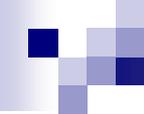




# **Employment-at-Will**

By Sol Garcia



# Caveat

This presentation is provided for informational purposes only, may not be construed as legal advice, and is not binding on any enforcement agency. Consult your designated legal counsel to address any pertinent issues that may affect you.



# Objectives

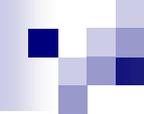
- Define employment-at-will.
- State the difference between employment-at-will and right-to-work.
- Cite and describe erosions to the employment-at-will doctrine.
- Discuss steps an employer may take to limit liability under employment-at-will.
- Share Best Practices

# What is employment at-will & why should I care?

- Employment-at-will is not a law. It is a doctrine based on common law.
- This legal doctrine states that an employment relationship may be terminated by the employer or employee at any time and for any or no reason.
- This means that an employer does not need good cause to involuntarily terminate an employee.
- In Utah, Charter Schools are exempted from the Orderly Termination Act which required school districts to establish and follow due process protocols.

# What is the difference between employment-at-will and right-to-work?

- Right-to-work pertains to state laws which prevent labor-management agreements requiring an individual to join a union as a condition of employment. These laws do not cover involuntary terminations or resignations.
- In right-to-work states (almost half of all states), there may be requirements that a union represents an employee in grievances and negotiations. Railway or airline employees are sometimes not protected by right-to-work laws, even if they reside in a right-to-work state. Federal properties may also be exempt.
- They are NOT the same thing.



# Erosions to at-will Employment

- Federal, State and Local legislation
  - Protected classes: race, color, religion, sex, or national origin, age, disabilities, (sexual orientation-in SLC)
  - Protected concerted activity

# Erosions to at-will Employment cont.

- Common Law: These exceptions are based on the states' case laws and created by the courts.
  - Public policy
  - Implied contract
  - Tort

*An article on employment-at-will and chart of state exceptions is found at <http://www.bls.gov/opub/mlr/2001/01/art1full.pdf>*

# Erosions to Employment-at-Will (cont'd)

## Public Policy:

- Happens when an employee is wrongfully discharged and the termination is against an explicit, well-established public policy of the state. The majority view among states is that public policy may be found in either a state constitution, statute, or administrative rule. Courts have held that employees can not be fired for fulfilling legal obligations to for performing actions considered to be socially useful.
- Example - *Palmateer v. International Harvester Company* – employee claimed he was terminated for providing information to law enforcement about employer criminal acts; the court found that public policy favored the exposure of criminal activity.

# Erosions to Employment-at-Will (cont'd)

## Implied Contract:

- An implied contract is formed between an employer and employee, even though no express, written instrument regarding the employment relationship exists. 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. Examples: policy language, employment offers, supervisor statements.
- Example - Toussaint v. Blue Cross & Blue Shield of Michigan – the employer had a policy of just cause terminations and did not follow established procedures.

# Erosions to Employment-at-Will (cont'd)

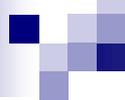
**Tort:** Tort exceptions include intentional infliction of emotional distress, defamation and an implied covenant of Good Faith and Fair Dealing.

- 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.
- Example - *Cleary v. American Airlines* – An employee with 18 years of service was terminated without any reason. 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.”



# General Guidelines Reduce Employer Liability

- Use disclaimers in the new hire process (offer letters and new hire orientation) and require signed acknowledgements.
- Outline clearly employment expectations.
- Implement a progressive discipline policy.
- Adopt an internal grievance procedure
- Train supervisors.
- Remind managers to document disciplinary actions.
- Include human resources in the disciplinary process.
- Review situations carefully and seek legal guidance prior to making adverse employment decisions.



# Checklist for Employers

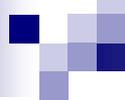
Before taking adverse employment actions ask yourself:

- Is the proposed action fair?
- Is the proposed action consistent with employer policies and practices?
- Is the proposed action made based on business needs (not made due to other factors, i.e. discriminatory reasons)?
- Is there good documentation to support items 1-3 above?



# BEST PRACTICES

- Do not discriminate against a protected class
- Adhere to the letter of the laws
- Following the Spirit of the laws
- Have employment policies
- Communicate, follow and expect employees to follow those policies
- Be consistent with employment practices
- Hire At-Will



# **BEST PRACTICES cont.**

- Communicate At-Will to employees
- Have clear documents of the employment relationship and business reasoning for employment decisions
- Have fair expectations and clarify expectations
- Address and resolve workplace problems



# Hiring At Will

- Keep ads bias-free
- Make job descriptions lawsuit proof
- Watch out for Resume fraud and make the application form sweat out the truth
- Protect your rights
- Make the most of interviews
- Beware of making promises or offers-IMPLIED contract
- Make tests work for you



# Hiring At Will cont.

- Run background checks
- Gain cooperation-get written permission from applicant to check background and references
- Avoid negligent hiring
- Beware of contracts

# Firing At Will

- Avoiding implied contract
- Avoid violations to public policy
- Don't react; think clearly and calmly
- Base your dismissal decision strictly on sound business reasoning
- Document, Document, Document
- Make the termination defensible



# Questions & Comments

Thank You for your participation!