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At-will employment is never as simple as it first sounds

Employers must treat workers in a consistent manner

While hiring new employees is often challenging enough, the decision about when and how to terminate employees can present a legal minefield for employers. A basic understanding of Oregon's "at-will" employment laws, and some legal guidance about how to avoid potential land mines, can help employers better protect themselves from wrongful termination and discrimination claims.

At-will employment means an employer or employee can terminate an employment relationship at any time, without cause. Employment in Oregon is presumed to be at-will. However, employers cannot solely rely on this presumption because, among other things, at-will employment does not prevent former employees from filing wrongful termination claims. Employers can take steps to preserve the at-will employment relationship in their policies and procedures, and employment offer letters.

Written policies, including employee handbooks, and offer letters should clearly state that employment is at-will and nothing in the document is intended to establish an employment contract. If an employment contract is deemed to exist, it could nullify the benefit of at-will employment — the right to terminate without cause.

In letters offering employment, it is critical to avoid setting a fixed date for when employment will end because doing so will void the at-will employment relationship.

When offering temporary employment, employers should note the expected end date and follow it immediately with an explanation that either party can end the relationship before or after that date without cause.

Employers also should not provide specific reasons why an employee can be discharged, as these reasons often supersede the right to terminate without cause.

The introductory page of employee handbooks create the perfect opportunity to declare that employment is at-will and that nothing in the handbook creates an employment contract. Handbooks should clearly establish that they describe the employer's general policies, which the employer may change at any time and deviate from if circumstances warrant it.

Employees should sign an acknowledgment that they read the handbook and specifically acknowledge the at-will employment relationship.

These same suggestions apply to other documents governing employer or employee conduct, including disciplinary policies. Disciplinary policies and procedures should be written in terms of what the employer "may" do, and not what it "will" do. Employers should be clear that the disciplinary procedures do not create a contract or otherwise void the at-will employment relationship, and they may change them at any time or deviate from them.

Employers can take proactive steps to help defend against wrongful termination lawsuits, should they be filed. Three universal practices help guard against even the perception of discrimination or retaliation: (1) establish and publicize processes for employees to report concerns; (2) apply disciplinary actions consistently; and (3) document, document, document.

Established reporting processes provide employees a means to report complaints of discrimination, harassment, retaliation or unlawful conduct. They also can assist employers with their obligation to investigate these types of complaints by helping them to track complaints made and ensure consistent and proper investigations and documentation.

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Publicizing and using these reporting processes increases the likelihood that complaints will be resolved internally.

Consistency is essential when it comes to disciplining employees. Employers should avoid selectively applying attendance policies or other standards of performance, and follow established disciplinary policies and procedures whenever possible. This applies to both termination and disciplinary actions leading up to termination.

Failing to treat all employees the same opens the door for one employee to claim he or she was treated less favorably than others. While every employee with the authority to discipline should strive for consistency, having a single person or department, such as human resources, vet all disciplinary and termination decisions is a great way to help ensure consistency across an organization.

It is essential to gather documentation, such as signed witness statements, that support the decision to discipline or discharge an employee.

Similarly, when investigating a complaint, employers should document the investigation process and what was learned. This documentation will memorialize why and how decisions were made, in addition to providing valuable evidence against wrongful termination allegations.

At-will employment does not provide a license for employers to discharge employees for unlawful reasons.

Most employers know they cannot discriminate against an employee based on certain protected characteristics, such as race, religion, national origin, age, gender, pregnancy, sexual orientation, disability or genetic information.

Employers also cannot retaliate against employees for engaging in protected activities, such as receiving workers compensation, making internal or external complaints of unlawful activity in the workplace, or using family or medical leave.

In addition, employers cannot retaliate against employees for opposing employer discrimination or retaliation, or exercising their rights as employees.

It can be particularly complicated to discharge an employee who has requested or is receiving workers' compensation, accommodations for a disability, family leave or medical leave, or has reported potentially unlawful activity. In these situations, it is more difficult, and even more necessary to avoid even the perception of discrimination or retaliation. Legal counsel may be especially helpful in these situations.

Without a doubt, protecting against wrongful termination allegations can be tricky. Whether an activity or characteristic is protected is not always clear, and avoiding the perception of discrimination or retaliation can be difficult.

Often the best defense is obtaining legal advice while preparing to discharge an employee, particularly when the discharge falls into one of the challenging situations described above.

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