

EMPLOYEES AT WILL LIMITING EXPOSURE TO WRONGFUL TERMINATION LIABILITY

California is an at-will employment state which basically means that either the employee or the employer may terminate the employment relationship at any time. California's Labor Code contains the following language :

“An employment, having no specified term, may be terminated by either party on notice to the other. Employment for a specified term means employment for a period greater than one month.”

The safe standard is “Just Cause”. Cause means a fair and honest cause or reason, acted on in good faith by the employer. A California Court of Appeals recently held that opening a competing business constituted a lack of loyalty and creates sufficient conflict of interest as to be a just cause.

Employees go to see attorneys when they feel that they have not been treated fairly. So, by treating employees fairly and terminating for just cause only the employer has a better chance of avoiding wrongful discharge litigation. The California Supreme Court recently ruled that if an employer terminates an employee based on a good faith determination that employee misconduct occurred, there is no wrongful termination claim, even if the employee later proves the misconduct did not take place. (In the case, an employee accused of sexual harassment was fired after an extensive and well documented investigation. At the trial, the former employee testified that the acts were consensual. Since the investigation was done well, there was no employer liability.)

Discrimination statutes - State and Federal statutes prohibit discrimination based on sex, race, religion, age, etc.

Retaliation Statutes - Also, an employee cannot be terminated in retaliation for refusing to break a law (improperly dumping hazardous material, refusing to accept less than minimum wage, etc.) or for whistle blowing to a government agency if the employee believes the employer is breaking the law.

Protected Activities - An employee cannot be terminated for engaging in protected activities, such as garnishment of wages, voluntary participation in a drug or alcohol rehab program, jury duty, time off for certain children's school activities, etc.

Employment Development - An employee is entitled to seek information about their rights under Unemployment Insurance, testify in UI proceedings, etc.

Termination in violation of public policy - An employee has rights based on what are considered to be public policy considerations, such as refusal to perjure oneself, testifying in civil or criminal proceedings, refusal of sexual relations, reporting concerns to state safety +/- health officials, making a wage claim to the Labor Commissioner.

CONTRACTS

In every employment contract, written, oral, or implied, there is an implied good faith covenant. In other words, decisions should be fair and similar employees (same job classification, similar seniority and rank) should be treated in a similar manner.

Written contracts must be honored. May want to have a specific limitation on when where and under what conditions the arrangement may be terminated.

Oral contracts are just as binding. These are most often created in the job posting or advertisement or in the interview itself. An applicant may ask about job security and an answer like "As long as you do a good job, you will have a job here." Creates an oral contract. This contract prevents termination for even economic reasons if the employee is in fact doing a good job.

Implied contracts are based on length of service and other indicators of job security such as raises, promotions, bonuses, etc.

An employee with an oral or implied contract may not be terminated without just cause.

Review employee handbooks, job applications, work rules, etc and eliminate any promises of fair treatment, progressive discipline and permanent employment.

Suggested at-will language for your employee handbook or employment application is as follows:

"You are free to resign at any time, just as the company is free to terminate your employment for any reason at any time. This provision may be modified only in writing." Signed by you.

"I understand that my employment can be terminated at any time, with or without cause, and with or without notice, at the option of either the company or myself." Signed by the employee.

Remember that an oral contract is as binding as a written one. Most people get into trouble during the interview itself. Avoid - both during the interview and at any other time - references like "you have the potential for a good future here", "as long as you perform well, you will have a job", etc. An employee with an implied contract may not be terminated without just cause. Length of employer

is a major factor in terms of how the courts view any termination decision. Other considerations include raises, promotions, etc.

Use standardized language during the interview to help you avoid a slip up.

Avoid references to “job tenure”, “career path”, “the future”, “security”, etc.

Consider not using an introductory period and avoid the term “probationary period”. To the employee, once the probationary period is passed there is an implication of permanence. If you decide that you still want to use one, consider language such as:

“An introductory period is a training and get acquainted period, completion of which does not guarantee continued employment. Following completion of the period, you still may resign and the company still has the right to terminate your employment at any time, with or without cause.”

Do evaluations on a timely basis.

Standardize the method for termination and do not deviate it. The fact that you do not promise progressive discipline does not mean that you should not follow such a course of action. In fact, it is still one of the most effective ways to avoid lawsuits.

If an employee is terminated, attempt to obtain a release and/or settlement agreement from the employee. Additionally, you should have the employee sign a simple form that gives the date of termination. Labor attorneys are split as to whether or not you should put the reason for the termination on the form. My personal feeling is that it's best not to.

Make sure when you terminate employment that you have taken the same action in similar situations.

Above all, make sure that you document all issues with your employees. It is definitely time consuming, but it's your best insurance.

Constructive discharge - Making life miserable for an employee so that they will quit. Conditions must be sufficiently extraordinary and egregious so that a reasonable person would resign. Employee must notify the employer of these conditions prior to resigning. Demotion, pay cut are not necessarily sufficient for the employee to win the case.