

## The employment-at-will doctrine: three major exceptions

*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*

Charles J. Muhl

Work joyfully and peacefully, knowing that  
right thoughts and right efforts will  
inevitably bring about right results  
—James Allen

See only that thou work and thou canst  
not escape the reward  
—Ralph Waldo Emerson

Like Allen and Emerson, many workers in the United States believe that satisfactory job performance should be rewarded with, among other benefits, job security. However, this expectation that employees will not be fired if they perform their jobs well has eroded in recent decades in the face of an increased incidence of mass layoffs, reductions in companies' workforces, and job turnover. In legal terms, though, since the last half of the 19th century, employment in each of the United States has been "at will," or terminable by either the employer or employee for any reason whatsoever. The employment-at-will doctrine avows that, when an employee does not have a written employment contract and the term of employment is of indefinite duration, the employer can terminate the employee for good cause, bad cause, or no cause at all.<sup>1</sup>

Traditionally and as recently as the early 1900s, courts viewed the relationship between employer and employee as being on equal foot-

ing in terms of bargaining power. Thus, the employment-at-will doctrine reflected the belief that people should be free to enter into employment contracts of a specified duration, but that no obligations attached to either employer or employee if a person was hired without such a contract. Because employees were able to resign from positions they no longer cared to occupy, employers also were permitted to discharge employees at their whim.

The Industrial Revolution planted the seeds for the erosion of the employment-at-will doctrine. When employees began forming unions, the collective bargaining agreements they subsequently negotiated with employers frequently had provisions in them that required just cause for adverse employment actions, as well as procedures for arbitrating employee grievances.<sup>2</sup> The 1960s marked the beginning of Federal legislative protections (including Title VII of the 1964 Civil Rights Act) from wrongful discharge based on race, religion, sex, age, and national origin.<sup>3</sup> These protections reflected the changing view of the relationship between employer and employee. Rather than seeing the relationship as being on equal footing, courts and legislatures slowly began to recognize that employers frequently have structural and economic advantages when negotiating with potential or current employees. The recognition of employment as being central to a person's livelihood and well-being, coupled with

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the fear of being unable to protect a person's livelihood from unjust termination, led to the development of common-law, or judicial, exceptions to the employment-at-will doctrine beginning in the late 1950s. The bulk of the development of these exceptions did not take place until the 1980s, but as we enter the new millennium, the employment-at-will doctrine has been significantly eroded by statutory and common-law protections against wrongful discharge.

This article focuses on the three major exceptions to the employment-at-will doctrine, as developed in common law, including recognition of these exceptions in the 50 States. The exceptions principally address terminations that, although they technically comply with the employment-at-will requirements, do not seem just. The most widespread exception prevents terminations for reasons that violate a State's public policy. Another widely recognized exception prohibits terminations after an implied contract for employment has been established; such a contract can be created through employer representations of continued employment, in the form of either oral assurances or expectations created by employer handbooks, policies, or other written assurances. Finally, a minority of States has read an implied covenant of good faith and fair dealing into the employment relationship. The good-faith covenant has been interpreted in different ways, from meaning that terminations must be for cause to meaning that terminations cannot be made in bad faith or with malice intended. Only six western States—Alaska, California, Idaho, Nevada, Utah, and Wyoming—recognize all three of the major exceptions.<sup>4</sup> Three southern States—Florida, Georgia, and Louisiana—and Rhode Island do not recognize *any* of the three major exceptions to employment at will. (See exhibit 1.)

### Public-policy exception

Under the public-policy exception to employment at will, an employee is wrongfully discharged when the termination is against an explicit, well-established public policy of the State. For example, in most States, an employer cannot terminate an employee for filing a workers' compensation claim after being injured on the job, or for refusing to break the law at the request of the employer. The majority view among States is that public policy may be found in either a State constitution, statute, or administrative rule, but some States have either restricted or expanded the doctrine beyond this bound. The public-policy exception is the most widely accepted exception, recognized in 43 of the 50 States. (See map 1.)

Although the significant development of exceptions to employment at will occurred in the 1980s, the first case to recognize a public-policy exception occurred in California in 1959. In *Petermann v. International Brotherhood of Teamsters*,<sup>5</sup> Peter Petermann was hired by the Teamsters Union as a busi-

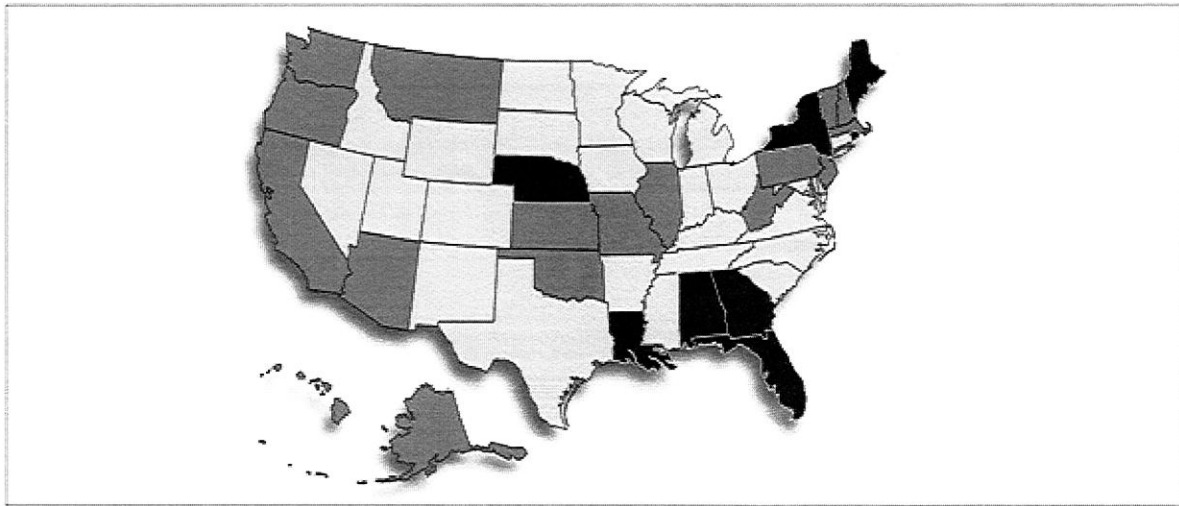
**Exhibit 1. Recognition of employment-at-will exceptions, by State, as of Oct. 1, 2000**

State	Public-policy exception	Implied-contract exception	Covenant of good faith and fair dealing
Total.....	43	38	11
Alabama.....	no	yes	yes
Alaska.....	yes	yes	yes
Arizona.....	yes	yes	yes
Arkansas.....	yes	yes	no
California.....	yes	yes	yes
Colorado.....	yes	yes	no
Connecticut.....	yes	yes	no
Delaware.....	yes	no	yes
District of Columbia	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	no	no
Iowa.....	yes	yes	no
Kansas.....	yes	yes <sup>1</sup>	no
Kentucky.....	yes	yes	no
Louisiana.....	no	no	no
Maine.....	no	yes	no
Maryland.....	yes	yes	no
Massachusetts.....	yes	no	yes
Michigan.....	yes	yes	no
Minnesota.....	yes	yes	no
Mississippi.....	yes <sup>1</sup>	yes	no
Missouri.....	yes	no <sup>1</sup>	no
Montana.....	yes	no	yes
Nebraska.....	no	yes	no
Nevada.....	yes	yes	yes
New Hampshire.....	yes	yes	no <sup>1</sup>
New Jersey.....	yes	yes	no
New Mexico.....	yes	yes	no
New York.....	no	yes	no
North Carolina.....	yes	no	no
North Dakota.....	yes	yes	no
Ohio.....	yes <sup>1</sup>	yes	no
Oklahoma.....	yes	yes	no
Oregon.....	yes	yes	no
Pennsylvania.....	yes	no	no
Rhode Island.....	no	no	no
South Carolina.....	yes	yes	no
South Dakota.....	yes	yes	no
Tennessee.....	yes	yes	no
Texas.....	yes	no	no
Utah.....	yes	yes	yes
Vermont.....	yes	yes	no
Virginia.....	yes	no	no
Washington.....	yes	yes	no
West Virginia.....	yes	yes	no
Wisconsin.....	yes	yes	no
Wyoming.....	yes	yes	yes

<sup>1</sup> Overturned previous decision that was contrary to current doctrine.

SOURCE: Data are from David J. Walsh and Joshua L. Schwarz, "State Common Law Wrongful Discharge Doctrines: Up-date, Refinement, and Rationales," 33 *Am. Bus. L.J.* 645 (summer 1996). Case law was shepardized (verified) to update the recognition of exceptions through Oct. 1, 2000.

Map 1. Public-policy exception to employment at will



- Yes, based on public policy from State constitution and statutes, as well as broader notions of public good and civic duty
- Yes, based strictly on public policy from State constitution and statutes
- No

SOURCE: Based on data from David J. Walsh and Joshua L. Schwartz, "State Common Law Wrongful Discharge Doctrines: Up-date, Retirement, and Rationales," 33 *Am. Bus. L. J.* 645 (summer 1996).

ness agent and was told by its secretary-treasurer that he would be employed for as long as his work was satisfactory. During his employment, Petermann was subpoenaed by the California legislature to appear before, and testify to, the Assembly Interim Committee on Governmental Efficiency and Economy, which was investigating corruption inside the Teamsters Union. The union directed Petermann to make false statements to the committee during his testimony, but he instead truthfully answered all questions posed to him. He was fired the day after his testimony.

In recognizing that an employer's right to discharge an employee could be limited by considerations of public policy, the California appellate court found that the definition of public policy, while imprecise, covered acts that had a "tendency to be injurious to the public or against the public good."<sup>6</sup> The court noted that, in California as elsewhere, perjury and the solicitation of perjury were criminal offenses and that false testimony in any official proceeding hindered the proper administration of both public affairs and justice. Even though employer and employee could otherwise be prosecuted under the criminal law for perjury or solicitation of perjury, the court

found that applying the public policy exception in this context would more fully effectuate California's declared policy against perjury. Holding otherwise would encourage criminal conduct by both employer and employee, the court reasoned.

Courts in other States were slow to follow California's lead. No other State considered adopting such an exception until after 1967, and only 22 States had considered the exception by the early 1980s.<sup>7</sup> Courts clearly struggled with the meaning of the phrase "public policy," with some finding that a policy was public only if it was clearly enunciated in a State's constitution or statutes and others finding that a public policy could be inferred from a statute even where the statute neither required nor permitted an employee to act in a manner that subsequently resulted in the employee's termination. The courts that refused to recognize the exception generally found that, given the vagueness of the term "public policy," such exceptions to employment at will should be created by legislative, not judicial, act.<sup>8</sup>

In 1981, one of the broadest definitions of "public policy" was adopted by the Illinois Supreme Court in *Palmateer v. International Harvester Company*.<sup>9</sup> In this case, Ray

Palmateer alleged that he was fired from his job with International Harvester after he provided information to local law enforcement authorities about potential criminal acts by a coworker and indicated that he would assist in any criminal investigation and subsequent trial. The court noted that the traditional employment-at-will rule was grounded in the notion that the employment relationship was based on reciprocal rights, and because an employee was free to end employment at any time for any condition merely by resigning, the employer was entitled to the same right in return. Rejecting this “mutuality theory,” the court pointed to the rising number of large corporations that conduct increasingly specialized operations, leading their employees’ skills to become more specialized in turn and, hence, less marketable. These changes made it apparent to the court that employer and employee are not on equal footing in terms of bargaining power. Thus, the public-policy exception to the employment-at-will doctrine was necessary to create a “proper balance...between the employer’s interest in operating a business efficiently and profitably, the employee’s interest in earning a livelihood, and society’s interest in seeing its public policies carried out.”<sup>10</sup>

The Illinois court found that matters of public policy “strike at the heart of a citizen’s social rights, duties, and responsibilities” and could be defined in the State constitution or statutes.<sup>11</sup> Beyond that, when the constitution and statutes were silent, judicial decisions could also create such policy, the court said in creating a broad scope for its exception. In this case, nothing in the Illinois Constitution or statutes required or permitted an employee to report potential criminal activity by a coworker. However, the court found that public policy favored citizen crime fighters and the exposure of criminal activity. Thus, Palmateer brought an actionable claim for retaliatory discharge.

Two years after *Palmateer*, the Wisconsin Supreme Court rejected such an expansive definition of public policy and limited the application of this employment-at-will exception in its State to cases in which the public policy was evidenced by a constitutional or statutory provision. In *Brockmeyer v. Dun & Bradstreet*,<sup>12</sup> the court found that the public-policy exception should apply neither to situations in which actions are merely “consistent with a legislative policy” nor to “judicially conceived and defined notions of public policy.”<sup>13</sup>

In *Brockmeyer*, the plaintiff worked for Dun & Bradstreet from August 1969 to May 1980, the last 3 years as district manager of the Credit Services Division in Wisconsin. Brockmeyer had an above-average performance record, but in February 1980, his immediate supervisors learned that he was vacationing with his secretary when it was understood by others that he was performing his normal duties as district manager. The supervisors also learned that Brockmeyer had smoked marijuana in the presence of other employees. The supervisors confronted him with the allegations and stated

unequivocally that he would be terminated or reassigned if his performance did not improve. They also suggested that either he or his secretary would have to find a reassignment within Dun & Bradstreet so that they would not continue to work together. When Brockmeyer tried unsuccessfully to find another position for his secretary, the supervisors sought and obtained her resignation. After leaving, the former secretary filed a sex discrimination claim against Dun & Bradstreet; Brockmeyer indicated to his supervisors that he would tell the truth if called to testify at a trial regarding this complaint. Dun & Bradstreet settled the sex discrimination suit, and Brockmeyer was fired 3 days later.

Brockmeyer contended that his termination violated Wisconsin statutes that prohibited (1) perjury, (2) willful and malicious injuring of another in his or her reputation, trade, business, or profession, and (3) the use of threats, intimidation, force, or coercion to keep a person from working. Rejecting these claims, the Wisconsin Supreme Court found that Dun & Bradstreet did not engage in any behavior that violated these statutes. Dun & Bradstreet had legitimate reasons for terminating Brockmeyer, and no evidence demonstrated that Dun & Bradstreet had asked him to lie in the event that the sex discrimination action by his secretary went to trial. The court held that it was not the State’s public policy to prevent discharge of an employee because the employee may testify in a manner contrary to his employer’s interests.

The court in *Brockmeyer* decided to limit the application of the public-policy exception to “fundamental and well-defined public policy as evidenced by existing law” and held that a wrongful-discharge claim should not be actionable merely because an “employee’s conduct was praiseworthy or because the public may have derived some benefit from it.”<sup>14</sup> The court justified its limitation by saying that it would safeguard employee job security interests against employer actions that undermine fundamental policy preferences, while still providing employers with flexibility to make personnel decisions in line with changing economic conditions. Later, the court issued a clarification to the effect that public policy could support a wrongful-termination suit in cases where an explicit constitutional or legislative statement did not evidence that policy, as long as the policy was evident from “the spirit as well as the letter” of the constitutional and legislative provisions.<sup>15</sup> The court also now permits public policy to be evidenced by administrative rules and regulations.<sup>16</sup>

Seven States have rejected the public-policy exception in its entirety: Alabama, Florida, Georgia, Louisiana, Nebraska, New York, and Rhode Island.<sup>17</sup> In *Murphy v. American Home Products Corporation*,<sup>18</sup> the Court of Appeals of New York (the State’s highest court) forcefully argued that such exceptions to the employment-at-will doctrine were the province of legislators, not judges. While recognizing that many other jurisdictions had created a public-policy exception, the court

found that legitimacy of the principal justification for such adoption—namely, inadequate bargaining power on the part of employees—was better left to the New York legislature to evaluate. The court found that legislators have “greater resources and procedural means to discern the public will” and “elicit the view of the various segments of the community that would be directly affected”.<sup>19</sup> Because the recognition of such an exception requires some sort of principal scheme for its application, the configuration of that scheme must be determined by the legislature after the public has had its opportunity to communicate its views, according to the court. Finally, the court found that any such change in the employment-at-will doctrine would fundamentally alter rights and obligations under the employment relationship and thus should be applied prospectively by the legislature, rather than retrospectively by the court.<sup>20</sup>

To summarize, the vast majority of States do recognize some form of a public-policy exception to the employment-at-will doctrine. Such a regulation prevents employees from being terminated for an action that supports a State’s public policy. The definition of public policy varies from State to State, but

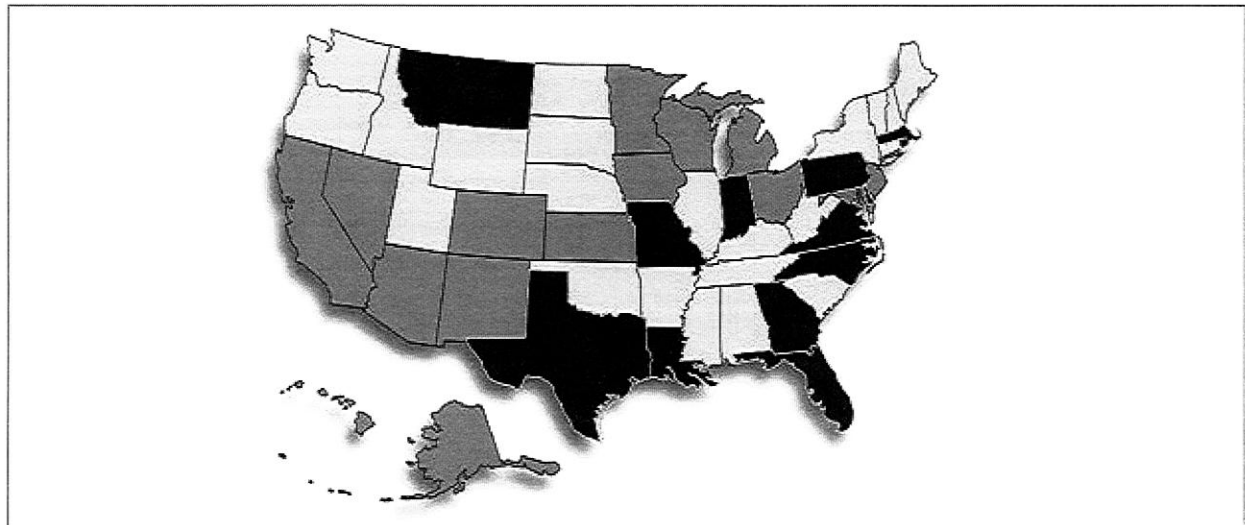
most States either narrowly limit the definition to clear statements in their constitution or statutes, or permit a broader definition that enables judges to infer or declare a State’s public policy beyond the State’s constitution or statutes.

### Implied-contract exception

The second major exception to the employment-at-will doctrine is applied when an implied contract is formed between an employer and employee, even though no express, written instrument regarding the employment relationship exists. Although employment is typically not governed by a contract, an employer may make oral or written representations to employees regarding job security or procedures that will be followed when adverse employment actions are taken. If so, these representations may create a contract for employment. This exception is recognized in 38 of the 50 States. (See map 2.)

A common occurrence in the recent past was courts finding that the contents and representations made in employee handbooks could create an implied contract, absent a clear and express waiver that the guidelines and policies in such

**Map 2. Implied-contract exception to employment at will, oral assurances and written assurances (handbook)**



- Yes, including oral and written assurances by employers; disclaimers not per se defense
- Yes, limited to written assurances; disclaimers nullify employer representation if unambiguous and prominent
- No

SOURCE: Based on data from David J. Walsh and Joshua L. Schwartz, "State Common Law Wrongful Discharge Doctrines: Up-date, Refinement, and Rationales," 33 *Am. Bus. L. J.* 645 (summer 1996).

handbooks did not create contract rights. The typical situation involves handbook provisions which state that employees will be disciplined or terminated only for “just cause” or under other specified circumstances, or provisions which indicate that an employer will follow specific procedures before disciplining or terminating an employee.<sup>21</sup> A hiring official’s oral representations to employees, such as saying that employment will continue as long as the employee’s performance is adequate, also may create an implied contract that would prevent termination except for cause.

The leading case having to do with the implied-contract exception is *Toussaint v. Blue Cross & Blue Shield of Michigan*, decided by the Supreme Court of that State in 1980.<sup>22</sup> Charles Toussaint had been employed in a middle management position with Blue Cross for 5 years before his employment was terminated. When he was hired, he asked his hiring official about his job security and was told that his employment would continue “as long as [he] did [his] job.” Toussaint also was provided with a manual of Blue Cross personnel policies some 260 pages long; within the manual were statements that disciplinary procedures would be applied to all Blue Cross employees who completed their probationary period and that it was Blue Cross’ policy to terminate employees only for “just cause.”

The court ruled that, even if employment is not for a definite term, a provision indicating that an employee would be fired only for just cause was enforceable and that such a provision could create an implied contract if it engendered legitimate expectations of job security in the employee. If the employee is arbitrarily fired thereafter, then a claim for wrongful discharge is actionable. The court noted that Blue Cross could have established a policy giving it the right to terminate employees for no cause at all, but chose instead to follow a “just cause” termination policy. The court argued that employer policies and practices create a “spirit of cooperation and friendliness” in the workforce, making employees “orderly, cooperative, and loyal” by giving them peace of mind regarding job security and the belief that they will be treated fairly when termination decisions are made.<sup>23</sup> If an employer’s actions lead an employee to believe that the policies and guidelines of the employer are “established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee,” then the employer has created an obligation.<sup>24</sup> That obligation is created even though the parties may not have mutually agreed that contract rights would be established by the policies.

An implied contract for employment cannot be disregarded at the employer’s whim, but the employer can prevent the contract from being created by including in its policies and provisions a clear and unambiguous disclaimer stating that its policies and guidelines do not create contractual rights.<sup>25</sup> If a company does this, no employee could reasonably expect

that the policies and guidelines provided a contractual right to job security or any other benefit described therein.

In *Pine River State Bank v. Mettilee*,<sup>26</sup> the Minnesota Supreme Court agreed with the rationale behind *Toussaint*. In *Pine River*, an employee handbook was given to an employee after he had been working for the bank for several months. The handbook contained two sections that the employee claimed created contract rights. The first was a section titled “Job Security” that described employment in the banking industry (though not the specific bank) as secure. The second involved the bank’s “Disciplinary Policy,” which outlined specific procedures, including reprimands and opportunities to correct one’s behavior, that would be followed if an employee was alleged to have violated a company policy. The court found that the “Job Security” section was insufficient to create contract rights, but that the “Disciplinary Policy” section was sufficient. The court analyzed that provision according to traditional requirements for the creation of a contract: offer, acceptance, and consideration for the contract. The court found that the employer offered employment subject to the terms in the employee handbook; the employee accepted the employment offer by showing up for work. The employee’s labor was the consideration in support of the contract. Thus, argued the court, the employer breached the employment contract by terminating the employee without following the specific procedures outlined in the handbook that created the implied contract. The court reasoned that, when an employer chooses to prepare and distribute a handbook, the employer is choosing to “implement or modify its existing contracts with all employees covered by the handbook.”<sup>27</sup>

Among the States rejecting the application of an implied-contract exception to employment at will are Florida, Pennsylvania, and Texas. In *Muller v. Stromberg Carlson Corporation*,<sup>28</sup> a Florida appellate court rejected the exception because of fear that it would lead to uncertainty in the application of the law. Walter H. Muller sued Stromberg Carlson following his termination and alleged that, pursuant to the company’s merit pay plan that required an annual review of an employee’s performance and a recommendation as to pay increases based on that performance, he had an annual implied-employment contract. The Florida court rejected Muller’s claim, finding no justification to depart from the “long established principles that an employment contract requires definiteness and certainty in its terms.”<sup>29</sup> The court reasoned that, if indefinite terms or assurances were used to imply an employment contract, the courts in Florida would be “flooded with claims that judicial discretion be substituted for employer discretion.”<sup>30</sup> Addressing the arguments made by the Michigan Supreme Court in *Toussaint*, the court said that the longstanding view in Florida, contrary to that in Michigan, was that beneficial social or economic policy should not be advanced by judicial decisions. The Florida court believed the judicial function to

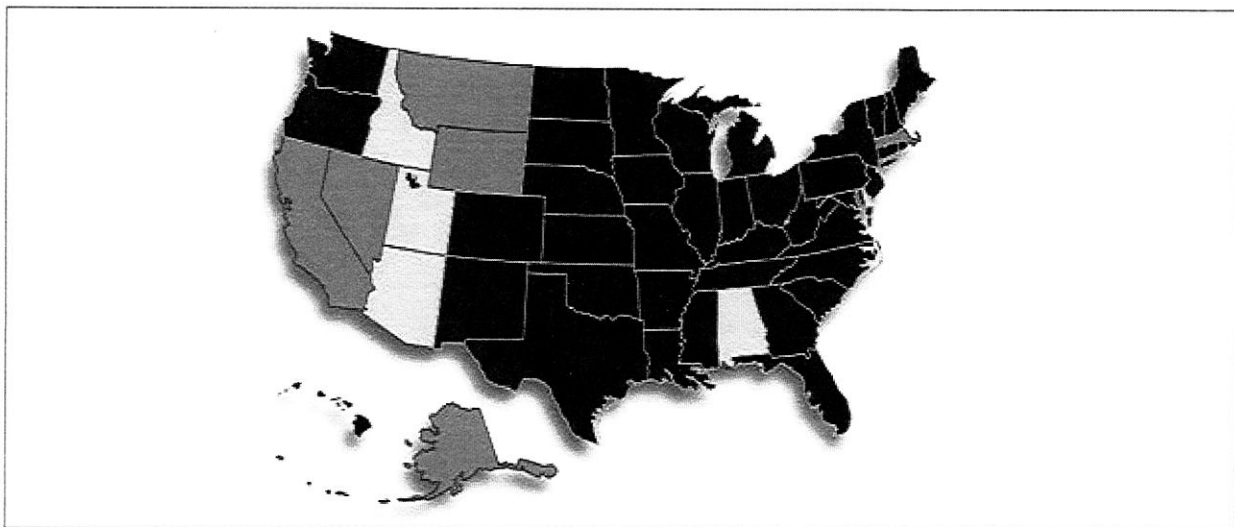
be advancing certainty in business relationships by providing meaningful criteria that lead to predictable consequences. The court had “serious reservations as to the advisability of relaxing the requirements of definiteness in employment contracts considering the concomitant uncertainty which would result in the employer-employee relationships.”<sup>31</sup> The court added that the inequality of bargaining power between employers and their employees was not a sufficient basis to create implied contracts of employment based on oral or written assurances.




Texas refused to recognize the implied-contract exception in the 1986 case *Webber v. M. W. Kellogg Company*.<sup>32</sup> In that case, the court found that a letter offering a position of employment, the classification of an employee as “permanent” rather than “temporary,” and the identification in company documents of a scheduled retirement date for the employee some 22 years after employment was initiated were insufficient in sum to create an implied contract of employment for a specific

duration. Likewise, in *Richardson v. Charles Cole Memorial Hospital*,<sup>33</sup> the Supreme Court of Pennsylvania rejected the implied-contract exception, finding that policies published in an employee handbook did not create a “meeting of the minds,” one of the traditional standards for evaluating whether a contract has been created between two parties. Because the terms of the handbook were not bargained for in the traditional sense, the court reasoned, the benefits conferred upon the parties by the handbook were mere gratuities and not rights that were contracted for.

To summarize, then, employers’ oral or written assurances regarding job tenure or disciplinary procedures can create an implied contract for employment under which the employer cannot terminate an employee without just cause and cannot take any other adverse employment action without following such procedures. Employers can prevent written assurances from creating an implied contract by including a clear and unambiguous disclaimer characterizing those assurances as

**Map 3. Covenant-of-good-faith-and-fair-dealing exception to employment at will**



-  Yes, plaintiff can sue in tort or contract, or otherwise broader application
-  Yes, limited to contractual remedies or narrower application
-  No

SOURCE: Based on data from David J. Walsh and Joshua L. Schwartz, “State Common Law Wrongful Discharge Doctrines: Up-date, Refinement, and Rationales,” 39 *Am. Bus. L. J.* 645 (summer 1996).

company policies that do not create contractual obligations. Oral assurances must create a reasonable expectation in the employee in order for an implied contract to be created.

### Covenant-of-good-faith exception

Recognized by only 11 States (see map 3), the exception for a covenant of good faith and fair dealing represents the most significant departure from the traditional employment-at-will doctrine.<sup>34</sup> Rather than narrowly prohibiting terminations based on public policy or an implied contract, this exception—at its broadest—reads a covenant of good faith and fair dealing into *every* employment relationship. It has been interpreted to mean either that employer personnel decisions are subject to a “just cause” standard or that terminations made in bad faith or motivated by malice are prohibited.<sup>35</sup>

As with the public-policy exception, California courts were the first to recognize an implied covenant of good faith and fair dealing in the employment relationship. In *Lawrence M. Cleary v. American Airlines, Inc.*,<sup>36</sup> an American Airlines employee who had worked satisfactorily for the company for 18 years was terminated without any reason given. A California appellate court held that, in virtue of the airline’s express policy of adjudicating personnel disputes *and the longevity of the employee’s service*, the employer could not fire the employee without good cause. The court stated that “Termination of employment without legal cause after such a period of time offends the implied-in-law covenant of good faith and fair dealing” and that, from the covenant, “a duty arose on the part of...American Airlines...to do nothing which would deprive...the employee...of the benefits of the employment...having accrued during [the employee’s] 18 years of employment.”<sup>37</sup> This California appellate case was decided in 1980, and the factual situation included an implied employment contract. However, the court did not hold that a covenant of good faith and fair dealing was actionable only if an employee had an express or implied employment contract from which the covenant could arise. Rather, the appellate court found that a tort action could be maintained for breach of the covenant of good faith and fair dealing in every employment relationship, not just those covered by an express or implied contract. The California Supreme Court subsequently rejected this formulation and eliminated the tort action.<sup>38</sup>

Later, however, in *Kmart Corporation v. Ponsock*, the Supreme Court of Nevada permitted a cause of action in tort for breach of an implied covenant of good faith and fair dealing in every employment relationship.<sup>39</sup> Ponsock was a tenured employee at Kmart, hired until retirement or as long as economically possible. At trial, the jury found that Kmart terminated Ponsock to avoid having to pay him retirement benefits. As part of his case, he claimed that Kmart’s discharge was in

“bad faith” and that, even without a contract,<sup>40</sup> such a termination gave rise to tort liability. The court agreed, citing the employer-employee relationship as one of the “rare and exceptional cases that the duty [of law] is of such a nature as to give rise to tort liability.”<sup>41</sup>

In its opinion, the court recognized the changes that many feel have occurred in the employment relationship:

We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all of their income is something new in the world. For our generation, the substance of life is in another man’s hands.<sup>42</sup>

The court found that Ponsock was dependent on Kmart’s commitment to extended employment and to retirement benefits based on that employment and that the “special relationships of trust” required a tort remedy in addition to any available contractual remedy if the employer conducts an “abusive and arbitrary” dismissal. Providing such a remedy, the court reasoned, would deter employers from engaging in such malicious behavior. Because the termination in *Ponsock* was motivated by the company’s desire to serve its own financial ends, the employee was entitled to recover for a bad-faith agreement.

The vast majority of courts have rejected reading such an implied covenant into the employment relationship. The reasoning used by a Florida appellate court in *Catania v. Eastern Airlines, Inc.*,<sup>43</sup> is representative. Four employees alleged that Eastern had wrongfully discharged them and claimed, among other things, that they were entitled to a good-faith review of the discharge. The court summarized the plaintiffs’ argument as follows:

To require employers to demonstrate valid grounds and methods for an employee’s discharge does not unduly restrict employers; it merely provides some balance of power. It is apparent that there is not truly freedom of contract between an employer and employee; the individual employee has no power or ability at all to negotiate an employment contract more favorable to himself. And the traditional common law [the employment-at-will doctrine] totally subordinates an interest of the employee to the employer’s freedom.

Rejecting the “plaintiff’s invitation to be a ‘law giver’” and applying reasoning that had been accepted by the Nevada Supreme Court, the Florida court found that the burden on courts of having to determine an employer’s motive for terminating an employee was too great an undertaking.

THE EMPLOYMENT RELATIONSHIP IS FOREVER EVOLVING. Additional statutory and common-law exceptions to the employment-at-

will doctrine may be developed in the future, but the traditional doctrine has already been significantly eroded by the public-policy and implied-contract exceptions. In addition to the three exceptions detailed in this article, other common-law limitations on employment at will have been developed, including actions based on the intentional infliction of emotional distress, intentional interference with a contract, and promissory estoppel or detrimental reliance on employer rep-

resentations. Suits seeking damages for “constructive discharge,” in which an employee alleges that he or she was forced to resign, and for “wrongful transfer” or “wrongful demotion” have increased in recent years. Accordingly, nowadays employers must be wary when they seek to end an employment relationship for good cause, bad cause, or, most importantly, no cause at all. □

## Notes

<sup>1</sup> Shane and Rosenthal, *Employment Law Deskbook*, § 16.02 (1999).

<sup>2</sup> Jeanne Duquette Gorr, *The Model Employment Termination Act: Fruitful Seed or Noxious Weed?* 31 DUQLR 111 (fall 1992); see also Robert W. Fisher, “When workers are discharged—an overview,” *Monthly Labor Review*, June 1973, pp. 4–17.

<sup>3</sup> 42 U.S.C. § 2000e *et seq.* This article does not address statutory exceptions to employment at will. Many such exceptions have been enacted at both the Federal and State level. For example, Federal law prevents employment discrimination, including termination for engaging in lawful union activities (see National Labor Relations Act, 29 U.S.C. § 201–219, 1978) and for safety and health violations at the workplace (see Occupational Safety and Health Act, 29 U.S.C. § 651–678, 1985), among others. Certain States have laws preventing employers from terminating employees for whistle-blowing (reporting potential violations of law committed by the employer); other State laws prohibit employers from terminating employees who file a worker’s compensation claim or serve on a jury. (See, generally, Shane and Rosenthal, *Employment Law Deskbook*.) However, only two States—Arizona and Montana—have enacted comprehensive wrongful termination legislation. Montana passed the Wrongful Discharge from Employment Act in 1987, and Arizona enacted its Employment Protection Act in 1996. Of the two, the Montana statute is broader in the scope of its protections for employees.

<sup>4</sup> Courts in Arizona had recognized all three exceptions until passage of the Employment Protection Act.

<sup>5</sup> 174 Cal.App.2d 184 (1959).

<sup>6</sup> 174 Cal.App.2d at 188.

<sup>7</sup> Deborah A. Ballum, “Employment-at-will: The Impending Death of a Doctrine,” 37 *Am. Bus. L.J.* 653, 660 (summer 2000).

<sup>8</sup> See, for example, *Pacheo v. Raytheon*, 623 A.2d 464 (R.I. 1993); and *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 448 N.E.2d (1983).

<sup>9</sup> 85 Ill.2d 124, 421 N.E.2d 876 (1981).

<sup>10</sup> *Id.* at 878.

<sup>11</sup> *Id.*

<sup>12</sup> 113 Wis.2d 561, 335 N.W.2d 834 (1983).

<sup>13</sup> *Id.* at 839–40.

<sup>14</sup> *Id.* at 840, citing *Palmateer v. International Harvester Co.*, 421 N.E.2d at 883.

<sup>15</sup> See *Wandry v. Eye Credit Union*, 129 Wis.2d 37, 384 N.W.2d 325 (1986).

<sup>16</sup> See *Winkelman v. Beloit Memorial Hosp.*, 168 Wis.2d 12, 483 N.W.2d 211 (1992).

<sup>17</sup> At this time, it is unclear how Maine views the public-policy exception, as no decision has addressed it directly.

<sup>18</sup> 58 N.Y.2d 293, 448 N.E.2d 86 (1983).

<sup>19</sup> *Id.* at 302.

<sup>20</sup> One year after the decision was rendered, the New York legislature enacted the Retaliatory Action by Employers Act, amending the State’s labor law so that it would protect whistle-blowers from wrongful termination. See N.Y. LAB. LAW § 740 (*Gould’s New York Consolidated Laws Unannotated*, 1988).

<sup>21</sup> Shane and Rosenthal, *Employment Law Deskbook*, § 16.03[5].

<sup>22</sup> 408 Mich. 579, 292 N.W.2d 880 (1980).

<sup>23</sup> *Id.* at 644.

<sup>24</sup> *Id.*

<sup>25</sup> The following is a sample disclaimer, which must be clear and unambiguous in the handbook or policy in order to be effective: “This policy is not intended as a contractual obligation of the company. The company reserves the right to amend this policy from time to time at its discretion and in accordance with applicable law.”

<sup>26</sup> 333 N.W.2d 622 (1983).

<sup>27</sup> *Id.* at 626–27.

<sup>28</sup> 427 So.2d 266 (1983).

<sup>29</sup> *Id.* at 268.

<sup>30</sup> *Id.* at 269.

<sup>31</sup> *Id.* at 270.

<sup>32</sup> 720 S.W.2d 124 (1986).

<sup>33</sup> 320 Pa.Super. 106, 466 A.2d 1084 (1983).

<sup>34</sup> Shane and Rosenthal, *Employment Law Deskbook*, § 16.03[8].

<sup>35</sup> *Id.*

<sup>36</sup> 111 Cal.App.3d 443 (1980).

<sup>37</sup> *Id.* at 455.

<sup>38</sup> See *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 765 P.2d 373 (Cal. 1988).

<sup>39</sup> 103 Nev. 39, 732 P.2d 1364 (1987).

<sup>40</sup> In the trial, the court did find that an employment contract existed that Kmart had breached.

<sup>41</sup> *Id.* at 49.

<sup>42</sup> *Id.* at 51, quoting F. Tannenbaum, *A Philosophy of Labor* (1951).

<sup>43</sup> 381 So.2d 265 (1980).