Understand What "At-Will" Employment Really Means To Reduce Significant Legal Exposure



July 10, 2023

When a client is sued by a former employee or receives notice of a governmental investigation into an employee issue, one of the first questions we frequently are asked is "How can this happen? He/she was an at-will employee." It is true that a person typically is presumed to be an "at-will" employee and, as such, the employer retains the right to terminate the employee at any time (with or without advance notice) and for any reason (whether it be a good reason, bad reason or no reason at all). This leads many employers to conclude that at-will employment means they can handle terminations and other employee issues however they see fit. The reality is quite the opposite.

Although the at-will employment doctrine allows employers to terminate employees for any reason, there are a substantial number of local, state and federal laws that create exceptions to this rule. These exceptions not only limit an employer's ability to terminate an at-will employee, but they also limit an employer's ability to take certain other employment actions that might negatively impact the employee's terms and conditions of employment. An employer's failure to fully understand their obligations under these laws is not a defense. As such, even an unknowing violation of the law can result in costly litigation and/or governmental investigations and audits.

Most employers probably understand that one exception to the at-will employment rule is the anti-discrimination laws which prohibit them from terminating an employee because they are in a legally "protected" status such as age, race or gender. One challenge for employers is that many don't fully understand how many protected statuses there are.

For example, an employee's "protected" disability can include such conditions as alcoholism, abuse of legal or illegal drugs, obesity, irritable bowel syndrome, anxiety, depression and other psychiatric disorders. Terminating an at-will employee who is in

any such protected status can result in legal liability.

In addition to the anti-discrimination laws, there are other local, state and federal laws that impose obligations on employers to affirmatively provide certain workplace rights, benefits and/or accommodations (e.g., providing a job-protected leave of absence, paid sick leave, modifying standard work hours or duties, reassigning an employee to a vacant position and providing regular break times because of the employee's disability status, religious beliefs or family needs). Such obligations exist regardless of the employee's at-will status. Further, these laws provide that the employer can be sued if they unlawfully deny, or take adverse action against an employee after they request, any such any such right, benefit or accommodation.

There also are laws that prohibit various types of retaliation. For example, employers are subject to liability for terminating at-will employees that make "protected" complaints. Some examples of "protected" complaints include employees who complain about workplace safety, harassment/hostile work environment, equal pay, failure to pay overtime, violation of privacy rights and violations of other laws, rules and regulations.

Most employers act in good faith, but many still suffer from a common misunderstanding about what at-will employment really means. Unfortunately, it does not mean much. If employers want to reduce the risk of legal claims, what they must realize is that at-will employment means that employers have significant obligations to such employees and that they are not free to take whatever action they deem is reasonable under the circumstances.

So what can employers to do reduce their legal risks? Here are a few tips:

• Before taking action that may deemed adverse by the employee, consider potential obligations under applicable law

• Don't fall into the trap of believing you can defend an employment action simply on the basis that the employee was "at-will"

• Prior to taking an adverse employment action (whether that action be termination, demotion, transfer, denial of workplace accommodation or other action), be sure you can articulate a legitimate non-discriminatory/non-retaliatory reason for taking the action/inaction

• Document employee performance issues and other problems as they arise

• Follow progressive discipline (if appropriate)

• Be consistent in treatment of employees

• Know your limits . . . Ask for outside help/legal counsel if needed

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