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The Eroding 'At-Will' Employment Doctrine

Contracts, case law and statutes begin to offer protections

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"At-will" employment is the most prevalent form of employment in the United States today, and it typically serves as the default form of employment. An employer normally need not provide any reason for terminating an at-will employee or for changing any of the terms or conditions of employment of an at-will employee, so long as the termination or change in employment is not unlawful, discriminatory or violative of a statute.

Despite the "at-will" nature of most employment relationships, Congress and many state legislatures have enacted laws that provide protections for even "at-will" employees. Even with statutory protections, an "at-will" employment relationship is often still the most desirable form of employment between an employer and the employee.

Because it is easier for an employer to terminate an employee who is hired on an "at-will" basis, most employers desire to ensure that employees are hired and retained on the "at-will" basis. In this regard, a company's employee handbook and other documents given to the employee at the start of, and during, their employment deserve attention.

Sloppy drafting is particularly dangerous when it includes statements that could be interpreted as some form of guarantee of future employment. Such statements could be interpreted by courts as changing the nature of "at-will" employment and could give the employee additional rights. Examples include those that state or imply that employees can expect a "long and happy relationship" with the company; that a supervisor "is here to resolve whatever problems might arise"; that the company prefers, whenever possible, to "promote from within."

For these reasons it is important for employers to include a prominent, clear and conspicuous disclaimer at the beginning of the handbook, and any other relevant documents, stating that nothing in the handbook or other documents changes the "at-will" nature of the employment relationship, nor does it create a contract for employment.

Legislative-Initiated Changes

State and federal legislatures have wrought changes to the "at-will" nature of most employment relationships. Most of these changes grant to the "at-will" employee additional rights not normally present in an "at-will" employment relationship.

Even "at-will" employees cannot be treated in a discriminatory manner. For example, under Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), and the New Jersey Law Against Discrimination ("LAD"), it is illegal to discriminate in any aspect of employment, including: hiring and firing; compensation, assignment, or classification of employees; or fringe benefits. Discriminatory practices under these laws include: harassment on the basis of race, color, religion, sex, national origin, disability, or age and other protected class status; and retaliation against an individual for filing a charge of discrimination, employment decisions based on stereotypes or assumptions about the abilities, and denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, national origin, or an individual with a disability. Title VII also prohibits discrimination because of participation in schools or places of worship associated with a particular racial, ethnic or religious group.

The New Jersey legislature passed the Law Against Discrimination in 1945 in recognition of New Jersey's public policy against discrimination. Similar to Title VII, the ADA, and the ADEA, although more extensive in reach, the Law Against Discrimination prohibits discrimination against employees on the basis of the employee's age, ancestry, atypical heredi-

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tary cellular or blood trait, service in the armed forces, color, creed, marital status, civil union status, domestic partnership status, sexual orientation, gender identity or expression, national origin, nationality, sex, race, or disability. *See, e.g.*, N.J.S.A. § 10:5-3.

The first step toward avoiding and minimizing the negative effects of a discrimination claim begins with the employee handbook. An employer's antidiscrimination policy, in order to adequately place employees on notice, should clearly state that the company will not tolerate discrimination, and will take all necessary and appropriate steps to ensure its eradication from the workplace. The policy should specifically state that the company will not discriminate regarding the terms or conditions of employment. Furthermore, the policy should be clear that it applies to all employees, regardless of their status within the company. Finally, the policy should establish complaint and reporting procedures.

A separate antiharassment policy may seem redundant, or even unnecessary, but a well-drafted antiharassment policy can be a cost-effective means of providing additional protections to an employer. Because harassment can be difficult to define, a clear and specific definition can protect an employer from harassment claims.

As always, any antidiscrimination or antiharassment policies are useless, both to employees and as a prophylactic against litigation, if the employees are not made aware of the policies and their rights and duties under those policies. Therefore, the policy should be included in any employee handbook or manual and given to every employee upon the commencement of his or her employment, should receive yearly policy updates and the employer must promptly respond to claims of discrimination.

The Fair Labor Standards Act: Minimum Wage and Overtime Pay: A second way that federal legislation has modified the nature of at-will employment is through the enactment of the Fair Labor Standards Act ("FLSA"). The FLSA requires employers of covered employees who are not otherwise exempt to pay a minimum wage of not less than $6.55 per hour effective July 24, 2008; and $7.25 per hour effective July 24, 2009. The FLSA also requires employers to pay covered employees not less than one and one-half times their regular rates of pay for all hours worked in excess of 40 hours per week, unless the employees are otherwise exempt.

In order to avoid suits filed under the FLSA, an employer must be knowledgeable about the various requirements of the potential exemptions, and recognize when those exemptions are appropriate.

There are several steps that an employer can take in order to avoid FLSA-based litigation. First, an employer should devise a clearly stated policy regarding the payment of overtime that states which employers are exempt. The employer should also provide clear, detailed job descriptions for all employees, especially those to whom the employer claims any exemption applies.

Whistleblower Protection Laws: Whistleblower protections, which in New Jersey generally fall under the Conscientious Employee Protection Act, refer to a category of laws that make it illegal for an employer to terminate or retaliate against an employee because the employee has reported or complained of a perceived violation of the law by the employer. Whistleblower protection laws exist at both the state and federal level. Employers need to be all the more aware of the steps they can take to avoid and minimize the effects of such claims. The first step toward this goal is to establish a system that provides routine education to supervisors and managers regarding both the company policy on retaliation and what, in fact, constitutes retaliation. As always, employers should ensure that their employee handbooks and manuals clearly explain that company policy prohibits all forms of retaliation against employees who complain about discrimination, harassment and other forms of illegal activity.

Employer Initiated Changes

Employers have sought to adapt at-will employment to suit their changing needs. Unlike the legislatures, though, employers carry out their modifications through contract.

Restrictive Covenants as a Means to Modify the At-Will Employment Contract: An example of an employer-driven modification to the at-will employment contract is the use of restrictive covenants in employment contracts, prohibiting the employee from competing against the employer after the employment relationship ends.

Restrictive covenants address the conflict between two competing concepts. On the one hand, employees acquire knowledge and skill through a certain employment relationship, and believe that what they have learned belongs to them and is theirs to take with them when they leave. On the other hand, employers invest significant amounts of time and money into each employee and feel that they have some right to reap a return on that investment. So, while an employer cannot force an employee to remain with the company, a restrictive covenant allows an employer to prevent former employees from using the knowledge and skills they have obtained for the benefit of another employer.

Generally, courts have enforced restrictive covenants when the agreements are no broader than necessary to protect the legitimate interests of the employer, and are reasonable in both duration and geographic scope. Judicial enforcement of restrictive covenants in at-will employment agreements can be particularly oppressive from the employee's standpoint. For this reason, some courts have imposed stricter requirements before enforcing such agreements against at-will employees, particularly when there is a perception that the employee was unfairly terminated.

Alternative Dispute Resolution as a Method for Addressing Employment Issues: While mandatory arbitration agreements do not modify the at-will employment relationship in the same way that restrictive covenants may, arbitration agreements are contracts that modify an employee's rights by limiting the employee's ability to file suit in state or federal court. In this way,

arbitration agreements serve as an effective means of limiting employment-driven litigation.

The relatively large number of employment disputes filed in state and federal court has caused many employers, large and small, to consider alternative means for resolution of employment disputes. One such method is for employers to establish their own systems of dispute resolution.

If an employer decides to require arbitration, it should keep several points in mind. First, while placing information regarding a company's arbitration policy in the employee handbook is a good idea, the employer should also consider having each employee sign a separate arbitration commitment. Second, because virtually any claim can be arbitrated, it is also advisable to define as broadly as possible the scope of all claims that the employer intends to be arbitrable.

Conclusion

Although the "at-will" doctrine has been eroded by contract, case law and statutes, it still is the most prevalent form of employment in the United States. ■