



At-Will Employment

Who, What, Why . . .

Who does it apply to: All employers regardless of size or shape.

What does “at-will” employment mean: You might be inclined to think that it means that employees serve at the will of the master, or at the master’s pleasure. While this historically makes sense, “at-will” employment is something more. It represents the idea that employer and employee are each free to terminate their relationship at any time without any strings attached for good reason, bad reason, or no reason.

Why an entire edition devoted to it then: If there are no strings attached, why would we need this edition? As I tell clients, at-will means you can let them go, but it does not mean they won’t sue you to claim it was for an illegal reason. The courts and legislature have created exceptions to the at-will doctrine. This edition is designed to give you a list of all the ways that the at-will employment doctrine is limited so you can minimize the risk you will be sued.

What is the exception created by the courts: Employees cannot be discharged solely for refusal to commit an illegal act. This does not include acts which would bring an administrative penalty or a lawsuit down on the employer. And, it only works if the sole reason for termination was the refusal.

What are the exceptions created by a statute: There are a bunch. Both the federal and state legislatures have created exceptions to the at-will doctrine:

- *Union or pre-union activity:* Employees may not be discharged for being in a qualified union, acting under a collective bargaining agreement, or engaging in pre-union concerted action (complaining about the terms and conditions of employment).
- *Discrimination:* Employees may not be discharged because of their membership in a protected class, i.e. race, sex, sexual orientation, pregnancy, national origin, religion (Under Title VII, the Texas Labor Code “TLC,” and other laws), age (under the Age Discrimination in Employment Act “ADEA”), disability or handicap (under the Americans with Disabilities Act “ADA” and Rehabilitation Act, genetic information (under the Genetic Information Non-Discrimination Act “GINA”), or military status (under the Uniformed Services Employment and Reemployment Rights Act “USERRA” and TLC).

- *Polygraph:* Employees may not be discharged for refusing to take prohibited polygraph examinations under the Employee Polygraph Protection Act.
- *Without required notice:* Employers engaging in a mass layoff must follow the Worker Adjustment and Retraining Notification Act.
- *In retaliation:* Employees may not be discharged in retaliation for making a complaint of discrimination or coming to the aid of another person who makes a complaint of discrimination (Title VII, ADEA, ADA, GINA, and USERRA). Employees also may not be terminated in retaliation for taking medical leave (under the Family Medical Leave Act), approved military leave (USERRA), responding to a subpoena (TLC), attending jury duty or a political convention (TLC), making a good-faith workers’ compensation claim (TLC), refusing to join a union or participate in an abortion (TLC), or, believe it or not, refusing to make a purchase at a company store (TLC).
- *Wage and hour:* Employees may not be discharged for making a claim for overtime, unpaid minimum wage, or other claim under the Fair Labor Standards Act. Employees also may not be discharged for complying with an investigation by the Department of Labor.
- *Health and safety:* Employees may not be charged for filing complaints, assisting in investigations, testifying in a proceeding or otherwise exercising their rights under the Occupational Safety and Health Act, Hazard Communication Act, or Agriculture Hazard Communication Act.
- *Employment benefits:* Employees may not be discharged to prevent them from vesting in employee benefits.
- *Returning from Military Service:* Under USERRA, a vet cannot be let go for a year after returning from duty without cause.

What about employment agreements: An at-will employment relationship is a contract of sorts, but it can be terminated by either side at any time. That said, sometimes an employment contract is entered for a specific length of time or an employer sets down a particular set of rules limiting the employer’s ability to let an employee go. These agreements can be oral or written, with certain limitations. An agreement that specifically requires more than one year to perform must be in writing and

all limitations on at-will employment must provide in a specific and meaningful way that the employer has a restriction on its right to terminate the employee.

Common Situations:

Whistleblower who: The captain of the ship Devil May Care, and owner of Angel Transport Company, discharged the bilge tank of his transport ship in environmentally protected coastal waters near Galveston. One of his crew discovered the act and confronted the captain, who, in turn, asked the employee not to report the violation. The employee refused and the captain fired him as soon as the ship landed. Is the employee protected? No. Employees are protected from termination when asked to commit an illegal act. The exception to the at-will doctrine does not extend to a request not to report the illegal act of another.

The old employee handbook trick: Mary discovered a provision in her employee handbook that promised employees would not be punished for reporting the negative or inappropriate acts of their co-workers. Taking this to heart, and being a lifelong tattletail, Mary took to reporting everyone – for everything. Mary could hardly get her work done she was tattling so much. This wore on the company's owner to a point she could no longer take it and fired Mary. Mary filed a lawsuit claiming that she could not be fired for reporting the acts of others. Did the court side with Mary? Not in this case. The employee handbook included a couple of key "outs" for the company. It stated the handbook could be changed at any time and that nothing in it could change the "at-will relationship."

You won't be fired for . . . : Bob worked for Titan Oil and Gas Company, a giant oil production company. Titan had a policy of prohibiting employees from competing with the company

without express written permission, so when Bob got an opportunity to go in with his brother to open a gas station he asked his supervisor, who sent Bob an email back indicating that Titan would not stand in his way. Years later, Titan changed the policy to require approval from senior management and told Bob to drop his interest or be fired. Bob filed suit. What was the outcome? Bob won. The company specifically provided a rule and Bob followed it. The fact that the rule was later changed did not affect Bob's initial compliance with the rule at the time.

What should I do:

Good: Review this edition each time you let someone go as a quick check to be sure that your risk of suit is low. Remember, former employees will grasp at anything. You may not think there is a claim there, but the employee may make it up. Be careful in your consideration and, if you have doubts, check with your lawyer for some guidance about managing your risks.

Better: Follow the above advice and be sure that your employee handbook provides that no change from at-will is created by it.

Best: All of the above, plus, be careful about the language in any employment agreements regarding termination. Be sure your offer letters reiterate that no period of employment is guaranteed, even if there is an "annual salary."



Michael Kelsheimer focuses his practice on the employment law needs of Texas businesses and executive employees. He recognizes that the cost and expense of litigation make resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at mkelsheimer@grayreed.com or by phone at **469.320.6063**