How Best to Manage an 'At-Will' Termination

Urgent message: In most states, employment is *at will*—meaning that an employer can fire or terminate an employee at any time, for any reason that is not against the law. Even so, the employment at-will doctrine isn't a license for an employer to fire employees at the drop of a hat. There are still critical considerations for urgent care operators to heed when terminating a provider or staff member.

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What is Employment *At Will*?

In short, if you're employed at will, an employer doesn't need good cause to fire you.[1-3] The employer can terminate an employee at any time, for any reason, with or without notice. That comes as a surprise to many employees (and some employers).

It may be a bit far-fetched for an employer to tell an at-will employee, "I don't like that you're a rabid Green Bay Packers fan—you're fired," but it's generally not against the law to do so. An employee in that situation has few, if any, remedies, unless the employer did something to violate the employee's rights or violated state or federal law.[4,5]

All states—except for Montana—have enacted laws that protect the employer in an at-will situation. Unless you signed an employment agreement that states you can't be terminated without good cause, it is assumed in all other states and jurisdictions that you're an at-will employee.[6,7]

In many situations, employers will explicitly state that a worker is an at-will employee in the onboarding process. However, as discussed below, some employees have won lawsuits where their employers told them they could only be fired for good cause.[8-10] Even statements as lighthearted as, "You'll always have a place here, as long as you keep up the great work," have been found to create a contractual relationship for employment.[11,12]

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Employment Contracts

An employment contract is a signed agreement between the employer and the employee that outlines the basic details of the position. This contract sets out the specific parameters of the employment situation. Provided the employee signs the employment contract, it is binding. An employment contract may include a detailed description of the terms under which the employee will work for the employer. This typically includes salary and health benefit eligibility after working a specific amount of time, as well as vacation, retirement, and personnel procedures.[13]

Implied contracts

In some circumstances where there is no written contract, an agreement will be *implied* through a verbal understanding or by the actions of the employer and the employee.[6] Again, while employment is presumed to be at-will,[14] typically, the "at-will presumption can be rebutted by a showing that the parties entered into an express or implied agreement which prohibited the employer from discharging the employee without just cause."[15]

In the private employment context, an express or implied agreement between the employer and employee may provide the terms of the employment contract. Courts frequently examine language of employee handbooks to determine terms of an employment contract and whether they provide that an

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employee may be discharged only for cause.[16,17] Some courts have held that personnel rules can form the terms of the employment contract.[18] Thus, an implied employment contract may in some instances be inferred from comments made during an interview or job promotion, or from provisions of a training manual or handbook.[19]

Although implied contracts are difficult for an employee to prove, they have been held to be binding.[19] Courts will look at factors such as these to determine if an implied contract existed:

- The length of employment
- Evidence of the employee's performance on the job, such as performance evaluations
- The employee's performance recommendations by the employer
- The history of discussions between the employer and the employee, to see if statements were made to ensure the future employment of the employee
- The employment handbook, to see whether the employer violated any actions in properly terminating the employee
- The employer's hiring and firing practices
- The timing of the employee's qualifications for benefits like medical coverage
- A comparison of similar industries as to whether written or implied contracts are the norm[13]

Exceptions to the At-Will Presumption

Courts have created exceptions to the at-will presumption in an attempt to in some way equitably mitigate the doctrine's sometimes severe consequences.

The three common-law exceptions accepted by most courts are public policy, implied contract, and implied covenant of good faith.[20] Courts that have recognized good-faith-and-fair-dealing exceptions have found either covenants implied in-fact or covenants implied in-law.[21-23]

Covenants implied in-fact have been found in "objective manifestations."[24] This includes actions by the employer such as repeated promotions and pay increases that might reasonably give an employee reason to think that they have job security and will be treated justly.[25] When determining if such a covenant should be inferred, a court will examine factors such as whether the company properly followed its stated personnel policies, the tenure of the individual's employment, any job security assurances that may have been given, a presence or lack of prior criticism of performance, and basic concepts of fairness.[26]

The most commonly recognized exception to the at-will presumption protects employees against adverse employment actions that violate a public interest or public policy.[27] Specifically, under the public policy exception to the at-will employment doctrine, South Carolina courts have held that an at-will employee has a cause of action in tort for wrongful termination where there is "a retaliatory termination of the at-will employee in violation of a clear mandate of public policy."[28,29]

The South Carolina Supreme Court found that the public policy exception clearly applies in cases in which either: 1) the employer requires the employee to violate the law; or 2) the reason for the employee's termination itself is a violation of criminal law.[30]

Note that those states that accept the public policy exception differ to various degrees in its application. Most states accept only public policy that is provided in state constitutions and statutes, but there are a few states that permit additional sources such as administrative regulations, professional codes of ethics, and notions of public good and civic duty.[31]

Takeaways

It's essential for urgent care operators and owners to understand and appreciate that while employment relationships are presumed to be "at-will" in all states except Montana, unlawful termination lawsuits can arise.

The common-law and statutory exceptions to the at-will rule are litigated with some frequency to determine whether the specific facts of a case constitute an exception or an implied contract. Generally, courts uphold the presumption of at-will employment, and a plaintiff's cause of action is difficult to prove.

While, in many cases, an employer may believe that he can terminate an employee "at will," there is some protection that can be taken to prevent a potential lawsuit. A severance agreement can be offered to the employee at termination. The employer can ask the employee to sign the agreement which provides them with a certain amount of salary (eg, 2 weeks for every year of employment) in exchange for full release of claims and a promise of confidentiality or nondisclosure.

The employment "at-will" doctrine does not give the employer a license to do whatever it pleases—there are still

very important issues to examine any time an employee is terminated. Always, discuss your employment issues with a qualified employment law attorney. ■

References

1. Guerin L. Employment at will: what does it mean? *Nolo*. Available at: https://www.nolo.com/legal-encyclopedia/employment-at-will-definition-30022.html. Accessed May 3, 2019.
2. *Crawford Rehab. Servs., Inc. v Weissman*, 938 P.2d 540, 546 (Colo. 1997).
3. *Hollowell v Postle Extrusion*, 2017 U.S. Dist. LEXIS 104132, 2017 WL 2876316, at *4 (N.D. Ind. July 6, 2017).
4. FindLaw. At-Will Employee FAQs. Available at: https://employment.findlaw.com/hiring-process/at-will-employee-faq-s.html. Accessed May 3, 2019.
5. *Mullin v Hyatt Residential Grp., Inc.*, 82 F. Supp. 3d 1248, 1251-52 (D. Colo. 2015).
7. Mont. Code Ann. §§ 39-2-901 through 39-2-915.
8. *Mastercraft Decorators, Inc. v Orlando*, No. 18-CV-6037-FPG, 2018 U.S. Dist. LEXIS 207951, at *12 (W.D.N.Y. Dec. 10, 2018).
9. *Keystone Fruit Mktg., Inc. v Brownfield*, CV-05-5087-RHW, 2006 U.S. Dist. LEXIS 101882, 2006 WL 1873800, at *9 (E.D. Wash. July 6, 2006), aff'd, 352 F. App'x 169 (9th Cir. 2009) (summary order).
10. *Brown v St. Paul Travelers Companies*, 559 F. Supp. 2d 288, 292 (W.D.N.Y. 2008), aff'd, 331 F. App'x 68 (2d Cir. 2009) (summary order).
11. *Britto v Prospect Chartercare SJHSRI, LLC*, 909 F.3d 506, 513 (1st Cir. 2018).
12. *Reasoner v Bill Woeste Chevrolet, Inc.*, 134 Ohio App.3d 196, 200-201, 730 N.E.2d 992, 995 (Ohio Ct. App. 1999).
14. *Lietz v State ex rel. Dep't of Family Servs.*, 2018 WY 127, ¶¶ 12-13, 430 P.3d 310, 314 (Wy. 2018), citing *Ormsby v Dana Kepner Co.*, 997 P.2d 465, 469, 471 (Wyo. 2000).
15. *Boone v Frontier Refining, Inc.*, 987 P.2d 681, 685 (Wyo. 1999).
16. *Brodie v Gen. Chem. Corp.*, 934 P.2d 1263, 1266 (Wyo. 1997).
17. *Mobil Coal Producing, Inc. v Parks*, 704 P.2d 702, 707 (Wyo. 1985).
18. *Abell v Dewey*, 870 P.2d 363, 369-71 (Wyo. 1994).
19. Doyle A. What is an employment contract? *The Balance Careers*. Available at: https://www.thebalancecareers.com/what-is-an-employment-contract-2061985. Accessed May 3, 2019.
20. National Conference of State Legislatures. The at-will presumption and exceptions to the rule. Available at: http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx. Accessed May 3, 2019.
21. *Lehner v ProSource Consulting LLC*, 2018 U.S. Dist. LEXIS 205919, at *15 (D. Md. Dec. 6, 2018).
22. *Jarvis v Enter. Fleet Servs. & Leasing Co.*, 2009 WL 10685552, at *4 (D.Md. Feb. 12, 2009).
23. *Suburban Hosp., Inc. v Dwiggins*, 324 Md. 294, 596 A.2d 1069, 1073 (Md. 1991).
24. *Kerr v Gibson's Products Co.*, 733 P.2d 1292 (Mont. 1987).
25. *Dare v Montana Petroleum Marketing*, 687 P.2d 1015 (Mont. 1984).
26. JRank. Employment at will – breach of an implied covenant of good faith and fair dealing - job, employee, covenants, and contract, Available at: http://law.jrank.org/pages/6433/Employment-at-Will-Breach-an-Implied-Covenant-Good-Faith-Fair-Dealing.html#ixzz5eob9EJR2. Accessed May 3, 2019.
27. Ashford University. BUS 311. The at-will presumption and exceptions to the rule. Available at: https://www.coursehero.com/file/13781425/Discussion-1-The-Employee-At-Will/. Accessed May 3, 2019.
28. *Owens v Crabtree*, No. 5616, 2019 S.C. App. LEXIS 10, at *8 (S.C. App. Jan. 16, 2019).
29. *Moshtaghi v The Citadel*, 314 S.C. 316, 323, 443 S.E.2d 915, 919 (S.C. App. 1994).
30. *Ludwick v This Minute of Carolina, Inc.*, 287 S.C. 219, 224, 337 S.E.2d 213, 216 (S.C. 1985).
31. Muhl CJ. The employment-at-will doctrine: three major exceptions. *Monthly Labor Review*. January 2001. Available at: https://www.bls.gov/opub/mlr/2001/01/art1full.pdf. Accessed May 7, 2019.