AT WILL VS. CONTRACT EMPLOYMENT

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Author and playwright Oscar Wilde once said, "The best way to appreciate your job is to imagine yourself without one." In this post-recession era, the employment landscape has changed dramatically – and it is important to examine one of the most fundamental, yet misunderstood, concepts in modern employment law: at-will employment.

What is At Will Employment?

Until the early part of the 20th century, it was common to employ someone for a fixed period of one year. That practice ended long ago, and the more common practice now is to hire employees on an at-will basis. In most states, including Texas, every employee is presumed to be an at-will employee. There are generally two exceptions: (1) employees with certain types of employment contracts, and (2) most union members. **In an at-will situation, either the employer or employee may terminate the employment relationship at any time, with or without warning, and for good cause, bad cause, or no cause.**

Very few employees actually have employment contracts for a fixed period of time. Some employers require signed contracts, but most of them address issues such as keeping the employer's information confidential, not competing against the employer, and not soliciting its customers or other employees. Just because an employee signs a contract to this effect, that contract alone does not change their status as an at-will employee, unless it specifically changes the status. **In order for a contract to change an employee's at-will status, it must expressly modify the "at-will" employment status in "clear and specific" language.** Usually these contracts have a specific time period for which the employee is to be employed, and specific grounds for how the employee will be terminated. For example, some contracts state that the employee can be terminated if he or she breaches company policy, gets arrested or convicted of certain crimes, or fails to satisfy performance goals. Such a contract will usually require the employer to send notice before the employee can be terminated.

Usually employment contracts are written and signed by all parties. Texas law, like most other states, requires that if the employment term is to last for one year or more, the contract must be in writing to be enforceable. Aside from that, oral contracts may be enforceable, but it is difficult to prove the specifics of oral contracts because memories often fade – sometimes unintentionally, sometimes conveniently. Remember: in an employment relationship, an oral contract isn't worth the paper it's written on!

Terminating At-Will Employment

Just because an employment relationship is "at-will", the employer doesn't have carte blanche to fire the employee. There are a variety of laws that make it illegal to fire employees for certain reasons. For example, employers are prohibited from terminating employees due to discrimination or retaliation. Accordingly, an employer with fifteen or more employees cannot fire an employee because of, among other things, the employee's race, color, sex, religion, or national original. Other types of employees – (e.g., pregnant workers, older workers, disabled persons, etc.) - may also be protected by various state and federal laws. These protections also

cover employees who take leave under the Family and Medical Leave Act. All told, there are a host of federal and state laws that protect approximately thirty different characteristics of employees. It is also illegal to fire an employee for "retaliation". The term "retaliation" essentially means that an employer cannot fire an employee because the employee lawfully exercised his or her rights. For example, an employee cannot be fired because he or she filed a workers' compensation claim, or because he or she filed a complaint with the federal government stating that the employer failed to pay overtime wages. Other "retaliation" laws – referred to as "whistleblower protection" – protect employees who report that their employer committed an unlawful act or failed to follow applicable laws. Recently the National Labor Relations Board, an arm of the federal government that we typically associate with employer-union issues, has ventured into the non-union employee realm and issued rulings and guidance indicating that employers cannot take adverse action against any employee (at will or not) who exercises his or her right to discuss the terms and conditions of employment with other employees – either personally or through social media. This is a new area of law with very gray parts, so before an employer issues a policy or revises an employee handbook, it would be a good idea to check with legal counsel knowledgeable in labor law. Employers should still document at-will employees' actions and misconduct. If any employee violates policy or makes mistakes, it is important to document the incident. Likewise, it is also important to document an employee's termination, even if it is at-will, in order to support the decision in the event the employee later claims he/she was fired for an unlawful purpose.

Independent Contractors

Independent contracts are treated differently than employees. The "at-will" rules that govern employees do not apply to independent contractors. Instead, the length and termination of an independent contractor's relationship is governed by the terms of its agreement with the company. However, employers often utilize independent contractors as employees in disguise so the employer can evade paying benefits, payroll taxes and overtime-wages. There are various state and federal laws governing whether or not an independent contractor is really an employee.

Improperly classifying employees as contractors in an attempt to reduce overhead is not only unfair to the worker, but creates inequality in the employer's business to the extent its competitors are abiding by the law.

To address this issue, on July 15, 2015, the U.S. Department of Labor (DOL) issued further "guidance" on determining whether a worker is an independent contractor or an employee. This is in addition to existing federal laws. Specifically the DOL's guidance focuses on what it calls an "economic realities test" to distinguish employees from contractors. This test has six factors, namely: (1) whether or not the work is an integral part of the employer's business; (2) whether the worker's managerial skills affect her opportunity for profit or loss; (3) whether the worker retained on a permanent or indefinite basis; (4) whether the worker's investment in the job is relatively minor as compared to the employer's investment; (5) whether the worker exercises business skills, judgment, and initiative in the work performed; and (6) whether the worker has control over meaningful aspects of the work performed. While all of these factors must be considered when making this determination, the DOL finds some of them more compelling than others, including, for example, whether the contractor is performing work that is integral to the business. **The DOL's ultimate inquiry is whether the worker is "economically dependent on the employer or truly in business for him or herself."**

Of particular significance to the real estate world, the DOL recognizes construction and janitorial/housekeeping providers as being particularly prone to misclassifying employees as contractors. So be on the alert!

Unions & Right To Work Laws

Many union members are not at-will employees. Some unions enter into collective bargaining agreements (CBAs) with employers. Most CBAs limit the employer's right to fire the employee, and provide for separate rights and remedies for employees that are wrongfully terminated. Normally, that process is handled through the union's grievance procedures. Some employees often confuse the concepts of "at-will" employment and "right to work" employment. The two concepts are really not related. A right to work law protects an employee's right to decide whether or not to join or financially support a union. Currently, 25 states, including Texas, have right to work laws. Most of these laws state that a worker cannot be required to join or pay dues to a union. There are a few exceptions to this, for example, employees of airlines and railroads, and employees working on certain federal property, may be required to pay union fees. Further, most right to work laws allow employees to resign from a union without penalty, but still require the union to provide certain benefits to the employee after they quit the union, such as covering the employee by the CBA.

While at-will employment gives both employer and employee certain freedoms, it is not without exception or recourse. Regardless of whether you are the employer or employee, you should understand your rights and you should understand what happens if your rights are not respected.