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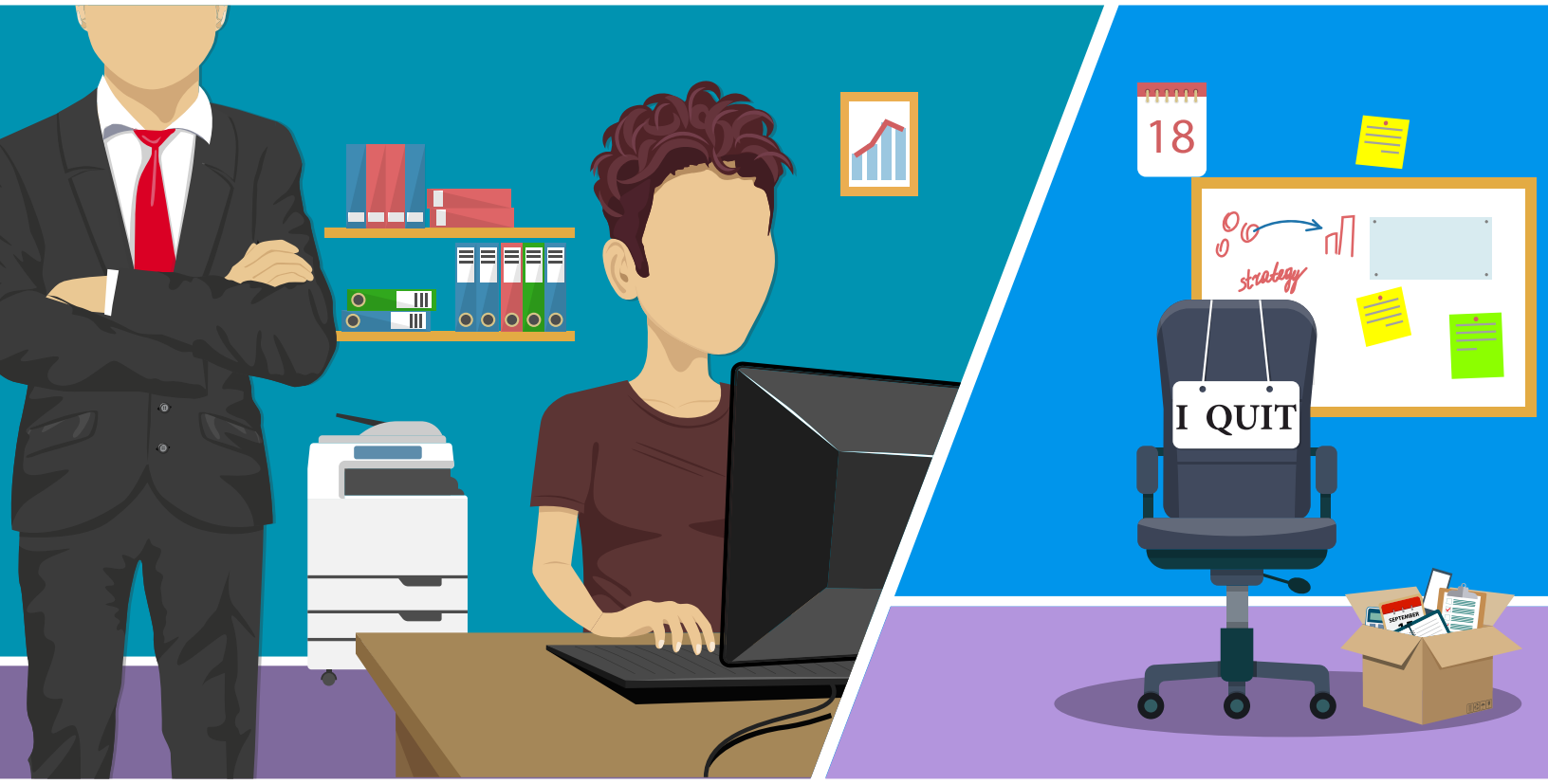

WHAT "AT-WILL" EMPLOYMENT MEANS UNDER CALIFORNIA LAW

Most workers in California are considered "at-will" employees. This article takes a look at what that means.

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Kyle D. Smith is a labor and employment attorney with a practice centered in Irvine, California Mr. Smith firmly believes in a client-centered approach to legal work. The starting point for every case should be the needs and wants of the client. Because those vary with every person, it's important for lawyers to take the time to understand their clients.

INTRODUCTION

Most employees in California are considered to be "at-will" employees. At-will employment means that the employee is free to leave their jobs at any time and employers are likewise free to fire the employee at any time for any lawful reason—or even no reason at all.[1]

The presumption that all employment is at-will may seem simple at first glance, but this doctrine has been, in large part, eroded over time. A number of exceptions have evolved through contractual, statutory, or public policy theories.[2] Any of these can significantly limit an employer's right to terminate an employee at will. This article explores those limits.

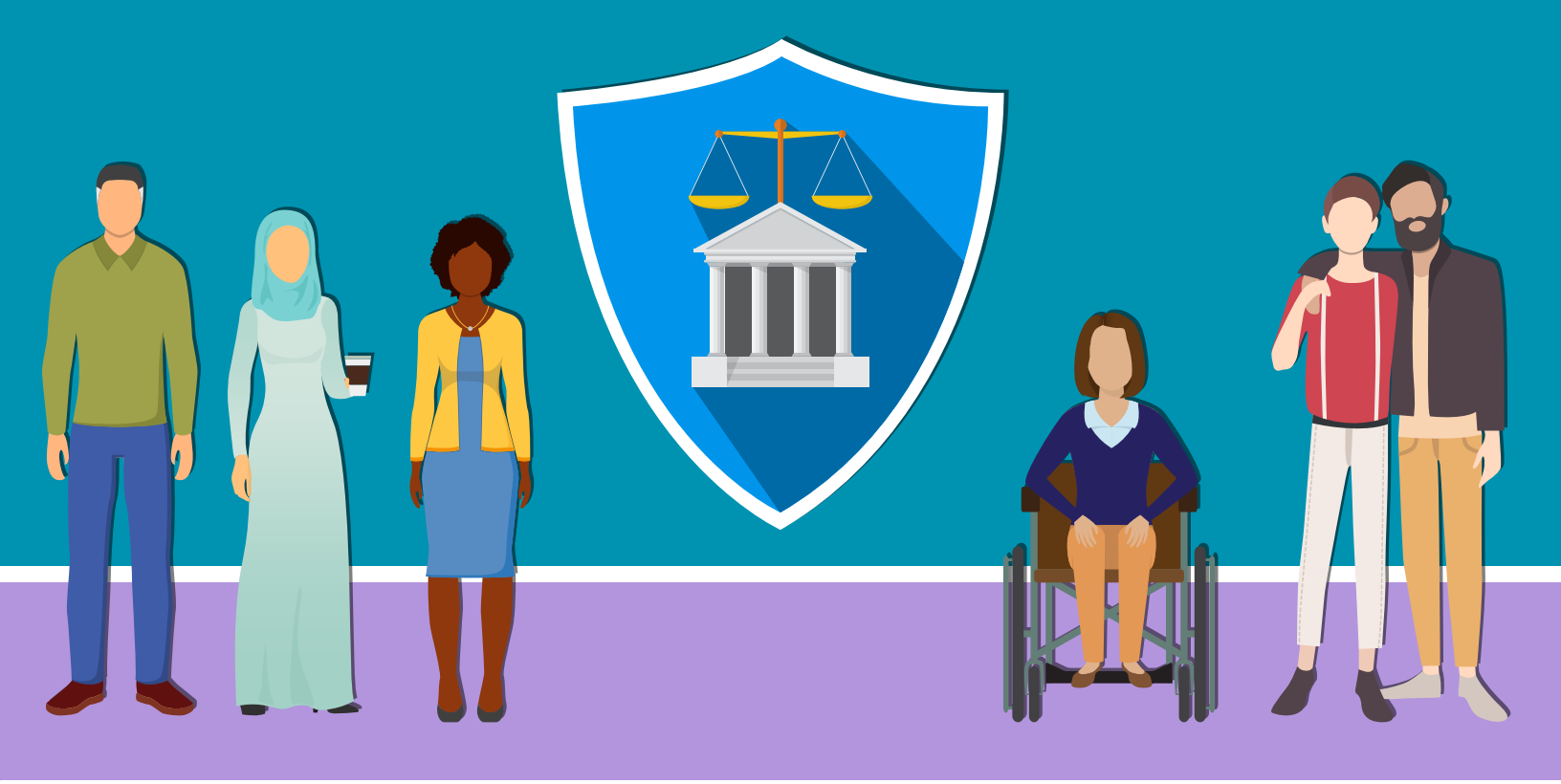
CH. 1. EMPLOYERS DON'T NEED A GOOD REASON TO FIRE AT-WILL EMPLOYEES

At-will employees can leave employment at any time. Likewise, employers can fire at-will employee for seemingly arbitrary reasons, so long as those reasons are not unlawful. [3] This can lead to some confusing results.

Many employees believe that their job is protected unless they break the rules, do a bad job, or commit some other type of wrongdoing. But that usually isn't the case.

At-will employment means that an employer can simply decide to fire the employee on a whim, without any good reason, even when the employee is doing a good job.[4]

For example, an employer might be in a bad mood one day, and decide to fire a random at-will employee. There is nothing inherently unlawful about doing that (even if it was an unwise business decision). As such, the fired employee probably cannot claim that they were wrongfully terminated.



CH. 2. BUT EMPLOYERS CAN'T FIRE EMPLOYEES FOR UNLAWFUL REASONS

State and federal laws have placed several important restrictions on the reasons for which an employer may terminate their employee. So, even though at-will employees may be terminated without cause, employers that have a cause must comply with the relevant laws on the matter. Examples of unlawful reasons include:

- Firing an employee because of their race, gender, disability, sexual orientation, religion, or other protected characteristic;[5]
- Firing an employee for their political beliefs or affiliations;[6]
- Firing an employee because the employee requested time off that they are legally-entitled to take; or
- Firing an employee because the employee reported a violation of the law.[7]

Put simply: Employers can fire at-will employees for any lawful reason (or no reason at all), but they can't fire employees if they are motivated by unlawful reasons. We'll explore several of these unlawful reasons next.

2.1. ANTI-DISCRIMINATION LAWS

The California Fair Employment and Housing Act (often called "FEHA") prohibits employers from terminating at-will employees for several protected reasons. For example, employers may not terminate their employees based on:

- Race,
- Religious creed,
- Color,
- National origin,
- Ancestry,
- Physical disability,
- Mental disability,
- Medical condition,
- Genetic information,
- Marital status,
- Sex,
- Gender,
- Gender identity,
- Gender expression,
- Age, or
- Sexual orientation.[8]

To a large extent, federal law echoes California's protections. For example, federal law prohibits most employers from terminating workers on the basis of their national origin, citizenship, race, color, sex, or religion.[9] Federal law, however, is missing several protected reasons that California has adopted—like California's protections different sexual orientations.

2.2. LAWS PROTECTING UNION ACTIVITY

The National Labor Relations Act[10] prohibits employers from interfering with employees in exercising collective bargaining rights—including unionization.[11] Terminating employees for exercising their collective bargaining rights would violate this law. So, an employer generally may not terminate or threaten to terminate employees for attempting to unionize or join a labor organization.

2.3. LAWS PROTECTING WHISTLEBLOWERS FROM RETALIATION

Employees are generally permitted to report certain unlawful conduct without fear of discipline from their employer. In other words, employers may not retaliate against employees for reporting certain kinds of misconduct. This serves as an additional limitation on at-will employment.

Employees receive protection for whistleblowing if they disclose information about a violation of state or federal law to a government or law enforcement agency.[12] Violations of state or federal law can include a variety of actions, like discrimination, unsafe workplaces, or submitting false claims of payment to the government.[13]

Importantly, the employee must have a reasonably based suspicion of illegal activity. So, the employee does not need to be absolutely certain that a violation occurred, but they should not be simply guessing that one occurred.[14]

2.4. PROTECTED LEAVES OF ABSENCE

California law also protects employees from being terminated for taking certain types of leave, even if their employment is at-will. For example, employers may not terminate employees that have been injured on the job.[15]

Nor may employers terminate female employees for taking maternity leave of up to four months as long as they are disabled from a childbirth or pregnancy-related condition.[16] Employers must also provide reasonable accommodations for physical or mental disabilities.[17]

Other common protected leaves of absence include, but are not limited to:

- Serving on a jury or as a witness.[18]
- Voting in a statewide election (for no more than two hours at the beginning or end of the shift).[19]
- The serious health conditions of close family members.[20]
- Military service.[21]

2.5. OTHER LIMITATIONS

California law provides numerous other situations limiting an employer's ability to terminate workers at-will. Employers, for instance, can't terminate employees for their political activities.[22]

There are a variety of other statutes that may protect employees from termination for certain reasons. At-will employees (or former employees) that believe they might have been terminated for an unlawful reason should contact a local employment attorney.

CH. 3. CONTRACTUAL LIMITATIONS ON AT-WILL EMPLOYMENT

In the context of at-will employment, there are two types of contracts that may limit an employer's right to terminate their employees without cause: **(1)** express contracts, and **(2)** implied contracts.

An *express contract* is one where one party has made an explicit offer and another party has accepted that offer in exchange for a valid promise. Express contracts can be written or oral.

An *implied contract* exists where a contract can be assumed to have been formed based on the surrounding circumstances. No clear agreement may have been formed, but the parties' conduct indicates that the parties understood a contract to have been formed.

3.1. EXPRESS CONTRACTS

Sometimes, a contract will explicitly include a provision that restricts an employer's ability to terminate an employee. Usually, this kind of provision will require that the employer have "good cause" before terminating the employee.

Good cause is usually defined to mean: a fair and honest reason. The

employer must have come to this reason in good faith. So it can't have come up with a reason after it made a bad faith decision to terminate an employee.[23] The decision may not be:

- Trivial,
- Capricious,
- Unrelated to business needs or goals, or
- Pretextual.[24]

In other words, it's not enough that the employer simply doesn't like the employer. The employer needs legitimate business reasons to terminate the employee.

In determining whether good cause exists, courts will try to balance:

- The employer's interest in operating its business efficiently and profitably, and
- The employee's interest in continued employment.[25]

This definition is a bit abstract and relative. Courts are therefore required to look at the facts of each individual case to determine if good cause exists.[26]

Even though this limit may exist in an express contract, employers still have a lot of discretion. Courts have acknowledged that they aren't in the best position to second guess the employer's business judgment. In many cases, courts will give the employer substantial deference in exercising their discretion.[27]

3.2. IMPLIED CONTRACTS

The Supreme Court of California has held that a requirement of good cause for termination can be implied even when there is no contract explicitly providing for it.[28] So, even if the terms of employment would appear to be at-will, it is possible that a court will interpret the relationship otherwise. In other words, a court may still require that the employer have good cause for terminating an employee, even if there is no contract with a good cause requirement.

Courts will try to look at the conduct of the employer and employ-

ee to determine if they had any unspoken understandings. If the parties acted in a way that suggests an implied contract exists, employees can often require their employer to terminate them only in the event of good cause.

To determine if an implied contract exists, courts will look at a number of factors, including:

- The personnel policies or practices of the employer,
- The employee's longevity of service,
- Actions or communications by the employer reflecting assurances of continued employment, and
- The practices of the industry in which the employee is engaged.[29]

If an implied contract requiring a good cause termination exists, the employer must have a fair, honest, and good faith reason for terminating the employee. Legitimate business reasons are normally required.

Implied contractual duties can also prohibit employers from terminating at-will employees if the termination was a mere pretext to cheat the worker out of a different benefit in their contract.[30] So, in effect, the employer is required to have good cause if their actions might be construed as a pretext for unfairly denying certain contractual benefits.

CH. 4. PUBLIC POLICY LIMITATIONS ON AT-WILL EMPLOYMENT

The Supreme Court of California has held that an employer's ability to terminate an "at-will" employee is limited by public policy considerations.[31] Public policy limitations are established primarily through California case law. But courts use California's statutes and constitution to determine which public policies are important.[32] The general rule is that an employer may not terminate an at-will employee for a reason that violates a fundamental public policy.

To determine whether a reason for termination is prohibited by public policy, a somewhat complicated legal analysis is required. In general, several elements are required:

- The public policy must be expressed in the constitution or in statutes,
- It must benefit the public, rather than a single individual,
- The public policy must be a substantial and fundamental public policy, and
- The public policy must be well-established at the time of termination.[33]

The courts have acknowledged that applying this test is difficult. So it isn't always clear whether a given situation involves a public policy violation. Concerned employees should contact an employment attorney to learn more about the public policy considerations involved in their particular situation.

CH. 5. FINAL THOUGHTS

The numerous exceptions to the "at-will" employment presumption raise an important question: is employment in California really at-will?

It isn't always clear. In many cases, employers do not understand their obligations in terminating employment. They often assume that "at-will" means they have an unlimited right to terminate their employees for any reason. This idea is largely outdated. Many exceptions now apply to the notion of "at-will" employment and employers should be mindful of each of these.

Equally as important, employees need to know their rights if they have been, or are worried about being, terminated from their job. In many cases, they have rights of which they were not aware.

ENDNOTES

1 Labor Code, § 2922 ["An employment, having no specified term, may be terminated at the will of either party on notice to the other."]; *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 678 ["[A] contract for permanent employment, for life employment, for so long as the employee chooses, or for other terms indicating permanent employment, is interpreted as a contract for an indefinite period terminable at the will of either party . . . ."]; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 335.

2 *Consolidated Theatres, Inc. v. Theatrical Stage Employees Union* (1968) 69 Cal.2d 713, 727, fn. 12.

3 *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 857–858 [overruling a summary judgment motion by the defendant employer in a case where there were issues of fact as to whether the employer used an arbitrary reason to fire the plaintiff capriciously when the true motive to fire the plaintiff was his age].

4 *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 396.

5 Gov. Code, § 12940, subd. (a).

6 Labor Code, § 1101.

7 Labor Code, § 1102.5.

8 Gov. Code, §§ 12926, subd. (k), 12940, subd. (a).

9 8 U.S.C. § 1324b; 42 U.S.C. § 2000e-2.

10 29 U.S.C. §§ 151 et seq.

11 29 U.S.C. § 158.

12 Labor Code, § 1102.5.

13 Gov. Code § 12940, subd. (h); Collier v. Superior Court (1991) 228 Cal.App.3d 1117, 1123; Gov. Code, § 12653 [California False Claims Act]; 31 U.S.C. §§ 3729, 3730, subd. (b) [Federal False Claims Act].

14 *Green v. Ralee Eng. Co.* (1998) 19 Cal.4th 66, 87.

15 Labor Code, § 132a.

16 Gov. Code, § 12945, subd. (a)(1).

17 Gov. Code, § 12940 subd. (m).

18 Labor Code, § 230, subd. (a).

19 Elections Code, § 14000.

20 Gov. Code, § 12945.2.

21 Military & Vet. Code, § 394.

22 Labor Code, §§ 96, subd. (k), 1101.

23 *Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal.4th 93, 100–101.

24 *Pugh v See's Candies, Inc.* (1988) 203 Cal.App.3d 743, 769.

25 *Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal.4th 93, 100–101.

26 *Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal.4th 93, 100–101.

27 *Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal.4th 93, 100–101.

28 *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654.

29 *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680.

30 *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349.

31 *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654.

32 *Stevenson v Superior Court* (1997) 16 Cal.4th 880, 897.

33 *Stevenson v Superior Court* (1997) 16 Cal.4th 880, 889–890.