AVOIDING WRONGFUL TERMINATION

An increase in wrongful termination claims over the years has left many employers and managers afraid to terminate difficult employees. Others unknowingly create costly wrongful termination liability through careless and uninformed practices. A single claim of wrongful termination can cost your company lost wages and benefits, punitive damages, and legal fees.

Much of this liability can be avoided by having a basic knowledge of the theories of wrongful termination and by applying sound practices and practical steps for avoiding claims. This course will help you:

- understand the principle of "at-will" employment and the important exceptions to the rule
- identify practices that could create liability
- identify methods for effectively handling terminations to minimize the risk of a lawsuit

AT WILL EMPLOYMENT

Many employees in the United States are employed "at-will." This means if employees do not have employment contracts, they can quit their jobs whenever they want, and also the employer can terminate them at any time, with or without reason or notice.

Each state has a similar "at-will" rule. For example, the California Labor Code Section 2922 states, "An employment having no specified term may be terminated at the will of either party on notice to the other."

Mississippi law follows the "employment at will" doctrine, which gives an employer the right to dismiss for any reason an employee that was hired for a period of time or an indefinite term. However, both the Mississippi Supreme Court and new federal laws have clearly defined specific instances where an employee's firing is wrongful or illegal.

Mississippi's high court has ruled that if a company creates procedures that employers must follow in terminating an employee and outlines those steps in the employee handbook or guidance policy, supervisors must follow them. In addition, anyone employed for a definite term, including through a written contract, cannot be fired at will. In such a case, the employer must show just cause for terminating the employee before the term expires.

Employment relationships remain "at will" unless some contract, statute, or common law principle creates an exception to this general rule. These various exceptions to the "at-will" employment principle are the basis of wrongful termination lawsuits and will be discussed in detail throughout this course.
Some exceptions to "at-will" employment have been established through federal, state, and local statutes. These statutes identify specific circumstances under which it is illegal to terminate an employee. Roll over the items below to learn more about statutory exceptions to "at-will" employment.

**Union Activity:** The National Labor Relations Act protects employees' right to organize into a union. It is illegal to terminate an "at will" employee because of union activity.

**Discriminatory Reasons:** Several Federal, State and local laws such as Title VII of the Civil Rights Act and the Americans with Disabilities Act prohibit discriminatory firing of employees on certain protective grounds such as race, color, national origin, religion, age, sex, pregnancy, disability and others.

**Filing a Work-Related Injury Claim:** Under Workers' Compensation Laws, it is illegal to terminate an employee because the employee made a work-related injury claim.

**Filing a Safety Complaint:** The Occupational Safety & Health Act prohibits terminating an employee for making a safety complaint.

In addition to specific statutory exceptions to "at-will" employment, other exceptions have resulted from court decisions and interpretations of constitutional and statutory provisions. These principles make up a body of common law. One common law exception to the "at-will" principle adopted by most states is the "public policy" exception. Courts have concluded that managers cannot terminate employees because they refuse to violate the law or because they report illegal activity of their employer.

**Whistle Blowing:** Termination of employees in retaliation for "whistle blowing," such as reporting employer violations of law to law enforcement or other government agencies raising safety complaints.

**Refusal to Violate Law:** Terminating an employee for refusing to do something that would violate law, such as falsifying financial information, covering up activity that violates laws or regulations, or inappropriately disposing hazardous waste.

**Asserting Legal Rights:** Termination for asserting statutory or constitutional rights such as fulfilling a duty imposed by law, including serving jury duty or testifying truthfully under oath.

**Contracts**

**Employment contracts** can create exceptions to the "at-will" employment rule, and can lead to wrongful termination claims based on breach of contract. The courts recognize three types of employment contracts: written, oral, and implied.

Written Contracts - An employee may have a written employment contract, signed and dated by both parties, that establishes conditions under which an employee may be terminated. Some employment contracts include a "just cause" provision for termination. Others may require notice before termination can occur. The terms and conditions of a contract must be honored to avoid wrongful termination.
claims. Terminating an employee before the term of a contract has ended, or not adhering to the provisions of a contract, may be a breach of contract.

Oral Contracts - An oral contract, based on an express oral commitment made by an employer, can be just as binding as a written contract. Oral contracts are often created in situations when an employee or applicant asks questions involving job security. Although nothing is necessarily in writing, a contract may be formed when a verbal promise is made that:

- employment will continue for a specific period of time
- employment will be terminated only for certain reasons
- an employee will be entitled to a particular procedure before termination
- a raise or promotion will be given

Implied Contracts - Implied contracts can create exceptions to "at-will" employment. In some states, courts have determined that an implied contract exists based on written policies or handbooks, and that employers must abide by these contracts. Terminating an employee in violation of a company's own written policies can be a breach of an implied contract and an exception to the "at-will" principle.

Some courts, like in California, take a "totality of circumstances" approach. This common law principle says that employees may have implied-in-law contracts, meaning they can only be terminated for "just cause," if they have:

- long-term employment (i.e., more than 4-5 years)
- favorable performance reviews
- regular salary increases
- merit bonuses
- promotions
- grants of stock options
- awards, etc.

Just Cause

If an employee is not "at-will" because he/she has an employment contract, either express or implied, the employee can be terminated only for "good cause" or "just cause." Courts and arbitrators look to various factors to determine whether a manager has "just cause." The following steps can help establish cause and avoid liability:

- Provide employees advance notice of performance standards and behavioral rules. Let them know if they are not meeting standards, and the penalty for failing to meet standards or correct deficiencies.
- Conduct a fair and thorough investigation into performance deficiencies or misconduct. Include opportunities for employees to present their side of the story before deciding on the proper discipline.
• Apply company rules and standards consistently to similarly situated employees. Be able to articulate a legitimate business reason for different treatment of employees.
• Implement corrective counseling and progressive discipline, as appropriate, before resorting to termination.

Constructive Discharge

Some managers feel they can avoid wrongful termination claims by forcing employees to quit, instead of terminating them. Creating intolerable conditions for the purpose of forcing an employee to quit is known as a "constructive discharge" and can lead to costly wrongful termination claims.

Constructive discharge cases usually occur when an employer coerces an employee into resigning or intentionally creates a work situation that any reasonable person would find intolerable. In such cases, a court may determine that an employee is justified in quitting, and courts will treat it as if the employee was terminated. Such a "constructive discharge" can be the subject of a wrongful termination claim.

Emotional Distress

All terminations are emotionally upsetting. If the manner in which a termination is carried out, however, is considered "outrageous" or if it would "shock the conscience of a civilized society," it could open a manager or company to a claim of intentional infliction of emotional distress. A court or a jury would eventually decide if the conduct was "outrageous" enough to support a claim, but there are certain types of conduct that are more likely to create liability.

• publicly humiliating employees
• racial or sexual harassment
• subjecting employees to intolerable working conditions to force their resignation
• intentionally falsifying work records or performance reviews to force an employee to quit or to adversely affect his or her employment

Prevention

Eliminating wrongful termination claims must begin with preventative measures.

• Honestly evaluate employees. Don't tell employees they are performing satisfactorily if they are not. A termination should never come as a surprise to an employee.
• Don't reward employees with merit raises and bonuses if they are performing poorly. It can make it more difficult to terminate them later.
• Read and follow personnel policies, procedures manual, and/or employee handbook.
• Review any disciplinary or termination decisions with your human resources representative.
• Meet with employees privately to talk about performance issues. Act professionally and courteously.
• Thoroughly investigate allegations of wrongdoing. Always give an employee the opportunity to tell his/her side of the story.
• Document any issues that may eventually lead to a termination.

Specific Preventive Measures (Prevention cont.)

Depending on the situation, more specific preventative measures may be needed.

Statutory Exceptions

• Be aware of federal, state, and local laws.
• Always abide by statutory regulations and do your best to assure others in your workplace do as well.
• Don't discriminate or retaliate against an employee who makes a complaint.

Public Policy Exceptions

• Listen when an employee raises questions or concerns about practices that may be illegal, discriminatory, or unsafe.
• Investigate the issues raised. If necessary, escalate the inquiry to the appropriate level for a meaningful response.
• Report back to the employee about the results of the investigation.
• Do not retaliate against or criticize the employee for raising the questions, even if the employee was wrong.
• Document each step.

Written Contracts

• Do not include anything in a written contract you cannot deliver.
• Know who has written contracts and the contract terms before you terminate.
• Do not modify personnel policies and procedures with written contracts.
• When a written contract is established, follow all of its terms, including those for discipline and termination.

Oral Contracts

• Do not make promises you cannot deliver or promises that modify personnel policies and procedures.
• Develop an appropriate response to inquiries about job security.
• Be honest with applicants and employees.
• Avoid overselling.
Implied Contracts

- Know your company's policies and procedures, and follow them.
- Treat employees fairly and consistently.
- Do not engage in "grade inflation" in evaluating an employee's performance. Give an honest assessment of each employee.
- Do not skip steps in your disciplinary process unless you can articulate the justification for doing so. Remember, not all performance and discipline problems merit progressive counseling. As an example, striking a co-worker may justify immediate termination.

Just Cause

- The following steps can help establish "just cause" and avoid liability:
- Provide advance notice of performance standards and behavioral rules.
- Conduct a fair and thorough investigation into performance deficiencies or misconduct. Include opportunities for employees to present their side of the story.
- Apply company rules and standards consistently to similarly situated employees.
- Implement corrective counseling and progressive discipline before resorting to termination.

Constructive Discharge

Make sure all decisions about an employee's job duties or discipline are:

- supported by good business reasons
- demonstrably related to business goals
- consistent with decisions about similarly situated employees
- non-discriminatory and non-retaliatory

Intentional Infliction of Emotional Distress

- Meet privately with employees to discuss performance, discipline, or termination.
- Act professionally and courteously toward employees.
- If you are angry, send the employee home and "cool off" before discussing the problems.
- Do not make examples of employees.

Links:

U.S. Department of Labor

www.dol.gov


http://www.eeoc.gov