



21 WAYS TO PREVENT EMPLOYEE LAWSUITS

Provided as an educational service by Alan J. Thayer, Jr.

Employees are going to lawyers in record numbers. In 1994, *Inc.* magazine reported that employment discrimination suits had risen 2,200% since 1974. According to another study, the discharged employees are winning two-thirds of the wrongful-discharge cases, with an average verdict of \$732,000.

Discrimination suits have risen 2,200% since 1974

As if the risk of a jury verdict is not bad enough, *Inc.* found that defense costs in employment cases average between \$20,000 and \$200,000.

The good news is you can reduce your exposure in future potential employee lawsuits by adopting preventative legal strategies today. A list of 21 steps you can take to ensure you comply with at-will employment law basics and to protect your business are included in this report.

The Basics

Discharged employees go to a lawyer because they believe they have been treated unfairly. The lawyer then determines whether the former employee has a claim that falls within one or more of a number of legal theories.

A successful preventative strategy will include developing policies and procedures so that 1) Terminated

employees (and any jury) will feel they have been treated fairly and 2) Your company can avoid violating the legal theories used in most discharge cases.

The general rule in the United States is that either the employee or the employer can terminate the employment relationship at any time, with or without notice and with or without cause. This is known as “employment-at-will.”

Since the 1930’s, judges and politicians have looked for ways to limit your ability to dismiss employees that do not work out. They have created three exceptions to the general employment-at-will rule: breach of a written, oral or implied contract, failure to treat fairly and violation of public policy.

Courts look to brochures, employee manuals, job interviews, offer letters, performance evaluations and informal representations by managers and supervisors to determine whether there is a written, oral or implied contract. If the court finds such a contract, the employer often must show they had “just cause” for dismissing the employee.

The just cause standard is far more difficult for employers to meet than the employment-at-will standard. Most companies prefer to adopt preventative strategies that attempt to preserve at-will employment.

The general employment-at-will rule does not apply if you have

written employment contracts or a union contract with your employees. Instead, the terms of the employment agreement, the terms of the union contract or the just cause standard will control.

If the court finds an expressed or implied agreement, then the court may also impose an implied duty to treat the employee “fairly.” This is an uncertain standard that can vary from jury to jury. For this and other reasons, many firms include disclaimers in employee manuals that the manual is not a contract.

Finally you cannot fire employees contrary to public policy. It is illegal to terminate any employee, including “at-will” employees, when the reason for discharge violates “public policy” set by statute, regulation, ordinance or judicial opinion.

Alan Thayer is an Oregon business attorney with over 20 years experience representing businesses huge and small. He welcomes your questions and comments. Call 541-345-2325 or email Alan at athayer@ptlaw.com.



21 Steps to Take

Steps you can take to preserve “employment-at-will” status so that it is easier to dismiss employees that do not work out are set out below.

These steps do not apply if you have a union contract. Written employment contracts should be reviewed by an experienced employment lawyer. Steps for communicating with your employees and conducting performance evaluations are also discussed.

Interviewing & Hiring

1. Do not make any statement limiting your ability to terminate employees. For example, comments such as, “this is a permanent position” or “you will have a job as long as you perform satisfactorily” can subject you to the higher “just cause” standard.

2. Do promise length of employment or continued employment. Persons hired for a particular period of time cannot be terminated before the time period expires without just cause.

3. Do not state an annual salary. Instead, discuss salary in weekly or monthly amounts. Stating an annual salary could be implied as a promise to employ for a year.

4. Print an “at-will” disclaimer on your job application. Have all job applicants sign the application as proof they received your disclaimer. The disclaimer should state that employment with your company is on an “at-will” basis, employment can be terminated with or without cause and with or without notice at any time by either the employee or the company and representations to the contrary must be in writing signed by the company president.

The employment application we prepared for our clients incorporates the disclaimer discussed above and other preventative law strategies.

5. Your interviewers must be aware of your at-will employment policy. Every one that conducts interviews for you must be aware of your

policy and must be able to clearly communicate your policy to applicants. If “puffing” in your hiring process goes too far, a court could imply a policy that you are not prepared to follow.

Employee Handbook

6. Add an employment-at-will disclaimer to your employee manual. If you have a manual, include a disclaimer. See the job application disclaimer discussed above.

7. Add disclaimers stating your handbook is subject to change. Also state your handbook does not constitute an expressed or implied contract.

8. Review for statements implying permanent or just cause employment. You should review your handbook and all documents you give to employees. Eliminate words such as “permanent,” “tenure” and “cause.” Substitute “regular,” “full time” and “part-time.”

9. Make clear that your at-will disclaimer applies to each of your classifications. This is important if your employee documents classify employees as “trial,” “regular” and “part-time.”

10. Replace all “reasons for discipline” with “rules of conduct.” With reasons for discipline, employees can argue that if they did commit one of the acts for which termination is a penalty, they cannot be fired. With rules that do not specify penalties, employees receive the same message without limiting your right to discipline.

11. Get help if you want grounds & procedures for discipline. Employers that do not want to preserve at-will status and instead want to provide grounds and procedures for discipline should

We also help our clients claim-proof their employee handbooks. We create customized handbooks, track employment law changes and create up-to-date revised handbooks each year. This way our clients have current handbooks without personally reviewing hundreds of employment law decisions each and every year.

consult an experienced employment lawyer for help drafting their policy.

Other Communications

12. Avoid written and oral promises and implied promises of job tenure. All owners and managers must be aware of this and must not invalidate your employment at-will policy with inappropriate comments.

13. Give each employee a written job description. A correct job description lets an employee know what is expected. It can also convince employees that the required duties are fair.

Performance Evaluations

14. Give honest, accurate and constructive evaluations in writing. Managers often fail to candidly identify job performance problems because they do not want to upset employees. As a result, the inaccurate favorable reviews are used against the company as evidence of discrimination or some other improper purpose in a latter wrongful termination suit.

15. Help your managers with their evaluations. Counsel managers regularly to give honest, accurate and constructive evaluations and monitor your managers’ evaluations.

16. Base evaluations on the employee’s job duties. Refer to the written job descriptions described in item 13 above.

17. Give specific, objective evaluations. Objective evaluations stating the number of times the employee was tardy or specific instances when they did not follow directions will help minimize unfairness and manager bias.

18. Correct performance problems. State any corrective action required and the consequences for failure to improve.

19. Review evaluations for fairness & consistency. Review all evaluations with another manager (preferably a higher level manager) before giving the evaluation to the employee.

20. Discuss evaluations with employees. Give employees an opportunity to discuss the evaluation with their manager and to note any comments on the evaluation before signing the

document. This gives the employee a fair chance to rebut any complaints.

21. Review evaluations throughout your organization. Periodically review evaluations to ensure they are applied consistently by each manager. Counsel any managers whose reviews appear to be inconsistent.