

At-Will Employment Overview

With the exception of Montana (where the at-will employment doctrine is not recognized), the default rule in the United States is at-will employment.

What does at-will employment mean?

At-will employment means that an employer can terminate an employee at any time for any reason, except an illegal one, or for no reason without incurring legal liability. Likewise, an employee is free to leave a job at any time for any or no reason with no adverse legal consequences.

At-will also means that an employer can change the terms of the employment relationship with no notice and no consequences. For example, an employer can alter wages, terminate benefits, or reduce paid time off benefits.

When is an employee's employment considered "at will"?

Unless otherwise stated by the employer (in a contract) or in Montana, employment is presumed to be "at will."

The at-will presumption is a default rule that can be modified by an employment contract, which may provide for a specific term of employment or allow termination for cause only. For example, collective bargaining agreements typically contain a provision that represented employees may only be terminated "for cause" (which includes reasons like poor employee performance, employee misconduct, or economic necessity).

Are there any exceptions to the "at will presumption"?

Yes, while the at-will presumption is strong, the Courts have recognized several exceptions to the at will presumption:

1. Public policy violation
2. Implied contract
3. Unlawful reason or terminating

What is the public policy violation exception?

The public policy violation exception protects employees against adverse employment actions that violate a public interest. In other words, an employee cannot be fired for engaging in any of the following acts:

- Refusing to perform an act that state law prohibits;
- Reporting a violation of law;
- Engaging in acts that are in the public interest; or
- Exercising a statutory right

When considering terminating an employee, it is recommended that **before** making a final decision, you review the employee's file to determine if there is a potential that the employee is or may be perceived as being terminated for engaging in one (or more) of the above-listed acts.

If, following that review, you are concerned that the public policy violation exception could protect this employee, contact an HR Professional or a qualified employment attorney to discuss the termination before you take any adverse employment action against the employee.

What is the implied contracts exception?

The implied contracts exception protects employees against adverse employment actions in circumstances where the employee may have an expectation of fixed term or even indefinite employment with the company.

An implied contract may be created in several different ways. Statements by a supervisor, manager, or company representative may inadvertently create an oral contract for continued employment. For example, statements like

- "We need good people around here, you've got a job for life!"
- "We don't dismiss employees without giving them a chance to correct their behavior."
- "You'll always have a home here as long as you do a good job,"
- "We only fire employees who are unable to meet our performance standards, even after coaching and training."

may alter the nature of the at-will employment relationship and create a situation where an employee can only be terminated "for cause."

Similarly, the employer's handbooks, policies, practices or other written assurances can also create an implied contract for continued employment. For example, an employer's practice of only firing employees for cause, or a provision in the employee handbook that specific disciplinary or termination procedures will be followed can also create a situation where an employee can only be terminated "for cause."

How can I avoid creating an implied contract for continued employment with my employees?

As a general rule, you need to be careful in your oral and written communications with your employees about the employment relationship.

Avoid making statements to employees that give the impression that

- Employees can only be fired for good cause and/or
- Employment is for a set period of time.

Employers can further protect themselves by using a clear and unambiguous disclaimer on written materials stating that its policies and procedures do not alter the nature of the at-will employment relationship. Employers can also reserve the right to modify policies and procedures at any time.

What is the unlawful reason exception?

Even where employment is at will, an employee cannot be fired for an unlawful reason.

Federal and state discrimination statutes prohibit employers from basing employment decisions on an employee's protected class (e.g. race, color, religion, sex, national origin, age, disability, veteran status, etc.). This means that an employer cannot terminate an employee because of his/her membership in a legally protected class and/or his/her association with an individual who is a member of a protected class.

In addition, many state and federal laws protected employees from being terminated in retaliation for performing a legally protected action.

Retaliation-protected actions include, but are not limited to:

- Filing a workers' compensation claim,

- Filing a discrimination or harassment suit
- Being a whistleblower regarding illegal or unsafe practices
- Refusing to perform illegal activities
- Participating in a workplace investigation
- Requesting reasonable accommodation for a disability
- Taking legally protected leave from work, such as FMLA leave
- Discussing (or complaining about) the working environment or wage and overtime practices

When considering terminating an employee, it is recommended that **before** making a final decision, you review the employee's file to determine if there is a potential that the termination could be or may be perceived as being for an unlawful reason (i.e. it could be viewed as discriminatory or retaliatory).

If, following that review, you are concerned that the termination could be for an unlawful reason, contact an HR Professional or a qualified employment attorney to discuss the termination before you take any adverse employment action against the employee.

What are some best practices to follow when terminating an at-will employee?

- **Document what leads to the reason for termination:** Keep accurate and thorough records of performance issues and disciplinary steps taken against an employee before the termination.
- **Conduct an investigation:** Don't terminate an employee without first conducting a thorough investigation of the issue leading to termination. During the investigation, speak to all parties who have knowledge of the issue – **including** the employee's side of the story
- **Give a reason:** Give the employee a clear and specific reason for the termination. This reason should also be documented as specifically as possible in writing.
- **Don't apologize:** Terminating an employee is never fun, but apologizing to the employee implies that something wrong or illegal is taking place. Be firm but polite.
- **Be consistent:** Follow the company policy for termination for all employees and apply all company rules equally to all employees. If an employee is terminated for a specific violation of policy, all employees who violate the same policy in the same way should face termination as well.
- **Check for "red flags":** Before terminating any employee review our "Red Flags when Taking Adverse Action" document and determine if there are any issues that may expose the company to a higher risk of legal action post-termination.
- **Consult with a professional:** Check with an HR Professional or a qualified employment attorney before terminating any employee to verify that you are acting within the laws of your state.

We recommend that you contact one of our HR Professionals before taking any adverse employment action against an employee so that they can discuss the reasons for termination with you and review any "red flags" that may exist.

The above information is a summary providing guidance on the key aspects of the law. Federal and state laws are more complex than presented here. This information is simplified for the sake of brevity and is not intended to be a substitute for legal advice. This information is provided with the understanding that (1) the author and publisher are not rendering legal advice and (2) this information is not a substitute for the advice of competent legal counsel. For more information, please contact a human resource professional or an employment law attorney.