3300 S Demaree Visalia, CA 93277
www.single-point.com 559-625-4800

The At-Will Employee: Five Things to Consider Before Terminating

By Verla Oliver, SPHR-CA

At-will status does NOT take the risk out of terminations!

"He's at-will; why can't I just fire him?"

Since most California employees are presumed to be "at-will," this approach appears to be the simple solution to getting rid of a troublesome employee.

However, this "simple" approach is risky and provides only one layer of defense against a lawsuit for wrongful termination, including retaliation or discrimination.

At-will employment means that either the employer or the employee can terminate the relationship at any time, with or without notice, and for any or no reason **– but only if the reason is not specifically prohibited by law.** Therefore, a manager must use great care when terminating an employee, even one that is at-will.

When contemplating ending the employment relationship with an employee, keep in mind these limitations to at-will terminations:

1. Protected Status

There are state and federal laws that protect employees against termination based on their protected status. In California, the list of protected status categories is lengthy and includes race, religious creed, age, marital status, gender, and medical condition.

If an employee claims his termination was because he is over 40 and a minority, you must prove otherwise. By presenting documentation of the employee's poor performance, you have a much better chance of defending against such a claim.

2. Protected Activity

Employees cannot be terminated for protected activities such as filing a workers' compensation claim, reporting unsafe working conditions, or taking certain leaves of absence. Terminating an employee in close proximity to a protected activity requires substantial documentation regarding the reason for the termination. Relying on an employee's at-will status will not bode well when defending your actions in court; it will look like "pre-text" – that you're trying to cover an illegal reason for the termination.

3. Implied Contract

Telling an employee that she "will play a key part in this business for many years to come" may seem innocent enough, but it could defeat the at-will status of the employee. This phrase leads the employee to believe that her position with the company is guaranteed, when you were just trying to encourage the employee. Avoid making promises you do not intend to keep, or even know if you can keep.

4. Employment Contract

You must adhere to contract terms regarding the length of the employment relationship. Many employers are surprised when their self-authored employment contract does not withstand legal scrutiny.

1025 N Demaree Visalia, CA 93291
www.single-point.com 559-625-4800

Continued..

Make sure your contract language will hold up in court by tapping into legal counsel for advice.

5. Good Faith and Fair Dealing

This is the assumption that people will act in good faith and deal fairly without breaking their word, using shifty means to avoid obligations, or denying what the other party obviously understood.

For example: an employer is prohibited from terminating a long-term employee just before he is due to receive financial benefits (for example, a lucrative company stock option or a large retirement payout). The employer may claim the employee is at-will so can fire him at any time; however, the real reason is to avoid costly compensation or benefits that will soon be owed to the employee.

Terminations can be costly! It's good business to base them on objective standards and legitimate business reasons, rather than on an employee's at-will status. Carefully document the legal reasons for the termination, including substandard performance, verbal coaching and written counseling, and you'll have a much better defense than just relying on the employee's at-will status.

Don't forget to check out our other articles:

- ***Employee Coaching for Success***
  Are you giving your employees the keys to success?

- ***Employee Timekeeping Why Worry?***
  Are you protected against CO$TLY wage and hour claims?