

Employment-at-Will

In all U.S. states, with the exception of Montana, employment relationships are presumed to be “at-will.” This means that in an employment relationship for no specific duration, an employer may terminate an employee at any time, for any reason (except an illegal one), or for no reason at all. Similarly, an employee is free to leave a job at any time for any or no reason with no adverse legal consequences.

Modification by Contract

The at-will presumption is a default rule that can be modified by contract. For example, a contract may provide for a specific term of employment or allow termination for cause only. Union contracts generally have provisions that prohibit termination except where there is just cause. **Just cause** termination must be based on reasonable grounds, with a fair and honest cause or reason, regulated by good faith. Termination based on just cause may be based on one of the following two categories:

- **Misconduct.** Misconduct includes, but is not limited to, the following:
 - Theft.
 - Workplace violence.
 - Intoxication at the workplace when required to work.
 - Bringing firearms to work.
 - Engaging in sexual or racial harassment.
- **Unsatisfactory performance.** Examples of unsatisfactory performance amounting to just cause have included the following:
 - Excessive absenteeism.
 - Poor work quality.
 - Failure to meet numerical production standards.

Serious misconduct is often subject to immediate dismissal, even under a union contract. However, unsatisfactory performance generally will not result in discharge until the employee has progressively been a discipline problem, been notified of the persistent problems, and failed to improve.

Some written employment contracts may specifically limit the circumstances in which an employee may be terminated. In some circumstances, a contract may imply that the employee may only be terminated for good cause. A valid, good cause termination or discharge must be based on a justifiable reason. For example, good cause termination may be established when based on the following:

- Unreasonable and excessive absenteeism.
- Recurring and incurable discipline problems.
- Corporate restructuring which requires layoffs.

Written employment contracts that specifically limit the circumstances in which an employee may be terminated are enforceable in court.

Common-Law Exceptions to Employment-at-Will

Over the years, courts have carved out exceptions to the employment-at-will doctrine. The three major common law exceptions are:

- Public policy.
- Implied contract.
- Implied covenant of good faith and fair dealing.

Important: Not all of the exceptions are recognized by all jurisdictions. Review state information [here](#).

The Public-Policy Exception

The most widely recognized common law exception to the employment-at-will doctrine protects employees against adverse employment actions that violate a public interest. The employee actions protected by the public-policy exception generally fall into one of the four following categories:

1. **Refusing to perform an act prohibited by state or federal law.** For example, an employee refusing to commit perjury at a trial.
2. **Reporting a violation of the law or engaging in other whistleblower activities.** For example, reporting an employer's health and safety violation or fraudulent accounting practices.
3. **Engaging in acts that are in the public interests.** For example, joining the National Guard, performing jury duty, or complying in an investigation of the employer.
4. **Exercising a statutory right.** For example, filing a workers' compensation claim.

States that recognize the public-policy exception vary significantly in how broadly or narrowly it is construed. The majority of states accept only public policy expressed in state constitutions and statutes. As a result, many states have codified their public-policy exception by adopting antiretaliation provisions to their employment-related statutes (i.e., wage and hour, occupational safety and health, workers' compensation, unemployment insurance, employment discrimination). A minority of states allow additional sources that may include administrative rules and regulations, professional codes of ethics, and broader notions of public good and civic duty.

Employers must be aware of discharges in violation of public policy because the lawsuits are often treated similarly to personal injury cases. In these cases, plaintiffs may recover additional compensation for mental anguish and punitive damages. The purpose of punitive damages is to punish the defendants for overt or intentional wrongdoing by awarding additional damage amounts to plaintiffs that greatly exceed the actual economic damages of lost wages and benefits.

The Implied-Contract Exception

The implied-contract exception to the employment-at-will doctrine is recognized in a majority of states. Under the implied-contract exception, oral or written assurances given to an employee regarding termination may create an implied contract prohibiting termination except for certain circumstances.

Implied contracts are inferred from the conduct of employer and employee. For example, an implied employment contract may be based upon the length of employment and indicators of job security an employee has received. Indicators of job security include promotions and bonuses, which indicate an employee has been doing a good job and has a right to feel secure in a job.

Even when employers made no specific promises, juries have determined that an implied contract existed, suggesting that employees would not be discharged except for good cause. Often, courts decide that such a promise exists even where the parties themselves clearly did not actually intend to create a contract. Frequently, juries must decide whether the employer had created a reasonable expectation that an employee would be discharged only for good cause.

The following list demonstrates the types of evidence juries have considered in determining whether an implied employment contract was created between the employer and employee:

- Employee handbooks that establish an initial employee probationary period.
- Disciplinary policies that state employees will be discharged only for particular offenses.
- Progressive disciplinary policies that allow employees chances to improve their performance where, in fact, the employee was not given such a chance.
- Handbooks or records that state fairness or special consideration will be given to employees because of longevity or seniority.
- An employee's work history, which reflects regular merit raises, good performance evaluations, praise, and promotions.
- The employer's practice of discharging employees only for good cause.
- An industry-wide practice that employees are treated fairly or terminated only for good cause.

Employers must affirmatively and openly declare the applicable at-will employment policy to prevent claims of contractual rights and violations. All employers should regularly review company handbooks, policies, and procedures, even when only supervisory employees receive such material, to ensure express or implied contracts may not be assumed from the employer-provided information. Employers must make sure that these documents do not contain promises or obligations to which the employer is unwilling to commit. Employers should avoid words such as "will," "shall," and "must" when stating obligations towards employees.

The Implied Covenant of Good Faith and Fair Dealing Exception

A minority of states recognize an implied covenant of good faith and fair dealing exception to the employment-at-will doctrine. Under this exception, every employment relationship contains a covenant of good faith and fair dealing. This exception operates under the theory that one party to the contract must not act in **bad faith** to deprive the other party of the benefits from the agreement. On the contrary, employment decisions should be made on a fair basis, and employees who are similarly situated should be treated in the same manner. **Similarly situated**, in relation to employment, means employees in the same general job categories and with similar seniority and rank are similarly situated and must be treated as such.

Most good faith and fair dealing cases involve abusive or highly offensive discharges, including, but not limited to, the following types of discharges:

- Termination of an employee to avoid paying a large sales commission.
- Termination of an older employee to avoid paying retirement benefits.
- Retaliation against an employee for refusing to become romantically involved with a supervisor.
- Retaliation for publicizing or alleging wrongdoing on the part of the employer.

Judicial interpretations of this covenant have varied from requiring just cause for termination to prohibiting terminations made in bad faith or motivated by malice.

Additional Tort-Based Claims Limiting At-Will Employment

At-will employees may also bring claims against their employers for the following torts:

- **Intentional interference with a contractual relationship.** Interference with contractual relationships involves allegations that individual supervisors or managers interfered with the contractual relationship between employees and their employer. An example of such a claim is where a supervisor knowingly communicates false information about an employee to higher

management that results in the termination of the employee. Normally these claims are brought against supervisors or managers. This tort is not recognized in all jurisdictions.

- **Intentional infliction of emotional distress.** The Restatement (Second) of Torts defines this tort as extreme and outrageous conduct that intentionally or recklessly causes severe emotional distress. In many courts, even serious emotional and psychological abuse may not be outrageous enough to establish liability. The claim of intentional infliction of emotional distress includes allegations of a purposeful and extremely abusive discharge of the employee. The employee would also claim the discharge was conducted in a degrading and humiliating manner. Employers can reduce emotional distress liability by :
 - Avoiding anger in administering discipline.
 - Requiring review of a contemplated disciplinary decision by another supervisor or manager who has no personal bias against the employee.
 - Applying common sense.
 - Documenting, signing, and dating every critical incident.

Promissory Estoppel

Promissory estoppel is an equitable remedy used by courts to protect a party where there is not an otherwise enforceable contract. Promissory estoppel intended to compensate an injured party who relied on a noncontractual promise to the party's detriment. Promissory estoppel is used when there is no legal basis for the injured party to be made whole.

Under the doctrine of promissory estoppel, an employer may be prevented from firing an employee, or required to pay damages, if the employee can show the following:

- The employer made a clear and unambiguous promise of employment.
- The employee relied on this promise.
- The employee's reliance was reasonable and foreseeable.
- The employee was injured as a result.

Consider the following example of an individual who receives and accepts a job offer, quits his current employment, and then relocates his family to the city where the new job is located. Before his first day with the new employer, he is terminated. Under this situation, the individual may be able to bring a successful promissory estoppel claim.

It is difficult for a plaintiff to prove all of the promissory estoppel elements, especially in an employment context. Some courts reject outright promissory estoppel claims made by an at-will employee by contending that an employee cannot reasonably rely on a promise of employment if the employment is at-will.

In any case, promissory estoppel provides only a limited remedy in comparison to a breach of contract claim. This is because damages are calculated based on the individual's previous employment, and not on the promised employment.

Statutory Exceptions to Employment-at-Will

In addition to the common-law exceptions to the employment-at-will doctrine outlined above, there are also many statutory exceptions to the at-will employment doctrine.

The following are applicable federal laws that limit the employment-at-will doctrine:

- **Age Discrimination in Employment Act** (29 U.S.C.A. § 621). Prohibits employment discrimination

- against employees ages 40 or older, bars retaliation against persons exercising ADEA rights.
- **Americans with Disabilities Act** (42 U.S.C.A. § 12101). Prohibits employment discrimination against qualified persons with disabilities; bars retaliation against persons exercising ADA rights.
 - **Bankruptcy Code** (11 U.S.C.A. § 525). Prohibits employers from discriminating against or terminating an individual solely because the person has filed for bankruptcy.
 - **Civil Service Reform Act of 1978** (5 U.S.C.A. § 7513(a)). Permits removing federal civil service employees only for efficiency-related causes.
 - **Civil Rights Act of 1964, Title VII** (42 U.S.C.A. §§ 2000e-2 and 2000e-3(a)). Prohibits discharge based on race, color, religion, sex, or national origin and reprisal for exercising rights under the act.
 - **Clean Air Act** (42 U.S.C.A. § 7622). Prohibits firing employees who assist in any proceeding under the act.
 - **Consumer Credit Protection Act** (15 U.S.C.A. § 1674(a)). Prohibits firing employees because of garnishment of wages for any one indebtedness.
 - **Employee Retirement Income Security Act of 1974** (29 U.S.C.A. §§ 1140 and 1141). Prohibits terminating employees to prevent them from attaining vested pension rights.
 - **Energy Reorganization Act of 1974** (42 U.S.C.A. § 5851). Prohibits firing employees who assist in any proceeding under the act.
 - **Fair Labor Standards Act** (29 U.S.C.A. §§ 215(a)(3) and 216(b)). Prohibits discharge for exercising FLSA rights.
 - **Federal Water Pollution Control Act** (33 U.S.C.A. § 1367). Prohibits firing employees who assist in any proceeding under the act.
 - **Immigration Reform and Control Act of 1968** (8 U.S.C.A. § 1324b). Prohibits employment discrimination against individuals, except unauthorized aliens, because of national origin and against U.S. citizens or aliens eligible for citizenship because of citizenship status.
 - **Judiciary and Judicial Procedure Act** (28 U.S.C.A. § 1875). Prohibits firing employees for service on a grand or petit jury.
 - **Labor Management Relations Act** (29 U.S.C.A. §§ 158(a)(1), 158(a)(3), and 158(a)(4)). Prohibits termination for union activity, protected concerted activity, or filing charges or giving testimony under the act.
 - **Occupational Safety and Health Act of 1970** (29 U.S.C.A. § 660(c)). Prohibits firing employees for exercising OSHA rights.
 - **Railroad Safety Act** (45 U.S.C.A. §§ 441(a) and 441(b)(1)). Prohibits firing employees who assist in any proceeding under the act.
 - **Rehabilitation Act of 1973** (29 U.S.C.A. §§ 793 and 794). Prohibits federal contractors or any program or activity receiving federal financial assistance from discriminating against persons with disabilities.
 - **Veterans' Re-Employment Rights Act** (38 U.S.C.A. §§ 4321 - 4327). Requires reinstatement of and protects returning veterans for a limited time against discharge without just cause.

Antidiscrimination Statutes

Both federal and state antidiscrimination statutes prohibit employers from basing employment decisions (hiring, benefits, termination) on certain characteristics, such as:

- Race.
- Creed.
- Sex or sexual orientation.
- Color.
- National origin.
- Religion.
- Age.

- Marital status.
- Physical or mental disability.
- Union activity.
- Pregnancy.
- Medical condition.
- Parental status.
- Military status.

These protected classes vary by jurisdiction. Review state protected classes [here](#).

It is important to recognize that discrimination statutes shield members of protected classes only from adverse employment actions made because of their membership in a protected class. In other words, an employer may fire an at-will employee because the employee failed to perform the required functions of her job, but not because the employee is in a wheelchair.

Antiretaliation Statutes

Retaliation is another statute-based exception to the at-will presumption. Federal and state laws prohibit employers from firing employees in retaliation for engaging in certain activities that are protected by law. For example, many states have statutes which explicitly prohibit employers from terminating or taking any negative employment action against an employee because the employee:

- Filed a worker's compensation claim.
- Initiated a discrimination or wage claim.
- Has a wage garnishment(s).
- Disclosed or refused to disclose wages.
- Voluntary participated in an alcohol or drug rehabilitation program.
- Refused to authorize disclosure of medical history or records.
- Performed jury duty.
- Engaged in political activity (voted) or served as election officer on Election Day.
- Engaged in military service.
- Is a volunteer firefighter.
- Refuses to patronize an employer.
- Refuses to commit illegal activity.
- Missed work due to attendance at child's school regarding a suspension or for a child's school or child care activities.
- Is a domestic violence victim taking time off from work to obtain a restraining order, receive care or counseling, or to relocate.
- Refused to disclose arrest records that did not lead to convictions.
- Refused to take a polygraph test.
- Enrolled in an adult literacy program.
- Refused to participate in an abortion.
- Exercised a statutory duty to report apparent victims of abuse or neglect, without suffering discharge or discipline (hospital employees).

Whistleblower Protection Statutes

Whistleblower protection statutes are closely related to antiretaliation statutes. Whistleblower protection statutes generally prohibit employers from retaliating against employees who have exposed unlawful behavior on the part of the employer. Many whistleblower protection statutes revolve around things such as occupational safety and health standards; environmental protection;

accounting practices; or government waste, fraud, and abuse. While most states provide whistleblower protection for public sector employees, protection for private sector employees is much more limited.

Where there is no general state statute, private employees are left with a patchwork of federal and state statutes that address a wide variety of issues including workplace health and safety, environmental protection, accounting fraud, and discrimination, and whistleblower protections. The challenge for employees in these jurisdictions is to find a statute that applies to their particular circumstances.

Review state whistleblower protection laws [here](#).

Protections for an Employee's Off-Duty Activities

Several states have statutes that protect employees from adverse employment actions resulting from legal off-duty activities. The laws primarily deal with the off-duty use of tobacco.

Potential Legal Claims Stemming from Termination

There are myriad legal claims that may be brought by an employee who has been terminated. Understanding the legal basis of the claim can help employers avoid frivolous claims by former employees.

Wrongful Discharge

Wrongful discharge can be defined as a termination of an employee that violates public policy, a contractual agreement, or a covenant of good faith and fair dealing. **Termination** occurs when an employee is any of the following:

- Fired.
- Laid off.
- Suspended for an unreasonably long period.
- Constructively discharged (see below).

The basic elements of a cause of action for wrongful termination or discharge will differ where the employee at issue is an employee at-will, an employee under contract with the offending employer, or an employee that is a member of a labor union who has been wrongfully terminated by their former employer. In understanding their differences, where there is a contract the claim will revolve around a breach of the terms of the contract; however, in the at-will employment situation, the claim will allege that the termination was done for an illegal reason or in an unlawful way.

In an action against a former employer, at-will employees will usually attempt to circumvent their at-will status by alleging that they fall into one of the exceptions to the "at-will" rule that were discussed in the preceding sections.

Defamation

Defamation claims are often linked to wrongful termination. A claim of defamation involves allegations by employees that supervisors or co-workers intentionally made false statements, whether published or publicly spoken, that injured the employee's reputation.

Examples of potential defamation claims include the following:

- Gross misconduct, theft, embezzlement, or falsification of records.
- Using or abusing drugs.
- Professional incompetence, criminal convictions, or arrests.
- Having a communicable or venereal disease.

Note: These claims may be valid only when the employer falsely accuses the employee.

Defamatory claims may be verbal or written and may be communicated to individuals inside or outside the organization. Any derogatory statements can be the basis of a defamation action. In some states, statements made only to a terminated employee may be considered a defamatory statement.

Employers have a right to make derogatory statements about employees to certain persons within the organization who have a need to know such information, and prospective employers who specifically request information about the employees. Employers can encounter problems if the employee can prove that the statement was made with a reckless disregard for whether it was true or not true. In the employment setting, defamation claims primarily arise from the following two situations:

- Discussing an employee's alleged poor performance, misconduct, or reasons for termination beyond those who need to know such personal and potentially reputation injuring statements.
- Responses to reference checks.

Employers may avoid defamation claims if they acquire and apply a basic understanding of the law in this sensitive area, and follow a few simple precautions. The following may assist employers in avoiding defamation liability:

- Thoroughly investigate and document incidents of employee misconduct prior to imposing any discipline, thereby avoiding a claim that the employer acted in reckless disregard of the truth.
- Limit disclosure of the reasons for discipline to those with a legitimate need to know such information.
- Maintain medical data records, mainly drug testing results, as strictly confidential records, which are only accessible by authorized personnel.
- Limit responses to reference checks to confirmation of dates of employment and positions held.
- Obtain a signed release from an employee before releasing any employment data.

Employer Defenses to Defamation

Employers may present a variety of defenses in response to a defamation lawsuit. An employer's available defenses include the following.

- **Truth.** Truth of the statement is a complete defense to a defamation claim because it defeats an essential element of the claim — a false statement. True statements, even if damaging to an employee's reputation, may not give rise to a legal claim.
- **Consent.** Courts recognize consent as an employer's defense to an employee's defamation claim. In fact, an employee's consent to the publication or communication of the alleged defamatory statement, this also serves as a complete defense to a defamation suit. Courts do not want to penalize an employer where the employer reasonably relied on an employee's consent to (via words or actions) the employer's assertion of a potentially defamatory statement.
- **Statute of Limitations.** The statute of limitations can provide a complete defense to a defamation claim. A statute of limitations fixes the time within which a court action must be initiated by the injured party. If the employee fails to bring a claim within the statutorily defined period, the claim is lost and cannot be initiated after the period has expired.

- **Absolute Privilege.** When the allegedly defamatory communication is a privileged communication, an employee may not recover damages for defamation. In order to further the public's interest, courts recognize an absolute privilege in a variety of situations. Where an absolute privilege exists, the employer has complete immunity from a defamation lawsuit, even if the employer made the remark out of malice. Statements under the following circumstances will be absolutely privileged:
 - When they are made by legislators during a legislative proceeding.
 - When they are made by participants in a judicial or quasi-judicial proceeding.
 - When there is a legal requirement to make a statement.
- **Qualified Privilege.** A qualified privilege exists when otherwise defamatory statements are made under circumstances where the person making the statement has a legitimate and reasonable justification to communicate the statement. Typically, a qualified privilege exists when a meeting is held with authorized management personnel to specifically discuss the employee's conduct in light of legitimate business concerns and negative comments are made about the employee in the course of the meeting. Such negative comments may fall under the qualified privilege because the circumstances of the meeting were to specifically address issues with the employee, for legitimate business purposes, and only authorized individuals were in attendance. **Note:** The qualified privilege does not totally protect an employer from defamation liability. When the employer abuses the privilege — by spreading the statements beyond any legitimate business justification, or by making false statements of fact with a bad motive — the employer may lose the qualified privilege.

Interference with Contractual Relationships

Interference with contractual relationships involves allegations that individual supervisors or managers interfered with the contractual relationship between employees and their employer. An example of such a claim is where a supervisor knowingly communicates false information about an employee to higher management that results in the termination of the employee. Normally these claims are brought against supervisors or managers.

Fraud and Negligent Misrepresentation

Often an employee may discover that a job is not all that it appeared to be during the pre-employment interviews due to the employee's interpretation of the information or employer's representation of the position. The job duties may be different, the bonuses may be extremely difficult to earn, or perhaps the boss is more difficult to work with than originally thought. In a fraud and negligent misrepresentation lawsuit against an employer, an employee may attempt to claim that acceptance of the job offer was based on the employer's intentional or negligent misrepresentation of the position to the employee. The employee may further assert that the employer either knew the statements concerning the position were false or should have reasonably known the statements were false and continued to make the statement despite the falseness. This is especially the case when an employee was discharged or came from another highly compensated job.

Intentional Infliction of Emotional Distress

The claim of intentional infliction of emotional distress includes allegations of a purposeful and extremely abusive discharge of the employee. The employee would also claim the discharge was conducted in a degrading and humiliating manner.

Employers can reduce emotional distress liability by any of the following methods:

- Avoiding anger in administering discipline.
- Requiring review of a contemplated disciplinary decision by another supervisor or manager who has

no personal bias against the employee.

- Applying common sense.
- Documenting, signing, and dating every critical incident.

Invasion of Privacy

Recently, employees have raised invasion of privacy claims in the context of employment litigation. Invasion of privacy claims are usually based on one of the three following theories:

- Unreasonable intrusion into an individual's personal affairs.
- Placing an individual in a false light by publicizing facts that are literally true but that give a false and negative impression of the individual.
- Public disclosure of embarrassing and private facts.

The following examples illustrate employment-related situations where an invasion of privacy is likely to occur:

- Checking references.
- Drug testing.
- Disclosure of employee records.
- Disclosure of discipline or misconduct.
- Searches of purses, lunchboxes, packages, lockers, automobiles, or the employee's person.
- Electronic transmission of data.

Employers can avoid liability from invasion of privacy claims by simply removing an expectation of privacy in specific areas. An employer can establish, distribute, and post policies stating that personal items, lockers, purses, and automobiles are subject to search and that drug testing may be required under certain circumstances during employment.

Employers should also consider the following:

- Inform employees with email access that the employer-provided email is not private and may be read by anyone having access to the system including the employer.
- Obtain consent to provide employment references, search employee property and persons, or perform drug testing.
- Protect the confidentiality of employee performance evaluations, medical records, and disciplinary records.
- Limit undercover investigations to workplace surveillance.

Constructive Discharge

Sometimes employees quit, but not voluntarily. **Constructive discharge** occurs when employees are forced or coerced into quitting, rather than voluntarily choosing to terminate the employment relationship. When alleging constructive discharge employees may claim that the resignation was not voluntary, but rather was forced by the employer's actions or the employer's failure to correct an intolerable work environment. For example, an employee who is victimized by a supervisor's constant sexual harassment may feel compelled to quit. The employee's leaving under such oppressive circumstances will be a constructive discharge. In this situation, the employee may sue for wrongful discharge (and harassment), even though the employee terminated the employment relationship.

Generally, a discharge is considered constructive if the following apply:

- The employer created or condoned working conditions for the employee that a reasonable person in the employee's position would find intolerable.
- Any reasonable employee would quit rather than endure the workplace situation.

Other than harassment, employees may be constructively (unfairly) discharged due to any of the following:

- Discrimination.
- Dangerous duties.
- Hazardous situations.
- Demeaning or malicious assignments.
- Employer's repeated and perpetual failure to provide employee with work.

Prevent Constructive Discharge

An employer's sincere, unhindered policy toward employee concerns and complaints may be an employer's best defense against a claim of constructive discharge. Employers should document and appropriately address all employee concerns. When an employee quits after complaining of intolerable work conditions, the employer should immediately perform an investigation to verify the employee's claim and, if appropriate, remedy the situation. If the employer wishes to retain the employee, the employer should offer the employee unconditional, immediate reinstatement. The employer should assure the employee that the intolerable conditions have been addressed and corrected. An employer's immediate and fair approach to employee complaints and concerns can reduce potential liability and severely undercut a claim of constructive discharge.

Guidelines for Discharging Employees

Improperly handled discharges not only raise important legal issues, but also undermine employee morale and productivity.

Retain Employees When Possible

If discharges can be initially avoided, then the issue of improper discharge becomes a moot point. Therefore, the following may be considered before the discharge of any employee:

- Employers should establish fair and reasonable work rules and apply the rules uniformly to all employees. Fair and reasonable rules foster good employee morale because the employees know what is expected of them from the employer. The work rules should also be related to valid business interests.
- When employees perform or behave inappropriately, an employer must respond with corrective or disciplinary procedures.

When Discharge Is Unavoidable

Discharging an employee is occasionally unavoidable. However, employers may minimize the risk of liability, retain an element of control, and maintain employee dignity should the following steps be taken:

- The executive responsible for employment decisions should make the final determination to discharge the employee, based upon the recommendation of lower line management and a human resources executive.
- Consider the timing of the termination. Do not terminate an employee before the employee's

birthday or major holidays.

- Two managers or a manager and human resource representative should be present at the time of communicating an employee's dismissal.
- Plan the details of the meeting when an employee will be discharged from employment.
- Document and record the meeting.
- Maintain control over the situation. If employees are involved in the termination process, they may feel that they control the outcome.
- Make any severance package consistent with what other employees have been offered.
- Make the termination a statement of fact and not open to discussion. Keep any termination discussion focused and to the point. Communicate all the reasons for the decision. Allow the employee an opportunity to respond.
- Try to balance the negative with positive statements about other aspects of the employee's performance. Explain the decision while acknowledging the employee's strengths and contributions.
- Focus on the employee's future and do not encourage thinking that the termination is the conclusion of the employee's career. An employer might consider showing the discharged employee a written termination statement for dissemination to future employers. Properly worded, such a statement can minimize the employee's fears about the future.
- Provide job counseling for terminated employees.
- Collect keys and other security-sensitive employer-provided items from the employee.
- If circumstances warrant, have the employee escorted off the premises.

Termination by Telephone or Letter

The law does not require an employer to terminate an employee in person. An employer may terminate an employee by telephone, letter, or any other means of effective communication.

Employers must remember that regardless of the means of communicating the termination, the laws for final wage payment apply. Although federal law requires the "prompt" payment of wages, no specific time for payment is mandated. However, some state laws mandate specific times and the manner of final payment of wages.

Termination Decision Checklist

Sometimes employee problems reach an extremely significant level which forces an organization to terminate an employee. Possibly the employee's conduct is so serious that it warrants immediate termination.

The following termination checklist provides guidance to employers who must discharge employees:

- When the employee is a member of a protected group, treat the employee the same as members of nonprotected groups.
- Ensure that the rule the employee violated was published, and be able to document how, where, and when the rule was published.
- Confirm that the employee received a written copy of the employer-provided workplace rules. To ensure that each employee receives the employer-provided workplace rules, an employee handbook should be distributed upon hiring. The handbook should include a document, to be returned to the employer, that employees must read, sign, and date. The document should state that the employee read and became familiar with the company policies and rules, as verified by the employee's signature.
- Apply rules and standards of conduct consistently. If different employees have violated the same rule, take the same disciplinary action with each employee.

- When the termination is for poor performance, confirm that the employee was given a notice of poor performance and an opportunity to improve.
- When a written contract exists, carefully read the contract before making a termination decision.
- Review the length of employment for the employee in question.
- If the employee has filed any kind of claim against the organization — workers' compensation, benefits pay claim, or discrimination charge — the employer must take care to avoid a retaliatory discharge claim based on the employee's claim against the organization.
- Review the employee file for complaints and concerns regarding company policies and activities the employee perceived to be illegal or immoral.
- Always consider alternatives to discharge. For example, consider last-chance agreements, demotion, option to resign, or settlement agreements.
- Take special care with reviews for employees with recognizable disabilities.
- Review the employee file for previous documented violations of the same rule or standard of conduct. Always consider who wrote the document.
- Evaluate the previous 12 months of written reviews. Consider any disciplinary actions.
- Make sure the event triggering disciplinary action was thoroughly investigated and that the employee had an opportunity to provide the employee's version of the facts.
- Ensure that all evidence includes names of witnesses, dates, times, places and other pertinent information on all past violations.
- Ensure that the degree of discipline imposed on the employee reflects the seriousness of the proven offense.
- Consider the extent, if any, that the organization contributed to the problem.

Final Decision

The termination checklist summarizes the most important considerations in the termination process. Additionally, the personnel or human resources department should become involved in the decision process before making the final decision to discharge any employee. In fact, the human resource manager should review the termination analysis. This type of review is necessary to confirm that the discharge followed company policy and that other company employees in similar circumstances received the same treatment.

Note: It is insufficient for the head of a department to review a supervisor's decision. The human resources department should check for oversights, assuring uniform and consistent treatment of all employees.

Communicating the Decision

Communicating the decision to terminate the employment relationship to the target employee is also an important part of the process. Employers should be considerate in delivering such delicate information and avoid a late Friday afternoon notice. Employers may also lessen the severity of a discharge decision by making the news not unexpected for the affected employee. In most situations, the employee will already be on probation or possibly expecting termination.

Employers deciding to terminate an employee should give notice in the early part or middle of the week. The notice should be brief and candid, accenting the positive without rendering the message inconsistent with the decision. Although apologies are unnecessary, the employer must be mindful that the event is traumatic and treat the employee with dignity and respect.

Notice to Employee of Change in Relationship

Federal law does not require employers to give employees written notice of discharge or any other change in employment status. However, state law may require such notice and employers should become familiar with any such state law discharge notice requirements to ensure the notice contains all required information and that any form requirements are followed.

Employers must provide a copy of the notice to the employee and should retain another copy of the notice for the employer's records. The employee's signature of acknowledgement on the employer-provided notice is not required by law, but should be requested by the employer. This notice may serve as evidence to challenge the granting of unemployment insurance or other employee benefits.

Termination Procedure Checklist

Employers have specific obligations when terminating an employee. Employers must ensure the company-established termination procedure addresses and meets all the employer's obligations. Employers should also anticipate and avoid practical problems that could evolve during the termination process. The termination meeting is critical because employers often mishandle the final interview. For instance, the employer will sometimes make illegal statements or employees will become angry and hostile during the final interview because the situation is tense and uncomfortable. Therefore, several guidelines should be followed throughout the termination procedure.

The following checklist includes many points to consider and implement in the final interview:

- The employer should review the employee's employment history, commenting on specific problems that have occurred and the attempts to correct those problems.
- The employee should be told immediately that the individual is being terminated. The ultimate announcement should not be delayed.
- The decision to terminate the employment relationship should be explained briefly and clearly.
- Counseling should be avoided during the final interview at this point, as the necessary counseling should have already occurred.
- Offering compliments in an effort not to hurt the employee's feelings should be avoided as compliments may appear insincere and be misunderstood in light of the situation.
- Consistently provide the employee with a truthful explanation for termination. The stated reason for termination can be critical if litigation occurs. In some cases, courts have held that either failing to state the true reason for the termination or stating reasons that are inconsistent constitutes discrimination.
- Documentation and note taking should be completed carefully to avoid recording too much or too little information. When terminations involve complicated or controversial matters, the employer should obtain legal advice concerning what to say in the separation notice. After the meeting, the employer should write notes detailing what the employee was told during the meeting and the employee's response to the statements. Each employer representative attending the interview should sign the document.
- Any benefits of which the employee is entitled upon termination should be fully explained, including COBRA insurance and unemployment compensation. The employee should be provided with information regarding when the employee may expect to receive such benefits. Employers should also offer an explanation when the employee will not receive certain benefits.
- The employee should be granted an opportunity to respond to both the statements made about the employee and the decision to terminate the employment relationship. Arguments from and justifications rendered by the employee should be avoided.
- The decision to terminate an employee may not be based on a discriminatory reason, but rather business-related reasons. See [warning](#), below*.
- The termination interview should never contain references to sex, age, race, religion, national origin,

or disability.

- If employers are prepared and organized, they exhibit confidence in their decision to terminate the employment relationship.
- Employers may attempt to obtain an employee's accord with statements regarding the employee's unsatisfactory job performance.
- Another managerial employee should be present at the time of actual discharge.
- Arrange for the return of materials, documents, tools, or other company property in the personal possession of the employee.
- Establish a procedure to help the employee clean out lockers, desks, and other applicable areas.
- Establish a procedure to retrieve IDs, delete passwords, change locks, and handle other security matters. If physical security preparations might be needed, employers should plan in advance.
- Employees should be reminded of any noncompete or confidentiality requirements.
- Always consider seeking a release of liability.
- Solicit suggestions about the exit interview process from the exiting employee. For employees who exit without an interview or who abandon the job, the employer may want to solicit suggestions by mail.
- Employers may seek to obtain a signed letter of resignation, stating the reasons for resignation, when an employee voluntarily resigns. In providing such a letter, former employees are discouraged from later claiming that their termination was not voluntary. Letters of resignation also offer protection from unemployment compensation claims.
- Employees should be permitted to physically leave with as much dignity and self-esteem as possible. In the case of discharge, employers should consider transportation arrangements, especially when the employee's motor skills are impaired in any way.
- All employment-related documents should be current, complete, accurate, signed, dated, and approved appropriately, as should the termination checklist.
- The employee termination and exit procedure should be conducted according to current business or industry practices and conventions.

Warning

Terminating the following types of employees is especially sensitive:

- A pregnant employee.
- An employee age 40 and older.
- A minority employee.
- Any other employee who may claim discrimination.

With these types of employees, the potential problem of a subsequent claim or lawsuit is based on the employee's legally protected class. Employers must take special care with these employees not to make any reference to anything that could be considered discriminatory.

Exit Interviews

Exit interviews assist employers in determining why employees decide to leave the organization and what changes may have kept the employees with the company. For example, the exit interview may help determine whether the organization is capitalizing on the insight that can be learned from departing employees.

Exit interviews may prevent other employees from resigning for similar reasons, thus reducing turnover and cost. Additionally, exit interviews are a great way to collect candid feedback from employees who are leaving the company and may speak more freely about the employment position.

With no fear of losing their job, employees in exit interviews are more likely to provide straightforward, honest answers to questions about the company, their managers, and their position.

The real benefit of exit interviews is what can be learned from the employee. An employer may use the feedback received from departing employees to improve the workplace for current employees. An employer might express to the departing employee that the employer understands it is too late to keep the individual on as an employee, but that the employer wants to make it a better workplace for former co-workers. Where employees leave an employment position due to internal company issues the exit interview provides the employer with a valuable opportunity to identify and address such issues for the future.

Administering the Exit Interview

In administering an exit interview, employers should ensure the interview encompasses more than a mere survey of which the employee would fill in the blanks. A mutually-agreeable time should be arranged to conduct an exit interview in-person. A personal exit interview will provide the employer with the opportunity to ask additional questions and explore the employee's perspectives at a more in-depth level. For example, if during the interview the employee provides details about problems with a manager, the employer will then be able to ask follow-up questions, receive additional information, and potentially gain a true understanding of the former situation. Where the employee completed an exit survey and described manager problems, the employer could not seek out additional information. The interview should strive to find out if and why there were problems in the workplace. Specific examples should be requested of the employee to demonstrate the problem and increase the employer's understanding of the issues. In addition to asking probing questions about the problems, the employer should ask what suggestions the employee might have to improve or eliminate the problem in the future.

In-person interviews also give an employer the ability to observe an employee's nonverbal cues, such as the following:

- Does the employee get uneasy when an employer asks about their manager?
- Does the employee appear exasperated, for example unintentionally sneer or roll their eyes, when the employer asks if they felt they were fairly compensated?

Nonverbal cues observed in an exit interview could give the employer more perspective and offer insight that there may be a different, more accurate version of the employee's verbal story.

A list of open-ended questions should be prepared to ask during the exit interview. The open-ended questions should be specifically designed to elicit answers that would help an organization determine all of the following:

- Employee likes and dislikes in regard to the company.
- Why the employee chose to leave the company.
- What actions could the employer have taken (or changes made) to retain the employee.
- What improvements the employee recommends the company implement to ensure future employee satisfaction.
- Would the employee recommend the company for employment to future employees? Why or why not?

Asking specific, detail oriented questions and requesting that individuals expand on their responses helps pinpoint the areas that the organization needs to improve. The same questions should be used for all departing employees to facilitate the employer's comparison of responses and identify any

trends or common themes in the answers.

The interview should be held in a private location, such as an enclosed office or a conference room so the departing employee feels comfortable that their comments will not be overheard. To further ensure that the employee feels at ease to share information about workplace issues, it is important to have a neutral party conduct the interview — someone who did not work directly with the employee. The employee's manager should not conduct the interview because the manager may have been part of the problem. The interviewer should be nonbiased and should not intimidate or influence the employee.

The employee should be informed at the start of the interview exactly why the organization wants the employee's feedback and what the employer intends to do with the obtained information. The employee should be clearly guaranteed that all verbal and documented comments will be kept anonymous and confidential. Additionally, the employer will not allow or tolerate any forms of retribution due to the employee's statements, evidenced by the employee's anonymity in providing information. The employee should also be advised that exit interview comments will not be filed in their personnel records. Exit interview files should be kept separate from employee records.

Finally, an employer should give the employee their full attention, actively listen to the employee's feedback, and document the employee's comments. The exit interview is not an appropriate time for an employer to interject in an argumentative or defensive manner in response to the employee's comments about their experience with the company.

There are no right or wrong answers in the exit interview process because the goal of the interview is to gather facts and opinions from the employee in regard to their candid perceptions of their employment with the organization.

Data Collection from Exit Interview

When the organization collects data from exit interviews, an employer may start to see trends in why employees leave the company.

For example, people leaving the IT department may commonly report that they can get a better salary with other organizations. Alternatively, people leaving the marketing department may commonly report that they leave due to limited opportunities for career advancement. Alternatively, maybe an issue is a company-wide problem and is commonly reported by departing employees regardless of their department or position — such as feeling that the company culture as a whole is negative and undesirable.

Once problem areas are identified, an organization can look for ways to improve the situation or resolve problems. Employers that fail to use the information collected from exit interviews to improve the company and raise employee satisfaction are fated to continue operating a workplace with recurring problems and worrisome employee issues.

The information obtained through exit interviews should be compiled into reports and then shared with senior management. The employer should be certain to keep the information generic and anonymous. If an employer recognizes an issue commonly mentioned in several exit interviews, the issue should be addressed and a plan of action should be determined to improve the situation.

Using feedback from exit interviews can help an organization identify problems and obstacles and help correct them **before** issues motivate other employees to leave the organization.

Final Paychecks

When an employee's employment is terminated, state law requires that the employer pay the employee his or her final wages within a certain amount of time. This time period varies greatly by jurisdiction. Review your state's wage payment requirements [here](#).

Unemployment Compensation

Employers should handle unemployment compensation claims carefully and meticulously. Often the employee and employer differ in the reason why the employment relationship was terminated. An unemployment compensation hearing provides a useful opportunity to ascertain the former employee's position on how or why the employment relationship was terminated. An unemployment compensation decision that favors the employer may help persuade the employee not to pursue the matter further. It may also help persuade the EEOC or a court that the employee's claim is not valid.

Replacing a Terminated Employee

Employers must conduct all recruiting, hiring, and discharging of employees based on the position available, the employee's qualifications (education and work experience), and other legally applicable criteria. Employers are strictly prohibited from terminating or replacing an employee based on the employee's or applicant's race, sex, age, national origin, and other legally protected status. Discriminatory employment actions subject an employer to lawsuits, extensive monetary penalties, and other legal recourse.

Separation Agreements

Separation agreements and general releases of liability are contracts between the employer and discharged employee. The employer agrees to provide the employee with benefits the employee would otherwise not be entitled upon termination and in return the employee agrees to end the employment relationship on an amicable basis.

A separation agreement consists of two essential elements as follows:

- The employer must provide the employee with additional valuable consideration — such as additional pay or enhanced retirement benefits — to which the employee was not otherwise entitled.
- The employee, in turn, must give a general release and covenant not to sue.

Note: To be enforceable under certain laws, such as the Age Discrimination in Employment Act, waivers contained in separation agreements may be granted only after the employee has been offered adequate time to review the terms of the agreement with the representative of the employee's choosing, including an attorney.

Separation agreements contain general releases, which must be knowingly and voluntarily entered. The agreements reduce the risk of litigation and, if properly prepared and executed, may provide a strong defense against employment claims covered by the release.

However, depending on applicable state law, a separation agreement may be ineffective or may be remiss because of any of the following:

- The employee's release was based upon the payment of compensation or benefits — such as vacation pay or severance pay — that the discharged employee was entitled to receive without a separation agreement. The employer submits the agreement to an employee before the individual

challenges the discharge; the employee then rejects the agreement and uses it as evidence of wrongful termination.

- The language of the agreement is too general and fails to identify specifically what claims the employee is agreeing not to pursue.
- The release is based on certain promises not contained in the written agreement, and the agreement fails to specify that the document contains the parties' complete agreement in the specific matter.
- The agreement does not describe in enough detail the employer's rights if the employee fails to follow the agreement — normally a promise not to sue, a promise not to publicize the agreement, and a promise not to re-apply for employment.

The agreement may also expressly provide any consequences should the employer or employee fail to abide by the terms. For example, the agreement might provide the following where an employee violates the terms:

- Liability for all legal expenses resulting from violating the promise not to sue.
- Liability for liquidated damages for violating the promise not to publicize.
- Denial of employment without legal recourse for violating the promise not to reapply for employment.

Noncompetition Agreements and Trade Secrets

When employer relationships end, the employer has many more concerns beyond the loss of an employee. While employed with an organization, employees gain valuable techniques, information, and relationships that make them competition for their former employer. Employees who have received confidential and proprietary information through the course of employment or who were the organization's principal contact for customers have the ability to seriously affect the confidentiality of that information and the customer relationships.

Unfortunately, employees with no written contract for employment are free to move among jobs within the same field or among competitors. Additionally, employees are free to use their knowledge and expertise in competition with former employers.

Employers are not entirely defenseless if they take certain protective measures before the employment relationship is terminated. Even absent these advance precautions, employers have some protections. Employees who gain access to their employer's trade secrets may have a legal obligation not to disclose or abuse those trade secrets, even where there is no written contract.

Confidentiality Agreement

A confidentiality agreement serves to protect the tender nature of company privacy in communications and publications. The confidentiality/secret provision should prohibit the disclosure of any company related secret or confidential information while employed and for a period after employment.

Alternative Provision 1: "Employee understands and agrees that in the course of his/her employment, he/she will receive and become aware of information, projects, practices, customer contacts, and potential customers which are sensitive and confidential in nature. Employee agrees to keep all such information strictly confidential, and further agrees that he/she will not communicate, disclose, divulge, or otherwise use, directly or indirectly, such confidential and/or sensitive information."

Alternative Provision 2: “Employee agrees to maintain the strict confidence of Employer’s trade secrets and customer information both during and after the term of this agreement.”

Nonsolicitation Agreement

Employers may request, through a **nonsolicitation agreement**, that the employee voluntarily agree to not engage in certain specified competitive activities, such as soliciting the former employer’s customers or, more specifically, those customers with which the employee had direct contact.

Limited Protections

Employers have some legally recognized limited protections against unfair competition, disloyal employees, and overreaching competitors. Employers must carefully review their legal rights and responsibilities and have knowledge of conflicting public policies.

A **noncompete agreement** is a contractual restriction upon an individual’s ability to compete with another person or entity following the termination of a transaction or relationship. Many employers seek to protect their business by requiring employees to sign agreements not to compete with the employer should the employee be terminated. These agreements were once reserved for high-level executives, researchers, and outside sales personnel, but are increasingly used for mid-level managers, technical staff, and other employees whose departure could create a competitive disadvantage.

Note: Unlike the common law duty of loyalty, a noncompete agreement prohibits conduct taking place after the employment relationship has ended.

Duty of Loyalty

Company employees are under a duty of loyalty to the organization. Generally, employees are not permitted to induce current customers, suppliers, or other employees to leave the organization, nor are they allowed to operate a competing business when employed by the organization. If an employee breaches this duty, the employer may be entitled to collect lost profits, punitive damages, and even out-of-pocket expenses in finding and training replacement employees.

Employees who are found to have breached this duty may be forced to forfeit their salaries and relinquish any profits gained as a result of the disloyal conduct. Additionally, a court may issue an injunction prohibiting similar conduct in the future. In essence, the duty of loyalty prohibits an individual from using trade secrets or proprietary information gained from a former or current employer to the detriment of that employer. Since the law recognizes this duty, the employer does not need to do anything special to create it. In addition, the employees are not required to sign any agreement to be covered by the duty. However, the employer does have the responsibility to prove in court that the information protected meets the appropriate standards and that everything was done to keep the information secret.

Restrictions on Noncompete Agreements

Courts generally do not like noncompete agreements and welcome the opportunity to limit or eliminate them. The dislike stems from a desire to allow individuals to earn a living in the field of their choice and unwillingness to let employers coerce their employees. Broad agreements are usually invalidated or rewritten by the court in those states that allow such an option.

Courts will consider the following factors in determining whether to enforce a restrictive covenant:

- **Is there a legitimate employer interest in being protected from a particular employee's competitive activity?** Even if such an interest is present, courts may refuse to enforce a restriction that is too broadly drafted.
- **Is the restriction reasonable in light of all the circumstances?** The restriction must be necessary, but not unreasonable, to protect the employer's legitimate business interests.
- **Is the restriction reasonably limited in time and geography?** The time limit under which an employee may not compete with a former employer must be reasonable based on such factors as the time to train a new employee and for customers to become familiar with the new employee. The geographical limitation must be to areas necessary to protect the employer's interests.
- **Does enforcing the restriction hurt the public interest or adversely affect public policy?** This is usually not a significant concern since such restrictions do not result in such a major impact.
- **Is there reasonable consideration in exchange for the restriction?** Most states require noncompete restrictions to be an equitable exchange between the employer and employee. For example, the employee does not compete with the employer in exchange for consideration or something of value. Something of value to the employee could be the initial job offer, a raise, a promotion, or extra benefits upon leaving the organization.
- **What triggers the noncompete agreement?** Some noncompete agreements apply automatically regardless of whether the termination was for cause, without cause, as part of a layoff, or reduction in force. Others apply only when the employee resigns or is terminated for cause, while some limit the period of restricted activity to the time severance benefits are being paid. The employee is therefore free to forego severance payments to accept employment.

Post Termination Conduct

Employers should note that after an employee has been terminated, an employer's post termination conduct may still have negative legal repercussions. For example, in the course of providing a reference to the former employee's prospective new employer, an employer may become subject to a claim of defamation. To assist employers with avoiding these types of defamation claims, many states have passed what are generally referred to as job reference liabilities laws. These laws generally hold that an employer who in good faith discloses information about a former employee's job performance is immune from civil liability for disclosing such information. Under these laws, an employer is generally presumed to be acting in good faith. This presumption may be rebutted upon a showing that the information disclosed by such employer was knowingly false, was deliberately misleading, or was rendered with malicious purpose; or that the information was disclosed in violation of a nondisclosure agreement, or was otherwise confidential according to state or federal law.

Some jurisdictions, like Texas and Kansas, also prohibit employers from intentionally attempting to prevent a former employee from obtaining employment elsewhere. This is often referred to as blacklisting.

Read more about job reference liability and blacklisting laws [here](#).

Summary

Employment-related litigation is becoming more common, and employees are recovering larger and larger verdicts. Employers should regularly review all of their personnel policies and procedures, as well as employee handbooks and other written personnel documents, to ensure that no promises or statements are being made that could be construed as a binding employment contract.

All employers should publish written disclaimers that preserve the employment-at-will relationship. Finally, when terminating employees, an employer should confirm that the action is uniform,

consistent, and fair. Whenever possible an employee should be given advance warning that particular behavior or continued misconduct could result in termination.

Fairness, honesty, and candor with employees are the keys to defending against or successfully avoiding employment-related lawsuits.