

26.4: Reading- Employee Rights- Job Protection and Privacy

Job Protection Rights

Employee rights is defined as the ability to receive fair treatment from employers. This section will discuss employee rights surrounding job protection and privacy.

If HR doesn't understand or properly manage employee rights, lawsuits are sure to follow. It's the HR professional's job to understand and protect the rights of employees. In the United States, the employment-at-will principle (EAW) is the right of an employer to fire an employee or an employee to leave an organization at any time, without any specific cause. The EAW principle gives both the employee and employer freedom to terminate the relationship at any time. There are three main exceptions to this principle, and whether they are accepted is up to the various states:

- 1. Public policy exception.** With a public policy exception, an employer may not fire an employee if it would violate the individual state's doctrine or statute. For example, in *Borse v. Piece Goods Shop* in Pennsylvania, a federal circuit court of appeals ruled that Pennsylvania law may protect at-will employees from being fired for refusing to take part in drug test programs if the employee's privacy is invaded. Borse contended that the free speech provisions of the state and of the First Amendment protected the refusal to participate. Some public policy exceptions occur when an employee is fired for refusing to violate state or federal law.
- 2. Implied contract exception.** In a breach of an implied contract, the discharged employee can prove that the employer indicated that the employee has job security. The indication does not need to be formally written, only implied. In *Wright v. Honda*, an Ohio employee was terminated but argued that the implied contract exception was relevant to the employment-at-will doctrine. She was able to prove that in orientation, Honda stressed to employees the importance of attendance and quality work. She was also able to prove that the language in the associate handbook implied job security: "the job security of each employee depends upon doing your best on your job with the spirit of cooperation." Progress reports showing professional development further solidified her case, as she had an implied contract that Honda had altered the employment-at-will doctrine through its policies and actions.
- 3. Good faith and fair dealing exception.** In the good faith and fair dealing exception, the discharged employee contends that he was not treated fairly. This exception to the employment-at-will doctrine is less common than the first two. Examples might include firing or transferring of employees to prevent them from collecting commissions, misleading employees about promotions and pay increases, and taking extreme actions that would force the employee to quit.

Table 26.4.1. State's Acceptance of Employment-at-Will Exceptions

State	Public-Policy Exception	Implied-Contract Exception	Good Faith and Fair Dealing Exception
Alabama	no	yes	yes
Alaska	yes	yes	yes
Arizona	yes	yes	yes
Arkansas	yes	yes	no
California	yes	yes	yes
Colorado	yes	yes	no
Connecticut	yes	yes	no
Delaware	yes	no	yes
District of Columbia	yes	yes	no
<i>Florida</i>	<i>no</i>	<i>no</i>	<i>no</i>
Bold text indicates a state with all three exceptions.			
<i>Italic text indicates a state with none of the three exceptions.</i>			

State	Public-Policy Exception	Implied-Contract Exception	Good Faith and Fair Dealing Exception
<i>Georgia</i>	<i>no</i>	<i>no</i>	<i>no</i>
Hawaii	yes	yes	no
Idaho	yes	yes	yes
Illinois	yes	yes	no
Indiana	yes	no	no
Iowa	yes	yes	no
Kansas	yes	yes	no
Kentucky	yes	yes	no
<i>Louisiana</i>	<i>no</i>	<i>no</i>	<i>no</i>
Maine	no	yes	no
Maryland	yes	yes	no
Massachusetts	yes	no	yes
Michigan	yes	yes	no
Minnesota	yes	yes	no
Mississippi	yes	yes	no
Missouri	yes	no	no
Montana	yes	no	no
Nebraska	no	yes	no
Nevada	yes	yes	yes
New Hampshire	yes	yes	no
New Jersey	yes	yes	no
New Mexico	yes	yes	no
New York	no	yes	no
North Carolina	yes	no	no
North Dakota	yes	yes	no
Ohio	yes	yes	no
Oklahoma	yes	yes	no
Oregon	yes	yes	no
Pennsylvania	yes	no	no
<i>Rhode Island</i>	<i>no</i>	<i>no</i>	<i>no</i>
South Carolina	yes	yes	No
South Dakota	yes	yes	no

Bold text indicates a state with all three exceptions.

Italic text indicates a state with none of the three exceptions.

State	Public-Policy Exception	Implied-Contract Exception	Good Faith and Fair Dealing Exception
Tennessee	yes	yes	no
Texas	yes	no	no
Utah	yes	yes	yes
Vermont	yes	yes	no
Virginia	yes	no	no
Washington	yes	yes	no
West Virginia	yes	yes	no
Wisconsin	yes	yes	no
Wyoming	yes	yes	yes
Bold text indicates a state with all three exceptions.			
<i>Italic text indicates a state with none of the three exceptions.</i>			

When one of the exceptions can be proven, wrongful discharge accusations may occur. The United States is one of the few major industrial powers that utilize an employment-at-will philosophy. Most countries, including France and the UK, require employers to show just cause for termination of a person's employment (USLegal, "[Employment at Will](#)," accessed March 15, 2011). The advantage of employment at will allows for freedom of employment; the possibility of wrongful discharge tells us that we must be prepared to defend the termination of an employee, as to not be charged with a wrongful discharge case.

Employees also have job protection if they engage in whistleblowing. Whistleblowing refers to an employee's telling the public about ethical or legal violations of his or her organization. This protection was granted in 1989 and extended through the Sarbanes-Oxley Act of 2002. Many organizations create whistleblowing policies and a mechanism to report illegal or unethical practices within the organization (Lilanthi Ravishankar, "[Encouraging Internal Whistle Blowing](#)," Santa Clara University, accessed March 15, 2011).

Another consideration for employee job protection is that of an implied contract. It is in the best interest of HR professionals and managers alike to avoid implying an employee has a contract with the organization. In fact, many organizations develop employment-at-will policies and ask their employees to sign these policies as a disclaimer for the organization.

A constructive discharge means the employee resigned, but only because the work conditions were so intolerable that he or she had no choice. For example, if James is being sexually harassed at work, and it is so bad he quits, he would need to prove not only the sexual harassment but that it was so bad it required him to quit. This type of situation is important to note; should James's case go to court and sexual harassment and constructive discharge are found, James may be entitled to back pay and other compensation.

The Worker Adjustment and Retraining Notification Act (WARN) requires organizations with more than one hundred employees to give employees and their communities at least sixty days' notice of closure or layoff affecting fifty or more full-time employees. This law does not apply in the case of unforeseeable business circumstances. If an employer violates this law, it can be subject to back pay for employees (US Department of Labor, "[WARN Fact Sheet](#)," accessed March 15, 2011). This does not include workers who have been with the organization for less than six months, however.

Retaliatory discharge means punishment of an employee for engaging in a protected activity, such as filing a discrimination charge or opposing illegal employer practices. For example, it might include poor treatment of an employee because he or she filed a workers' compensation claim. Employees should not be harassed or mistreated should they file a claim against the organization.

Privacy Rights

Technology makes it possible to more easily monitor aspects of employees' jobs, although a policy on this subject should be considered before implementing it. In regard to privacy, there is a question about whether an employer should be allowed to monitor an employee's online activities. This may include work e-mail, websites visited using company property, and also personal activity online.

Digital Footprints, Inc. is a company that specializes in tracking the digital movements of employees and can provide reports to the organization by tracking these footprints. This type of technology might look for patterns, word usage, and other communication patterns between individuals. This monitoring can be useful in determining violations of workplace policies, such as sexual harassment. This type of software and management can be expensive, so before launching it, it's imperative to address its value in the workplace.

Another privacy concern can include monitoring of employee postings on external websites. Companies such as Social Sentry, under contract, monitor employee postings on sites such as Facebook, Twitter, LinkedIn, and YouTube (Teneros Corporation, "Social Sentry Lets Employers Track Their Workers across the Internet," accessed March 17, 2011). Lawyers warn, however, that this type of monitoring should only be done if the employee has consented (People Management, "[Employers Should Have Monitoring Policy for Social Networks](#)," accessed March 17, 2011). A monitoring company isn't always needed to monitor employees' movements on social networking. And sometimes employees don't even have to tweet something negative about their own company to lose their job. A case in point is when Chadd Scott, who does Atlanta sports updates for 680/The Fan, was fired for tweeting about Delta Airlines. In his tweet, he complained about a Delta delay and said they did not have enough de-icing fluid. Within a few hours, he was fired from his job, because Delta was a sponsor of 680/The Fan (Rodney Ho, "Chadd Scott Said He Was Fired for Tweets about Delta," *Access Atlanta* (blog), accessed March 16, 2011).

The US Patriot Act also includes caveats to privacy when investigating possible terrorist activity. The Patriot Act requires organizations to provide private employee information when requested. Overall, it is a good idea to have a clear company policy and perhaps even a signed waiver from employees stating they understand their activities may be monitored and information shared with the US government under the Patriot Act.

Depending on the state in which you live, employees may be given to see their personnel files and the right to see and correct any incorrect information within their files. Medical or disability information should be kept separate from the employee's work file, per the Americans with Disabilities Act. In addition, the Health Insurance Portability and Accountability Act (HIPAA) mandates that health information should be private, and therefore it is good practice to keep health information in a separate file as well.

Finally, drug testing and the right to privacy is a delicate balancing act. Organizations that implement drug testing often do so for insurance or safety reasons. Because of the Drug-Free Workplace Act of 1988 Requires that some federal contractors and all federal grantees agree they will provide a drug-free workplace as a condition of obtaining a contract., some federal contractors and all federal grantees must agree they will provide a drug-free workplace, as a condition of obtaining the contract. The ADA does not view testing for illegal drug use as a medical examination (making them legal), and people using illegal drugs are not protected under the ADA (US Equal Employment Opportunity Commission, "[The ADA, Your Responsibilities as an Employer](#)," accessed August 1, 2011). However, people covered under ADA laws are allowed to take medications directly related to their disability. In a recent case, *Bates v. Dura Automotive Systems*, an auto parts manufacturer had a high accident rate and decided to implement drug testing to increase safety. Several prescription drugs were banned because they were known to cause impairment. The plaintiffs in the case had been dismissed from their jobs because of prescription drug use, and they sued, claiming the drug-testing program violated ADA laws (Jackson Lewis, "Employees' ADA Claims on Prescription-Drug-Use Dismissals Rejected by Federal Court," December 1, 2010, accessed August 1, 2011). However, the Sixth Circuit Court reversed the case because the plaintiffs were not protected under ADA laws (they did not have a documented disability).

In organizations where heavy machinery is operated, a monthly drug test may be a job requirement. In fact, under the Omnibus Transportation Employee Testing Act of 1991, employers are legally required to test for drugs in transportation-related businesses such as airlines, railroads, trucking, and public transportation, such as bus systems. Medical marijuana is a relatively new issue that is still being addressed in states that allow its use. For example, if the company requires a drug test and the employee shows positive for marijuana use, does asking the employee to prove it is being used for medical purposes violate HIPAA privacy laws? This issue is certainly one to watch over the coming years.

Employee Privacy at XYZ Company

Email Monitoring

Emails can be monitored without prior notification if the company deems this necessary. If there is evidence that you are not adhering to the guidelines set out in the technology or email policy, the company reserves the right to take disciplinary action, including termination.

Website Monitoring

Websites visited during work hours may be monitored without prior notification. If there is evidence that inappropriate websites that violate company policy are visited, disciplinary action may be taken, including termination.

Social Media Monitoring

As a representative of this organization, all posts on social network sites such as Facebook or Twitter should not mention the organization, its customer or suppliers. Your social media websites may be monitored, and if inappropriate posts are made, disciplinary action may be taken including termination.

Signed

Dated

Department

Figure 26.4.1: Sample Policies on Privacy Relating to Technology

KEY TAKEAWAYS

- The *employment-at-will principle* means that an employer can separate from an employee without cause, and vice versa.
- Even though we have employment at will, a wrongful discharge can occur when there are violations of public policy, an employee has a contract with an employer, or an employer does something outside the boundaries of good faith.
- *Whistleblowing* is when an employee notifies organizations of illegal or unethical activity. Whistleblowers are protected from discharge due to their activity.
- A *constructive discharge* means the conditions are so poor that the employee had no choice but to leave the organization.
- The *Worker Adjustment and Retraining Notification Act (WARN)* is a law that requires companies of one hundred or more employees to notify employees and the community if fifty or more employees are to be laid off.
- A *retaliatory discharge* is one that occurs if an employer fires or lays off an employee owing to a charge the employee filed. For example, if an employee files a workers' compensation claim and then is let go, this could be a retaliatory discharge.
- The privacy of employees is an issue that HR must address. It is prudent to develop policies surrounding what type of monitoring may occur within an organization. For example, some organizations monitor e-mail, computer usage, and even postings on social network sites.
- Drug testing is also a privacy issue, although in many industries requiring safe working conditions, drug testing can be necessary to ensure the safety of all employees.

Contributors and Attributions

CC licensed content, Shared previously

- Beginning Management of Human Resources. **Authored by:** Anonymous. **Provided by:** Anonymous. **Located at:** <http://2012books.lardbucket.org/books/beginning-management-of-human-resources/s14-02-employee-rights.html>. **License:** CC BY-NC-SA: Attribution-NonCommercial-ShareAlike

- Adaptation and revision. **Authored by:** Linda Williams and Lumen Learning. **Provided by:** Tidewater Community College.
License: [CC BY-NC-SA: Attribution-NonCommercial-ShareAlike](#)

26.4: Reading- Employee Rights- Job Protection and Privacy is shared under a [not declared](#) license and was authored, remixed, and/or curated by LibreTexts.