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SOME BASIC EMPLOYMENT LAW INFORMATION

Employment at Will

At Will Employment is a doctrine of American law that defines an employment relationship in which either party can break the relationship with no liability. Under this legal doctrine any hiring is presumed to be “at will.” That means the employer is free to discharge individuals for good cause, bad cause, or no cause at all, and the employee is equally free to quit, strike, or otherwise cease work.

Several exceptions to the doctrine exist, including employment contracts, collective bargaining contracts, and employment discrimination.

There is no requirement for an employer or an employee to give advance notice of a termination. An “at will” employee who gives advance notice of separation may be terminated immediately by the employer.

Contracts and Severance Agreements

An employee may have an enforceable contract with his employer limiting the circumstances of termination through an offer letter, an individual employment contract, or a collective bargaining contract.

Severance agreements may be enforceable as a contract or by federal law (the Employee Retirement Income Security Act).

Discrimination

Federal and state law make many forms of employment discrimination illegal, including discrimination on the basis of race, color, religion, sex (gender discrimination including pregnancy, childbirth or related medical condition), national origin, age, handicap or disability, and sexual or racial harassment.

Military Service Discrimination

The Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits employment discrimination against a person on the basis of past military service, current military obligation, or intent to serve. An employer must not deny initial employment, reemployment, retention in employment, promotion, or any benefit of employment to a person on the basis of a past, present, or future service obligation. In addition, an employer must not retaliate against a person because of an action taken to enforce or exercise any USERRA right or for assisting in an USERRA investigation.

Illegal Harassment

There are two forms of sexual harassment.

1. “Quid pro quo” harassment occurs when an employer harasses an employee because the employee refuses to consent to an unwelcome sexual proposal.
2. “Hostile environment” harassment occurs when the employer subjects an employee to severe unwelcome harassment such that it alters the employee’s conditions of employment and creates an abusive work environment. Merely offensive, rude, or boorish comments generally are not sufficient to constitute a hostile work environment.

Harassment based on race is illegal as well.

Immigration Reform and Control Act (IRCA)

The Immigration Reform and Control Act makes all U.S. employers responsible to verify the employment eligibility and identity of all employees hired to work in the United States. To implement the law, employers are required to complete and retain Employment Eligibility Verification forms (Form I-9) for all employees, including U.S. citizens.

Fair Labor Standards Act (FLSA)

Employees who are not exempt from overtime pay under the Fair Labor Standards Act must receive one and one-half times their regular hourly rate of pay for all hours worked in excess of 40 hours in a workweek.

There are numerous exemptions to the overtime provisions of the Fair Labor Standards Act. Much litigation focuses on the so-called white collar exemptions – executive employees, administrative employees and professional employees. There are both salary and duties tests for these exemptions which are often difficult to apply to real-life situations. If an employee meets the definition of an executive employee, administrative employee or professional employee, then that person is not eligible for overtime.

Paychecks

The Texas Payday Law requires an employer to pay its employees in full and on time on regularly scheduled paydays. The law deals with the timing and manner of wage payments and how to avoid illegal deductions from wages.

Employers are required to pay non-exempt employees (as defined by the Fair Labor Standards Act) at least twice per month on regularly scheduled paydays and exempt employees (again defined by the Fair Labor Standards Act) at least once per month.

Employees who quit must be paid no later than the next regularly scheduled payday.

Terminated employees must be paid their final pay no later than the sixth day after the date the employee is discharged.

Severance pay is not generally due unless there is a written agreement between the parties about severance or the employer has a severance pay policy.

Payouts of accrued leave are required only if such a payment is promised by the employer in a written policy or agreement. If there is no such written policy or agreement, then no payment is owed.

With few exceptions, an employer may only deduct from wages items which are authorized by the employee in writing to be deducted.

Family and Medical Leave (FMLA)

The Family Medical Leave Act entitles eligible employees of covered employers to take job-protected, unpaid leave for specified family and medical reasons. Eligible employees are entitled to twelve workweeks of leave in any 12 month period for a serious health condition that makes the employee unable to perform the essential functions of his job, care of an immediate family member (spouse, child, or parent) who has a serious health condition, birth or care of a child within one year or both, or adoption of a child within one year of the adoption.

COBRA (Consolidated Omnibus Budget Reconciliation Act of 1985).

Employers with 20 or more employees that offer health benefits to employees generally require that an employer provide notice to an employee and the spouse of their right to continue health coverage at their own cost under the employer's plan for up to 18 months.

References

False statements made with malice may be actionable as defamation. This can occur especially in the context of references regarding employees. There are defenses to defamation including the truth of the statement, lack of malice, or privilege.

Unemployment

Generally, an employee who is out of work through no fault of his own may file for unemployment insurance. There are requirements including earnings during a sufficient number of quarters, medical ability to work, and active searching for employment.

Employees who resign their position or who engage in misconduct generally are not eligible for unemployment insurance benefits.

Whistleblowing

Many different statutes (such as Sarbanes Oxley, the Occupational Safety and Health Act, and the False Claims Act) protect whistleblowers. Generally, the employee protection provisions prohibit covered employers from discharging or otherwise discriminating against any employee because the employee engaged in protected whistle blowing activities.

The protected activities typically include:

1. Initiating a proceeding under, or for the enforcement of, any of these statutes, or causing such a proceeding to be initiated;
2. Testifying in any such proceeding;
3. Assisting or participating in any such proceeding or in any other action to carry out the purposes of these statutes; or
4. Complaining about a violation.

Independent Contractors

A determination whether an individual is an employee or an independent contractor can be important for several reasons including:

1. Tax withholding (income and unemployment taxes)
2. Benefits (health care, pensions, and vacation)
3. Unemployment discrimination laws
4. Liability (Employers are liable for negligence by employees but not for negligence by independent contractors.)

Different statutes have different definitions of “independent contractor.”

The Internal Revenue Service looks to 20 factors to determine whether someone is an employee or independent contractor. Perhaps the most critical factor is whether the employing entity has the right or ability to control the work of the worker.

Covenants Not to Compete

This area of the law has been in a state of flux for the past few decades in Texas. Critical factors in analyzing a covenant not to compete are:

1. Time (how long the covenant lasts)
2. Scope (how broad it is in terms of restricting the employee from types of jobs)
3. Geography (how broad it is geographically)
4. Consideration (what is given in exchange for the covenant by the employee not to compete with his employer)

Employee Retirement Income Security Act (ERISA)

ERISA sets uniform minimum standards to ensure that employee benefit plans are established and maintained in a fair and financially sound manner. In addition, employers have an obligation to provide promised benefits and satisfy ERISA’s requirements for managing and administering private retirement and welfare plans.

Occupational Safety and Health Act (OSHA)

The Act has two regulatory functions: setting standards and conducting inspections to ensure that employers are providing safe and healthful workplaces. OSHA standards may require that employers adopt certain practices, means, methods, or processes reasonably necessary and appropriate to protect workers on the job.

Employees may file complaints with OSHA if they believe that they have experienced discrimination or retaliation for exercising any right afforded by the OSH Act, such as complaining to the employer, union, OSHA, or any other government agency about workplace safety or health hazards; or for participating in OSHA inspection conferences, hearings, or other OSHA-related activities.

Privacy

Invasion of privacy in the workplace includes prying or intrusion into private matters or making private facts public when the facts are embarrassing or objectionable.

Invasion of privacy can occur through physical searches (for cash, inventory shortages, company property, employee property, or for contraband including drugs or alcohol), drug testing, or monitoring of telephone use, internet use, email, or computer files.