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What happened to at will?

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"So I can fire him, right?" This is the hopeful, leading question many clients ask when they call to see if I agree with their decision to terminate an employee. As an employment lawyer, I am often left in these situations with the generally thankless task of explaining to clients the reasons why it would be imprudent to terminate their employees. This unpopular advice is often met with a response such as, "What do you mean? This is employment at will. I don't even need a reason to fire this person."

And there it is, the bane of my existence: the comforting dream of many employers that their employees are "at-will employees" and that there is such a thing as "employment at will."

The common law meaning

At common law, the legal principle of employment at will traditionally meant that an employer could fire an employee at any time for any reason or no reason at all. This "black-letter law" is part of every employment lawyer's vocabulary, as well as that of most of their clients. Indeed, digests have been published that purport to provide authoritative lists of which states in this country are "at will" states and which are not.

But in the context of today's workplace, the doctrine of "employment at will" has simply lost its meaning. Any employer believing that it does not need a good reason to terminate an employee is just kidding itself.

Terminating an employee almost automatically subjects employers to a wide range of potential liability. Society, through legislation, has placed numerous restrictions on an employer's ability to terminate its employees.

For example, employers can incur liability if they terminate employees for discriminatory reasons or in retaliation for exercising rights under federal, state or local discrimination laws, wage/hour laws or labor laws. No one questions that an employer should not, for instance, be able to terminate an employee on the basis of his or her race or sex. These laws exist because society believes that it is a good thing that employers are prohibited from terminating employees for such reasons.

Society, however, cannot always agree on what is or is not an acceptable reason for terminating an employee. Witness the recent storm of controversy over a Michigan employer's decision to terminate employees at his company who continue to smoke. Certainly, this employer's decision to terminate smokers was consistent with the employment-at-will doctrine. However, a large segment of the population does not believe an employer should be able to dismiss an employee for conduct engaged in outside the workplace.

State legislation

To this end, many state legislatures have passed laws prohibiting employers from terminating the employment of individuals for smoking or engaging in other activity away from the workplace. Currently, there is no such law in Michigan, but there are efforts now to pass one in that state because of this employer's decision to terminate smokers.

However, the restrictions placed on employers by laws prohibiting termination for certain reasons go far beyond the letter of the law. This is the case because the private rights of action allowed under such laws place additional limits, practically speaking, on an employer's ability to terminate its employees. Not only does an employer have to make sure it is not violating any of these laws when it terminates an employee, it also has to worry about whether a terminated employee will bring a cause of action against it under any of these laws alleging that a violation has occurred.

Expense of litigation is at issue

From a practical perspective, it matters not whether the employee will actually be able to prevail on his or her claim. Prior to terminating an employee, an employer has to answer the question whether it is willing to accept the expense and inconvenience of litigation that may result from the termination.

Thus, the doctrine of employment at will has been dramatically undermined by the wide range of restrictions placed on an employer's ability to terminate its employees and the ability of employees to assert (often frivolous) legal claims against their employers. In this context, it simply does not make sense to continue to use the term "employment at will." An employer cannot fire an employee at any time for any reason or no reason. The prudent employer will terminate employees only for good reasons that it will be able prove in a court of law through documentary evidence and testimony.

The fact of the matter is that we live in a world of "litigation at will" where any employee can sue his employer for any reason or no reason at all, and the burden is on the employer to go to the expense and inconvenience of trying to demonstrate that the employee does not have a viable legal claim. And how does an employer generally defend against a claim of, for example, discriminatory or retaliatory discharge? The employer is required to demonstrate that it had a legitimate nondiscriminatory or nonretaliatory reason for the termination. In other words, the employer must have a good reason for terminating its employee.

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