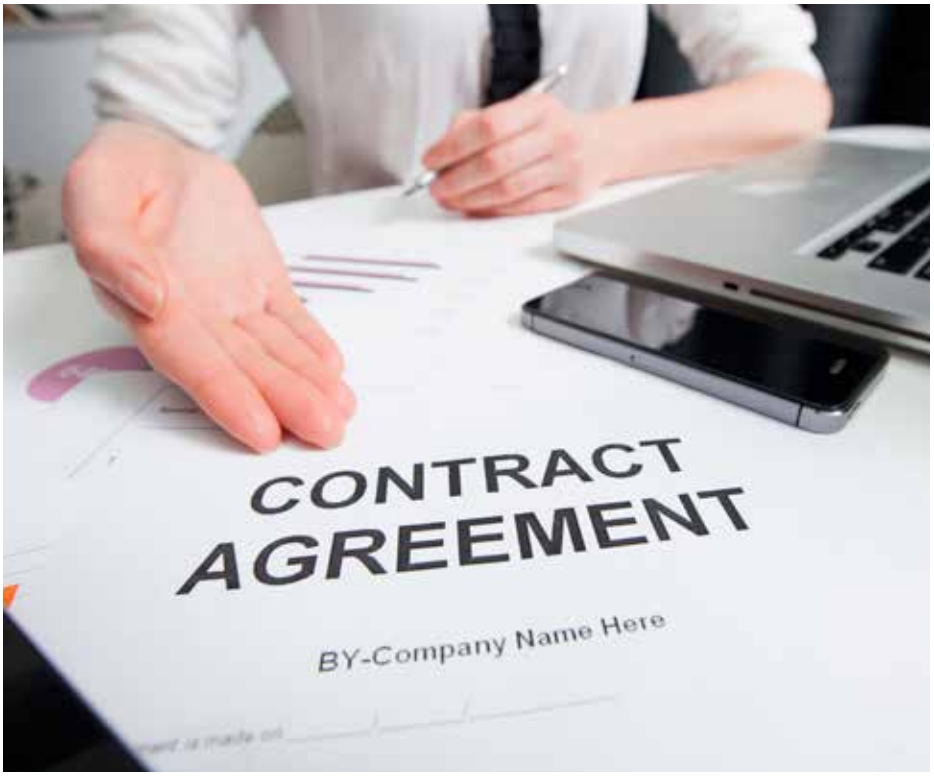
Is there 'at-will' employment in Oregon anymore?



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"TELL ME, is there really such a thing as 'at-will' employment in Oregon anymore?"

This is a question that comes up more and more frequently in my world as an employment lawyer advising businesses — either from clients, friends or at social gatherings. The short answer I usually give is, "Yes, but it doesn't always seem that way."

In fact, employment "at will" is still the law of the land in Oregon.[1] Under this principle developed by the courts (what we call "common law," as opposed to laws created by legislation), an employer is free to end the employment relationship at any time and for any reason, with or without cause, and with or without notice.

However, there are so many exceptions to this rule that it can be eclipsed in practice, even if the rule is still true in theory.

To give you an idea of how the exceptions can dominate the rule in today's workplace, here is a very short summary of the most common exceptions that affect "at-will" employment in Oregon.

Contractual limitations

Written employment agreements may provide some commitment for a particular length of time or limit the circumstances for which an employee can be terminated. For example, some agreements provide that the employee must be given a certain amount of notice, or cannot be terminated at all, unless the employer has "cause."

"Cause" is typically defined in the contract as specific wrongful acts, such as theft, gross misconduct, violations of the law or company policy, or failure to follow directives.

Likewise, union contracts and collective bargaining agreements typically include negotiated contractual terms that constrain an employer's ability to terminate union-represented personnel without following negotiated layoff rules or taking specific disciplinary steps in advance.

Employers also occasionally create contractual limitations, usually unknowingly, by written policy, employee handbooks, verbal commitments and even past practice. This is precisely why most employers include a disclaimer in their handbook, or other written policies, that advises the reader that policies, practices and verbal discussions cannot be relied upon and that a written agreement signed by an authorized representative of the company is required to create a binding contractual commitment of the employer.

Without an appropriately and clearly worded disclaimer, employers may leave themselves exposed unnecessarily.

Anti-discrimination laws

There is a host of state and federal laws prohibiting employment decisions on the basis of certain defined categories, which we refer to as "protected classifications."

These are the obvious categories most of us in today's workplace know and expect, including an individual's race, color, religion, national origin, citizenship, age, gender, sexual orientation, gender identity and gender expression, disability, protected genetic information, pregnancy, and/or

[1]This article primarily addresses private employment. Public employees typically have additional protections.

veteran/military status, as well as association with a person in a protected classification.

In addition, lesser-known protected classifications under Oregon law also exist, including marital status, family relationships (with limited exceptions), expunged juvenile court records, off-duty tobacco use and wage garnishments.

Anti-retaliation protections

Other laws also forbid adverse employment consequences (in this case, termination) because an employee exercised certain rights or legal remedies.

This includes what are traditionally referred to as "whistleblower" protections, which impose strict protections for workers who have made a complaint or raised legitimate, good faith concerns about issues such as discrimination, harassment or retaliation on the basis of any protected classification (listed above); wages and hour compliance; health and safety issues; financial reporting, accounting errors or fraudulent practices; or any other potential violation of a state or federal law, rule or regulation.

Thanks to fairly robust anti-retaliation protections now included in most state and federal employment statutes, this exception to "at-will" employment goes further than just classic whistleblowing scenarios like those described above, and prohibits terminations based in whole or in part upon the following additional employee activities or events:

• **Engaging in a union or other related activities** protected by the National Labor Relations Act, which includes voicing concerns and engaging in discussions with other employees or management about wages, working conditions and unionization. This is not limited to only workplaces where a union or collective bargaining agreement is already involved.

• **Participating in certain criminal/civil proceedings,** agency proceedings or wage claim activities, including pursuing a lawsuit against the employer, testifying at unemployment or workers' compensation insurance hearings, or cooperating with BOLI enforcement efforts.

• **Being injured on the job** and/or filing a workers' compensation claim.

• **Being absent for one or more of the reasons protected by applicable leave laws,** which in Oregon may include: sick leave, FMLA/OFLA leave, crime victims leave, domestic violence leave, leave for military service, military family leave, jury/witness duty, or pregnancy and/or disability leave.

What does all this mean to your business?

You want to make sure your own definition of employment "at-will" is consistent with current standards and you should be aware of the exceptions.

Also, I recommend employers be proactive about documenting the reasons leading up to a termination. For example, if you are contemplating discipline for attendance, make sure your documentation reflects that any protected absences were excluded from consideration.

While you may not ultimately need to defend your decision in court, if you do, it can be critically important that your paper trail reflects your true rationale and doesn't stray into the impermissible reasons discussed above.

Finally, as always, consult qualified counsel if you have any cause for concern or want to make sure you have spotted any applicable exceptions before you proceed with termination.

This article is intended to inform the reader of general legal principles applicable to the subject area. It is not intended to provide legal advice regarding specific problems or circumstances. Readers should consult with competent counsel with regard to specific situations.