

Termination And “At-Will” Status

Protecting Your Employment at-Will Status

An employee at-will can be terminated with or without notice or cause for any reason or no reason so long as it is a legal reason. Employment at-will has been adopted in nearly all jurisdictions, with a few differences by state. The doctrine is built on the premise that both employees and employers may end the employment relationship at any time. Nearly all private sector employees are considered to be “at-will,” except those with specific employment contracts and those subject to collective bargaining agreements.

Employment at-will is an important tool of employers. Consequently, organizations should take care to ensure that it is protected and available for use--when you need it. There are several ways that employers unintentionally weaken their at-will status, including creating unintended oral and written contracts with employees. They are summarized below.

Creating an Unintentional Oral Contract

An express oral promise, typically made by a line manager, may alter an employer’s right to terminate at will. Examples involve statements that may change the at-will relationship or create new obligations such as:

- An employee who does a good job will not be terminated;
- Employment will only be terminated for certain reasons;
- Employment will continue for a defined period;
- Certain steps/procedures will be followed before anyone is terminated (e.g., plenty of warning to improve will be given);
- An employee will be transferred, not terminated, if a layoff occurs; and
- The employee will receive a pay increase, bonus or promotion.

Minimizing the Risks of Creating an Oral Contract

How do you answer an applicant’s or current employee’s questions regarding job security or employment terms without undermining your employment-at-will status?

- Be honest and candid;
- Don’t over-promise;
- Be prepared to answer questions regarding job security with responses such as “we can’t predict the future;”
- Keep in mind you are an at-will employer; and

- Put all job offers in writing and include an at-will statement in the offer. Also add “no other representations have been made.”

Creation of an Implied Written Contract

An implied contract can be created through written policies and procedures that specify what steps will be taken and how an employee will be disciplined or terminated. The result is you will be forced to follow the steps and procedures you have created and be unable to rely on employment at-will.

Minimizing the Risks of Creating Implied Written Contracts

- Ensure that all policies and procedures are current and accurate. Do they say what you want them to say?;
- Ensure that policies and procedures are actually implemented. Are you doing what you say you will be doing?;
- Ensure managers understand your policies and are following them;
- Review policies (e.g., Corrective Action, Termination) to ensure that they permit management discretion, as appropriate;
- Review policy language so that it includes discretionary phrases such as: “a few examples include,” “suggested steps, which may not be followed in every instance include, but are not limited to,...;”
- Ensure that progressive discipline is discretionary and the employer retains the right to discharge employees immediately;
- Remove language from handbooks such as: “just cause is required for termination” or that “employees won’t be fired without good cause;”
- Include appropriate disclaimers (e.g., that handbooks and policies aren’t intended to form express or implied contracts regarding the terms and duration of employment or that policies may not be followed in every situation); and
- Include specific, prominent at-will statements in documents.