are often in employer documents like employee handbooks, offer letters, company manuals, personnel policies, or employee reviews (Coley, 2010b; Rand, 2007). Subject to state law nuances, an employer's assurances that evidence of a promise of continued employment changes the relationship from at-will to a stated term and limits the employer's rights to terminate employees for just cause (Institute of Management & Administration, 2007).

3. Implied Covenant of Good Faith and Fair Dealing. States that recognize this exception require that employers act fairly and in good faith with at-will employees (Schwartz, 1996). This exception may limit terminations to 'just cause' or prohibit those

based on bad faith or malice (Shane & Rosenthal, 1999, as cited in Muhl, 2001). Courts may find this covenant where an employer's representations cause employees to believe the employer will provide fair treatment and job security (Institute of Management and Administration, 2007). Some suggest internal branding programs "...could and should serve as a basis for implied-in-fact contract claims..." under this exception (Crain, 2010).

Trends

Other challenges include intentional infliction of emotional distress and promissory estoppel (Buckley & Green, 2006, as cited in Sonne, 2007). Some discuss exceptions to protect an at-will employee's conscious objections to activities, such as objections to a particular health care procedure (Sonne, 2007). Additionally, in some jurisdictions employees may try to use other state laws, like closely held corporation laws, to trump the doctrine and provide them with a cause of action (*Kortum v. Independent Family Doctors*, 2010). Recently, someone asked if states could so broadly define a class of persons entitled to protection under the doctrine's exceptions to virtually protect every disgruntled employee (Rand, 2007). Recognizing the continuing litigation under this doctrine, employers should ensure that employee terminations are properly motivated and do not violate the doctrine (Institute of Management & Administration, 2007; Muhl 2001).

Conclusion: Practical Advice to Employers

The doctrine's application continues to evolve and its scope varies among jurisdictions (Coley, 2010a). This complicates general discussions about how the doctrine and its exceptions apply in various employment situations and requires employers to work with local counsel on those issues. To minimize problems, some suggest that employers use employment contracts (Coley,

2010a). Others suggest employers work with local counsel to see if the following will preserve at-will status in a particular jurisdiction (*Institute of Management & Administration*, 2007):

1. Confirm that at-will employment relationships are not altered by statements in employer documents like handbooks, policies, procedures, and hiring applications;
2. Give employees a handbook and have them sign a receipt;
3. Have employees sign a statement acknowledging their at-will employment status; and
4. Regularly train personnel responsible for employment issues about at-will employment issues.
5. Create documented paper trails for hiring and performance reviews that confirm the at-will relationship has not been terminated.

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Resources

Employment Law Information Network

<http://www.elinfont.com>

Employment Law Resource for Recent Developments

<http://www.hrhero.com/>

Institute of Management and Administration, Inc.

<http://www.ioma.com/>

LexisNexis Research

<http://www.lexis.com/>

National Labor Relations Board

<http://www.nlr.gov/index.aspx>

Society for Human Resource Management

<http://www.shrm.org/Pages/default.aspx>

U.S. Department of Labor

<http://www.dol.gov/>

Workforce Management

<http://www.workforce.com>

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