

## PERSONNEL NOTEBOOK

For Your Most Important Resource—The Human Resource

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## EMPLOYMENT AT WILL Does it still work?

About a year ago we received a call at our office from a recent college graduate who had been with his first employer for 8 months. He was angry and had a surprising question; “My company just fired me”, he said, “Don’t they have to get permission from the government to do that?”

We explained to him that his employment with the company was “at will”. But a question we then asked ourselves was, how did we reach the point where an employee might think that the government controls employment? Isn’t employment in the United States still “Employment At Will (EAW)?”

Well yes, and no. We might say “Its kind of complicated”.

Just what is Employment At Will and is it the law or not?

### What Is Employment At Will?

In the simplest of terms, The Employment At Will (EAW) Doctrine says that employment is considered to be voluntary and indefinite for both the employee and the employer. The employee may cease his/her employment with you at any time and for any reason, and you, the company,

may also cease their employment at any time and for any reason.

And either party may end the employment without notice. Sounds pretty simple. But then why all the fuss, why is it so complicated? There are three primary reasons.

### Three Reasons For Confusion.

- 1 The explosion of employment law suits against companies for discriminatory terminations has led to a general belief that it is very difficult (and scary) to fire an employee.
- 2 The expansion of federal and state regulations and restrictions focused on terminations has led to a belief by some, that government controls employment.
- 3 There are now so many restrictions on the right to fire that many companies feel that there is little meaning left in EAW

### First Steps

Before we proceed to identifying those regulations and restrictions, lets look at a few good guide lines about EAW.

1 Always state your declaration that you are an Employment At Will company. Put it in your employee handbook in at least three places. Have the employee sign a signature sheet for the handbook and have the EAW statement on that signed sheet. Recognize that the courts tend to believe that you have abandoned your rights to EAW, unless you establish that you are claiming those rights and that you have taken clear, definitive steps to inform your employees of your EAW position.

- 2 Have a good business reason (Just Cause) for terminating employment. To protect your company use the following guidelines:
- Be sure the employee knew in advance that what he was doing was wrong and/or what he was not doing that he should have been doing.
  - Give the individual an opportunity to explain and to take his explanation into consideration.
  - Ask yourself honestly if this rule or requirement is frivolous. What really is the impact on the company, the employees or the clients?
  - Consider the individual's employment record.
  - Are you treating this employee differently from others who have done similar things?
  - Re-examine your motives for this termination. Are they really business related? Do they violate any of the regulations listed below?

3 Be particular whom you hire with an employment agreement or contract. Creating an employment contract may eliminate your Employment At Will rights. As a general rule, you want to state that there is no contract of employment, there is no guarantee of employment and that employment is "At Will."

Have a specific and defined reason to enter into an employment contract. Ask yourself, "Do the policies and procedures in my employee handbook represent what I expect from this employee? If not, can they be altered to do so?"

There may be a position, or even a number of such positions in your company, that may work best under an employment contract. Positions such as, Designers, Engineers or Sales Reps are examples.

Or there may be specific situations that are best resolved with an employment contract. Your employment attorney can advise for your specific case. But again, those employees hired under employment contracts may lose their Employment At Will status.

## **Regulations and Restrictions Against EAW.**

**Age Discrimination In Employment Act**  
Prohibits age discrimination against individuals who are at least 40 years of age.

**Americans with Disabilities Act (ADA)**  
Prohibits discrimination against qualified individuals who have disabilities, because they have disabilities.

**Bankruptcy Act**  
Cannot discriminate against an applicant or employee solely because of bankruptcy or the bad debts they had before the bankruptcy.

**Civil Rights Act**

Prohibits discrimination based on race, sex, color, religion or national origin.

**Consumer Credit Protection Act**

Prohibits discrimination for garnishment of wages for any one indebtedness.

**Employee Polygraph Protection Act**

Places significant requirement on the use of polygraph tests in employment.

Prohibits termination for refusing to take polygraph.

**Employee Retirement Income Security Act (ERISA)**

Prohibits terminating employees in order to prevent their retirement vesting.

**Fair Credit Reporting Act**

Some states allow companies to terminate an employee based on their credit report, but the federal act regulates the process under which you do so.

**Fair Labor Standards Act (FLSA)**

Prevents termination for filing complaints and exercising wage and hour rights under FLSA.

**Family and Medical Leave Act (FMLA)**

Prohibits termination for pregnancy or exercising rights under FMLA.

**Immigration Reform and Control Act (IRCA)**

Prevents discrimination based on national origin or citizenship status.

**Judiciary and Judicial Procedure Act**

Prohibits discrimination or coercion of regular-full time employees because of jury duty.

**Labor Management Relations Act (aka Taft Hartley Act)**

Prohibits discrimination for joining or forming a union.

**Uniformed Services Employment and Reemployment Rights Act (USERRA)**

Prohibits discrimination or retaliation against individuals who have served in the military or for refusing to rehire after service time.

**Vietnam Era Veterans Readjustment Assistance Act**

Prohibits discrimination against Vietnam era veterans and specially disabled vets. For companies with federal contracts of \$25,000 or more.

**Whistle Blower Protection**

Prohibits discrimination against, and provides additional protection for, employees who refuse to engage in unlawful acts or who report illegal acts and violations to the proper authorities (not just someone inside the company)

The following are examples of the acts most associated with Whistle Blowers.

They are enforced by the Department of Labor

- **Clean Air Act**
- **Comprehensive Environmental Response, Compensation and Liability Act.**
- **Energy Reorganization Act**
- **Occupational Safety and Health Act (OSHA)**
- **Safe Drinking Water Act**
- **Sarbanes-Oxley Act**
- **Solid Waste Disposal Act**
- **Toxic Substance Control Act**
- **Water Pollution Control Act**

**Worker Adjustment And Retraining Act Notification Act (WARN)**

Requires 60 days notice before closing down a workplace that has a significant impact on local employment. Prohibits termination of employees without this notice.

**Retaliation**

Although, not a specific law, almost all new employment regulations now include a retaliation clause. The intent is to protect the employee from vengeful actions taken against him/her as a result of exercising their employment rights or

when taking legal actions against the company.

### **Two Weeks Notice?**

Some companies have a policy in their employee handbook stating that employees leaving the company are *required* to give 2 weeks or 30 days advance notice *Requiring* them to do so may void the Employment At Will status. It should be *requested*. An employee who is supposed to have the right to cease employment at any time for any reason shouldn't be told that he/she may not do so.

However, there are many things you can do. You may state that employment references will reflect this lack of notice. You may withhold any expected severance pay or bonuses. In some states employers do not pay a departing employee for accrued but unused vacation time.

But in about 30 states the law identifies vacation as wages. In those states, all accrued unused vacation must be paid upon termination for any reason.

If you are in a state that does not restrict this and you intend to refuse payment of vacation at termination, you should state your policy on this in your employee handbook.

### **Employment At Will Statement**

Recent court decisions have reinforced the requirement that you boldly and clearly affirm your declaration that you are an EAW employer. One court ruled that the EAW statement must be listed at least 3 times, and at least once all by itself, in the employee handbook.

The following is an example of an EAW statement. Ideally, it should be in the front of the handbook, in clear sight, again

somewhere in an appropriate text and at the end on a signature, tear-off sheet.

## **EMPLOYMENT AT WILL**

**ABC Manufacturing Inc. is an "Employment At Will" employer. You may terminate your employment with us at any time and for any reason, and we may also terminate your employment at any time and for any reason.**

**This "Employment At Will" status may only be altered by written agreement between you and The Company and must be signed by the President.**

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