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## AT WILL AT WORK

by D. Gregory Valenza

In California, Labor Code Section 2922 recognizes employees and employers presumptively may end their relationship "at will." Now and then, someone writes an article or introduces legislation proposing the end of employment at will. The advocates have their reasons (e.g., at-will employment is anachronistic, meaningless because of the numerous exceptions, unfair etc.). They are wrong. At-will employment remains a legally significant principle, even with the many exceptions the courts and legislature have applied to it.

### What Is Employment at Will?

At-will employment is based on the freedom to make contracts and enforce them in accordance with their terms. An employee provides labor only willingly. A worker typically may end the relationship at any time, for any reason; hence, "at will." The modern definition of at-will employment is that an employer may discharge workers for any lawful reason, at any time, and either with or without notice or cause. At-will employment is not a license to fire an employee for an illegal reason. Employment discrimination, retaliation against whistleblowers and other decisions to discharge that are prohibited by law or public policy, are just as illegal whether the employer has a contract restricting the right to terminate or retains at-will status.

### At Will in Practice

Critics say at-will employment is unnecessary or even silly. After all, no rational employer fires a worker for "no"

reason. Arguing the literal interpretation of the right to fire "at will" is a rhetorical gambit, or maybe just naïve. An employer of course will have a reason before firing an employee. The courts have said that at-will employers may apply "progressive discipline" - such as verbal and written warnings - before terminating a worker. Common sense aside, it is hardly a profitable strategy for employers to invest time and money recruiting and training workers only to cast them aside for arbitrary reasons, even if they are legally entitled to do so.

What, then, is so important about protecting the right to fire arbitrarily or for "no" reason? In essence, the at-will employer gets to say when enough is enough. Management decides the grounds, whether progressive discipline is necessary, and whether the employee deserves another chance. The employee's lawyer, a union, an arbitrator, a jury or a personnel board has no standing to challenge the decision.

The employer that promises to fire a worker only for "cause" earns the right to submit its justification for discharge. Juries, arbitrators and personnel boards may and do substitute their judgment for the employer's. Their opinions are hard to challenge. The appellate courts are unlikely to overturn a jury's conclusion that an employer did not have sufficient cause to take action. Arbitrators' decisions, too, typically escape judicial review. As any manager in a unionized or public sector work environment knows, it does not matter whether the employee was warned or whether a fired employee engaged in serious misconduct. Even decisions to

reduce the workforce may not be immune from scrutiny, not only for whom is laid off, but also for whether the decision itself is justified.

The court of appeal's decision in Binder v. Aetna LifeInsurance Co., 75 Cal.App.4th 832 (1999), illustrates the consequences of abandoning at-will employment. Binder was an Aetna employee with a 30-year record of good performance. He submitted an admittedly false expense report for \$300 in travel expenses, to collect on a bonus he was in fact due. Why? He did not have a receipt from the trip he actually took. Aetna discharged him for the false report. Aetna conceded for purposes of summary judgment Binder could be fired only for "good cause."

Binder sued Aetna for discrimination, as well as being fired without sufficient "good cause." Aetna argued that firing an employee for falsifying an expense report was adequate "cause" for discharge as a matter of law. The Court of Appeal disagreed and sent the case to a jury for trial: "[A]n inference could be drawn that Aetna merely seized upon the Rancho Bernardo "invoice" incident as a justification for terminating plaintiff, which Aetna wanted to do for other reasons. ... In view of the possibility of such an inference, summary judgment should have been denied, even though this record suggests a significant possibility of a meritorious defense, and bearing in mind the trial court's duty to ensure that a jury does not simply usurp the managerial role." So, the court held that it would be up to a jury to decide whether Aetna's facially good reason to discharge was good

enough. The trial court's comments before granting summary judgment were not encouraging: "He was with you for 30 years, and you fired him on a very rigid, very rigid application of a ... what I think 12 people are going to find a pretty minor point."

There are other reasons to preserve at-will status. In lawsuits alleging employment discrimination, retaliation or violation of public policy, the employer prevails if it establishes a legitimate, non-discriminatory reason for taking action. If the "legitimate reason" is measured under a heightened standard, the employer's burden naturally is that much higher.

At-will employment also means employers have the right to change employment terms without negotiating modifications. An employer may modify an at-will employee's pay, demote the worker, etc. merely upon providing reasonable advance notice. The at-will employee accepts the modification by continuing to work after the employer implements the change.

#### Protecting At-Will Status

In California, a valid agreement generally may be express or implied. But an implied contract cannot contradict a contemporaneous express agreement. So, employers should create express agreements of employment at will, whether in an offer letter or an employee handbook. Boilerplate language in an application may not be sufficient, but it does not hurt.

A contrary implied agreement formed after the express contract may effectively modify the original express contract of at-will employment. To avoid unintended modifications, an at-will employment agreement should be "integrated," in that it is the parties' entire agreement on the subject. Additionally, express limitations on modifications will be enforced. It is good practice to limit any modifications to at-will status to an express writing.

#### Defining 'Cause'

Employers may have reasons for contractually limiting their discretion to terminate employment. An employee may have special skills. The employer may wish to provide job security in exchange for loyalty. The employee may

negotiate such a term in exchange for coming aboard.

In those circumstances, employers should consider including in the contract a specific definition of what "cause" means. A court will attempt to effectuate the parties' intent. Absent proof of that intent, the fact finder will apply a vague standard the Supreme Court synthesized in Cotran v. Rollins Hudig Hall International Inc., 17 Cal.4th 93 (Cal. 1998): "fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion ... supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond."

This standard provides fact finders broad discretion to reverse a legitimate management decision.

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