



Employment Law for Business Professionals in “At-Will” States

The majority of states in the U.S., including Texas, have “at-will” legislation to protect employers from wrongful termination lawsuits. Employment law--even at-will employment--can be tricky. Federal laws and other anti-discrimination legislation provide important exceptions to the at-will employment contract. The three Ds method for hiring and firing employees provides an excellent backdrop for explaining the do’s and don’ts of employment law in an at-will state like Texas. Anti-discrimination policies necessitate thoughtful management planning that begins in the interview process and continues until the termination of the employment contract. For this reason, employers will benefit from remembering the three Ds of hiring and firing employees: Discrimination, Documentation, and Delivery.

Discrimination

The first D, Discrimination, represents federal and state laws for hiring and firing which protect the basic rights of employees. Adherence to anti-discrimination laws begins with the hiring process. Employers who are hiring new employees can fulfill most anti-discrimination requirements by asking only pertinent and relevant questions which are specifically related to the job opening. For most private employers, interview questions relating to race, gender, disability, age, religion, military reserve status, national origin, pregnancy, children, political preference and sexual orientation are off limits. Employers must remain mindful of small talk which may inadvertently veer in the direction of these topics. Questions such as “I see you were in ROTC in college, do you belong to the reserves?” or “Don’t I know you from church?” are unnecessary and potentially damaging when considered in the big picture.

Employers in at-will states must still abide by federal employment laws applicable to standards like company size and, in some cases, annual income. Common federal laws are Family and Medical Leave Act, which prohibits dismissal on grounds of a family illness; anti-discrimination statutes such as Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. State laws often supplement federal wage and anti-discrimination legislation to strengthen federal standards or to address events or circumstances that are state-specific. Some local governments even have living wage standards, which allow low-income working families to continue to live in high cost cities. New York City has additional anti-discrimination laws of its own because of the city’s size and its tradition of a diverse populace. Texas has a statute in the Labor Code¹ which protects employees from retaliation and wrongful termination in cases where the employee has filed a workers’ compensation claim in good faith. Employment law is an interesting window into the soul of a society and how a government views its small business owners and working citizens. For this reason, employment law is both fascinating and complex.

¹ Texas Statutes. Labor Code. § 451.

Documentation

Documentation, the second D, is always important to follow in at-will states. Documentation is a key component for a solid defense and the speedy resolution of disputes. Employers should express company policies consistently and in accordance with the law. This can be tricky for employers with multiple businesses in different locations. International businesses and multistate companies need to take time to examine the benefits of combining all state requirements into one company policy, and therefore, one complete employee handbook and set of documents, or consider having different employment documents for each office location. This decision depends on company preference and convenience, but most of all, according to the laws of each location.

States with “at-will” employment, such as Texas, allow employers and employees to terminate the employment relationship for any reason, or simply no reason at all. One important detail for employers to remember is to provide “at-will” disclaimers on all employment documents. At-will arrangements require consistency in offer letters, written contracts, employee manuals, and verbal statements. It is important for employers not to alter the “at-will” relationship with verbal statements of job security such as, “you have a job with us as long as you work hard.” Such written or verbal communication promising unlimited employment may compromise valuable firm resources such as time and money in the future.

Above all, remember to document any performance related problems in writing once they occur. Written warnings are acceptable in many circumstances. Regular performance evaluations, when reviewed by the supervisor with the employee and with an employee signature, are very important when it becomes necessary to demonstrate that a legitimate or performance-related firing was not based on discriminatory reasons. In addition, the termination notice and employee resignations should be in writing.

Delivery

How employers deliver a notice of termination makes almost as much difference to the employee’s morale and to the overall staff morale as the act of firing itself. This applies to the third D, Delivery. Of course it is difficult for an employee to digest the news of a termination, but *how* an employer or manager delivers the news makes a difference in the employee’s attitude about the firing. If the employee feels he is treated or fired unfairly, he is going to immediately reflect on past experiences and other events he deems as unfair. The key for terminating an employment contract is to clearly express the reasoning behind the firing and limit the discussion to documentable occurrences.

Immediate supervisors or employee managers should deliver news of the termination in a meeting not to exceed 15 minutes. The meeting should be short, to the point, and direct. The supervisor should advise the employee of the facts related to the dismissal and the effective date and time of the termination. Supervisors and employers must be careful to avoid sugarcoating facts to appear compassionate. Above all, they must be truthful about the reasons for the dismissal. Lying or hiding facts can look very bad in a lawsuit. Finally, show some consideration in the scheduling of the termination meeting. Avoid firing an employee before a family holiday

like Christmas, and consider reserving termination meetings for Fridays to preserve staff morale. Let the employee know of benefits available such as insurance, retirement, COBRA, and unemployment benefits. Doing so displays compassion and concern for the employee's well-being and may serve to quell some of the resentment felt from the termination.

While employers have a lot of leeway in the at-will employment agreement to hire and fire at will, and employers have a great deal of legal protections, the best office policy consistently follows the three Ds of employment law. When employers in at-will states follow the three Ds, they further insulate the company and reduce the likelihood of extensive legal scrutiny.