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At-Will Employment: The Myth, the Truth, and Everything In Between

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At-Will Employment Basics

- All employees are At-Will...unless they are not.
- Under Colorado law, at-will employees may be terminated at any time without cause and without a hearing.
 - “Traditionally, the law has accorded employers, including government agencies, broad discretion in the discharge of employees who are terminable at will.” *Widder v. Durango Sch. Dist. No. 9-R*, 85 P.3d 518, 526 (Colo. 2004).
 - Absent statutory or contractual requirements, at-will employees are not entitled to notice or a hearing when facing dismissal.

At-Will Employment Basics

- At-will employees typically do not have a property interest in their employment.
- There is no expectation of continued employment.
 - Such expectations generally cannot be created by other employees or officials.
- **These presumptions of at-will employment, however, should not be considered absolute, but rebuttable under certain circumstances.**

THE MYTH: *“You are at-will, so I can just fire you!”*

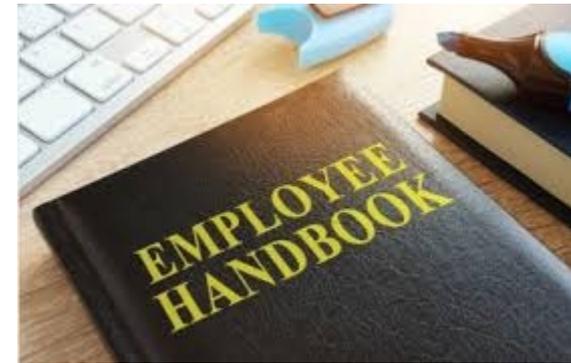


THE MYTH (cont.)

- Many employers think that at-will employment means they can discharge an employee for no reason at all.
- While in theory that may be true, there are several necessary considerations before taking any adverse employment action, including termination, of an employee – even an at-will employee.

THE TRUTH: Before firing an employee, you must consider...

1. Is the Employee in a protected class?
2. Does the Employee have an employment contract?
3. Does the Employee Handbook or Policies call for any specific process before terminating or disciplining an employee?
4. Have you followed  your own required processes?



Is the Employee in a Protected Class?

- If an employee is in a protected class, in order to rebut a claim of discrimination, an employer must have valid, non-discriminatory, non-retaliatory reasons supporting disciplinary action.
- Unlawful reasons for discharge (even if at-will) include:

Race	Age
Gender	Disability
National	Sexual
Origin	orientation
Religion	Retaliation
Pregnancy	

Legal Exceptions to At-Will Employment

- **Public Policy Limitation** – this limitation is grounded on the principle that an employer should be prohibited from discharging an employee for reasons that are contrary to substantial and widely accepted public policies.
 - Wrongful discharge in violation of public policy is shown when an employee can prove:
 - a) Employer directed the employee to perform an illegal act as part of the employee's work-related duties or prohibited the employee from performing a public duty;
 - b) The action would violate statute relating to public health, safety, or welfare or would undermine public policy related to employee's basic responsibility as a citizen or right as a worker;
 - c) The employee was terminated as a result of refusing to perform the act directed by the employer;
 - d) The employer knew or should have known that the employee's refusal to comply with the order was based on the employee's reasonable belief that the action ordered was illegal and/or contrary to policy.

Hoyt v. Target Stores, 981 P.2d 188, 190-91(Colo. App. 1998)

Public Policy Exception Examples

- Workers' compensation claim
- Reporting a safety violation
- Joining a  UNION
- Whistle-blowing
- Complaining about legal violations
- C.R.S. §24-34-402.5 – termination because of employee engaging in lawful activity off employer premises during nonworking hours (unless certain exceptions apply).



Creation of Contract



- The two most common ways in which employees challenge their at-will employment status is through argument that an **express or implied contract** was created and by arguing promissory estoppel.
- So, even if you have a disclaimer about these issues, certain language in your policies and/or conduct by supervisors can provide employees with an argument that their employment was not actually at-will.

Express Employment Contracts

An employer can alter the at-will employment status of any employee at any time by entering into an expressly written, or in some cases, oral contract.

- General assurances of a secure job ~~≠~~ contract.



- To establish a wrongful discharge claim based on breach of an express contract an employee must prove:
 - 1) The existence of a contract;
 - 2) Justification for nonperformance;
 - 3) Failure to perform the contract; and
 - 4) Damages to the employee.

Express Employment Contracts (cont.)

- Executive-level employees (District Manager, Fire Chief etc.) often have a written employment contract.
- Considerations:
 - Does the contract set out a different disciplinary or termination process from your Employee Handbook?
 - Does the contract provide for a severance upon termination?

Implied Employment Contracts

Inferred from acts or conduct giving rise to the existence of an enforceable contract.

- **Caution:** avoid making promises that limit the employer's right to terminate the employment relationship for any reason or no reason at all.



- **Examples:**
 - Promises concerning the length of employment;
 - Promising that only certain events will lead to discharge;
 - Promising that discharge will only occur after certain progressive disciplinary steps are taken.

Promissory Estoppel

- Even without an express or implied contract, courts may still find an employee can enforce termination procedures set forth in a Handbook under a theory of promissory estoppel.
 - To prove this claim, an employee must show:
 - 1) The employer should have reasonably expected the employee to consider the employee handbook as a commitment from the employer to follow the termination procedures outlined therein;
 - 2) The employee reasonably relied on the termination procedures to his/her detriment; and
 - 3) Injustice can be avoided only by enforcement of the termination procedures.

Why Your Employee Handbook is SO Important



An employee handbook or manual, regulations or policies your District uses are most often the source of an employee's attempts to overcome at-will employment status.

Why Your Employee Handbook is SO Important (Cont.)

- If an employee proves the existence of an express or implied contract or promissory estoppel, the employee may be able to enforce the promises/procedures or assert a claim for due process violations if procedures cannot be satisfied.
 - Deviations from policy can be evidence of discrimination, wrongful discharge, breach of contract, promissory estoppel, or even can create constitutional claims under the 14th Amendment.

Why Your Employee Handbook is SO Important (Cont.)

- Examples of written policies & procedures that may be enforceable/actionable:
 - Termination procedures;
 - Progressive discipline procedures;
 - Promises related to compensation procedures;
 - Processes related to investigation of allegations of discrimination and/or retaliation;
 - Promises to provide a workplace free from sexual harassment or other abusive conduct;
 - Promises regarding the prohibition of retaliation for reporting or participating in discrimination investigation;
 - Drug testing policies;
 - Confidentiality policies (usually involving personnel investigations).

Why are These Things Important?



- To Avoid a Lawsuit OR to Win a Lawsuit
 - Generally, juries do not like employers and really dislike an employer who fired an employee for no reason.
 - Personnel policies are an issue in almost every employment case and can create disputed issues of fact that must be decided by a jury.
 - Policy violations make the employer the issue, and distract from the reasons why an employee was terminated.

So...How Do We Terminate An Employee?

1. Review and follow your own written policies.
2. Consider getting a **Release and Separation Agreement** from the employee.



THE TRUTH: FINAL THOUGHTS

- You can fire, suspend, terminate at-will employees.
- **BUT** only *after* consideration of all of the circumstances and please please please **contact your attorney for guidance before taking action.**
- Consider contacting your insurance carrier. They may provide pre-loss coverage in certain circumstances.
- If your employment handbook/manual or other policies are old, outdated, or have not been reviewed in a while, GET THEM TO AN ATTORNEY FOR REVIEW!



QUESTIONS?

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