

# Employment At-Will and Employment Law Litigation



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# Employment At-Will Doctrine

- Employment is for an indefinite term and can be terminated by the employer or the employee at will and without cause.
  - Texas strictly conforms to this doctrine unless there is an exception.
- Exceptions:
  - Employment contracts
  - Exceptions carved out by statutory law, some common law, and even local ordinances.

# Exceptions to Employment At-Will Doctrine

# Federal Exceptions to the Employment At-Will Doctrine

- Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. Seq.*
  - Employer with 15 or more employees cannot discriminate on the basis of sex, race, national origin, and/or religion.
  - Bars retaliation against an employee who opposes and/or participates in an investigation of such unlawful conduct.
  - Prerequisite to filing suit: employee must file an administrative charge with the Equal Employment Opportunity Commission or with a state or municipal referral agency such as the TWC-CRD.
- 42 U.S.C. § 1981: also bars employment discrimination based on race, including retaliation.
  - There is no prerequisite to file an administrative grievance before a lawsuit can be filed and no damage cap as with Title VII. Further, this statute does not require the employer to employ more than one employee.

# Federal Exceptions to the Employment At-Will Doctrine

- Age Discrimination in Employment Act, 29 U.S.C. § 621 *et. seq.*: bars discrimination based on age for employees age 40 and over.
- Americans with Disabilities Act, 42 U.S.C. § 12101 *et. seq.*:
  - A disabled individual has a physical or mental impairment(s) that substantially limits one or more major life activities, has a record of such impairment, and/or is regarded as having such impairment. A person(s) associated with a disabled individual is also protected.
  - Bars discrimination against *applicants* and employees.
  - Protects qualified individuals who are disabled and can perform the essential functions of the job *with or without* reasonable accommodation.
    - An employer must provide accommodation unless the accommodation creates an undue hardship.

# Federal Exceptions to the Employment At-Will Doctrine

- The Family and Medical Leave Act, 29 U.S.C. § 2601 *et. seq.*
  - Employees are entitled to up to 12 work weeks of unpaid leave during any 12 month period for one or more of the following:
    - Birth of child or adoption/foster care placement of child with employee;
    - To care for spouse, child, or parent of employee with serious health condition; or
    - For a serious health condition that makes the employee unable to perform the functions of the position.
  - Applies to:
    - Employers with 50 or more employees.
    - Employees who have worked for the employer for 12 months and worked 1250 hours for the employer during the previous 12 months.
  - Employee's Position:
    - Employee is entitled to be restored to the position he/she held prior to leave or an equivalent position with equivalent pay, benefits and other terms and conditions.
    - Employee cannot be dismissed or otherwise discriminated against. The employer cannot interfere, restrain or deny an employee's right to take leave.
- Other Federal exceptions include: National Labor Relations Act; Workers Adjustment and Retraining Notification Act; Genetic Information Nondiscrimination Act of 2008; and Uniformed Services Employment and Reemployment Rights Act.

# Texas State Statutory Exceptions to the Employment At-Will Doctrine

- Texas Commission on Human Rights Act, Tex. Labor Code § 21.051: bars discrimination against employees based on race, color, disability, religion, sex, national origin or age.
- Examples of other statutory provisions:
  - Texas Labor Code Chapter 451 (Workers' Compensation Retaliation)
  - Texas Government Code § 431.006 (cannot terminate an employee that is a member of state military forces and is ordered to active duty during an emergency within the state)
  - Texas Labor Code § 101.052 (cannot deny employment based on a person's membership or non-membership in a labor union)

# Texas Common Law Exceptions to the Employment At-Will Doctrine

- Modification of the employment at-will doctrine must be based on express agreements. Implied agreements are generally insufficient.
- Employer can modify the doctrine by limiting its right to terminate an employee by either an oral or written contract. Ex: Employee will only be terminated “for cause” or for certain specified reasons, i.e. poor performance.
- Public policy exception: an employee cannot be terminated for refusing to perform an illegal act that would subject the employee to criminal liability. *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985).



# Employment Contracts

# Texas: Employment Contracts

- An employment contract must limit the employer's right to terminate an employee without due cause or provide a definite term of employment.
- An oral employment agreement with a term of less than one year is generally binding.
- Examples: written contract, collective agreements, employee handbooks.

# Texas: Employment Contracts

- What may be addressed in the contract:
  - Job description
  - Compensation
  - Notice required for resignation or termination
  - Basis for termination
  - Non-compete clause
  - Policies and procedures manual

# Independent Contractors

- Independent contractors are not employees.
- Normally, an oral or written contract governs the independent contractor relationship.
- Independent contractors perform work for businesses and individuals for which they are compensated. They work on a project-by-project basis.
- The independent contractor is told by the customer what the desired outcome of the work is and can often determine how to perform certain or many aspects of the work.

Independent Contractor or  
Employee?

# Texas: Independent Contractor or Employee?

- Texas Workforce Commission, IRS, Department of Labor, and Commercial Litigation
  - Different tests used by each, but there are similar categories.
  - Presumption made that a person is an employee.
- Types of Factors Examined
  - Instruction and Control
  - Training
  - Equipment and Expenses
  - Benefits
  - Taxes
  - Other Work
  - Payment

# IRS

- Generally, if the employer controls the services the worker performs, then the worker is an employee.
- IRS: facts that provide evidence of the degree of control and independence fall into three categories:
  - Behavioral
  - Financial
  - Type of Relationship

# Department of Labor

- Applies an economic reality test.
- Factors
  - Extent to which the services rendered are an integral part of the principal's business;
  - Permanency of the relationship;
  - Amount of the contractor's investment in facilities and equipment;
  - Nature and degree of control by the principal;
  - Contractor's opportunities for profit and loss;
  - Amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor; and
  - Degree of independent business organization and operation.



# Misclassification of Workers

- Problem in Texas: during 2010-2012, 35,000 Texas workers were misclassified, including 4300 in the construction industry.
- Employers avoid paying payroll taxes, overtime and workers' compensation. Employers can also get around providing proof that workers can work in the US legally.
- Costs to misclassified employees: loss of protections provided to employees, increased tax burden, no overtime pay, ineligible for unemployment insurance and disability compensation.

# Types of Claims

# Discrimination Claim

- Disparate treatment: employer intentionally treats the employee less favorably due to the employee's race, age, religion, etc.
- Employee's burden: prove the employer engaged in intentional, unlawful discrimination.
- How to prove:
  - Direct Evidence
  - Circumstantial Evidence
- Potential remedies: injunction, reinstatement, backpay, frontpay, compensatory damages, and punitive damages, attorney fees and costs.

# Retaliation

- Employee's burden: establish a prima facie case that he/she engaged in a protected activity, suffered an adverse employment action, and there is a connection between the two.
- Burden shifts to employer: articulate a legitimate reason for its action.
- Burden shifts back to employee: establish the articulated reason is pretextual and that the retaliation was the reason for the adverse employment action.

# Employment Torts

- Based on the common law.
- No damage caps.
- Examples:
  - Defamation
  - Invasion of Privacy
  - Negligence
  - Intentional Infliction of Emotion Distress

# Proactive Steps Employers Can Take

# Being Proactive

- Employee Handbook
- Disciplinary Procedures
- On-The-Job Training
- Established Performance Standards
- Performance Appraisals
- Serious Violations/Misconduct
- Termination