

Say Goodbye to Employment "At Will"

by Perry Safran and Douglas McClanahan



In most states, where there is no employment contract, employers have the right to fire employees "at will." Historically, "at will" means that an employee can be fired for a good reason, for a bad reason, or for no reason at all, as long as the reason is not discriminatory (federal and state statutes prohibit firing because of an employee's race, religion, or gender). But rules vary regarding termination of employees, and there is little agreement on what is right and wrong.

Employers and employees seeking more uniform firing policy may have an answer with the Model Employment Termination Act (META). The act was developed by the Uniform Law Commissioners (ULC), a group of legal scholars who draft model legislation that can be used "off the shelf" by state legislatures. Although META is just a model, it will probably be used as a guide by the 40 states presently considering this type of legislation. By reviewing META now, you may have a head start on understanding your state's new rules regarding termination of employment.

Who is covered by META? The ULC used broad language in META and attempted to cover most employment situations. Employers with fewer than five employees, however, are not covered by META. The act also distinguishes between employees (anyone who receives a W-2), who are covered, and independent contractors (subs, for example), who are not.

What is the basic rule? Employees cannot be terminated without good cause. "Good cause" includes reasons related to the employee's individual performance, as well as reasons related to the employer's business judgment. When a company reorganizes, for example, or discontinues a service, employees that are no longer needed may be terminated.

How is termination defined? Termination includes a dismissal, a lay-off, the elimination of a position, and the employee quitting or retiring due to an

act or omission by the employer, such as a demotion or a cut in pay, that makes continued employment intolerable.

Can META be waived? Employers and employees can waive META through a written agreement signed by both parties, but the employer must agree to provide some severance pay to a terminated employee.

What is the proper termination procedure? There are two procedures outlined in META. First, employees can be fired without notice. Ten days after termination, however, the employer must give a written statement as to the reasons for the termination.

The other option is for the employer to file a complaint against the employee to see if there is good cause for termination. In this case, at least 15 days before filing the complaint, the employer must give the employee a written statement of its intent and the reasons for seeking to terminate the employee.

Can an employee dispute termination? An employee who wants to challenge his or her termination must file a complaint within 180 days of the termination (states will set up an agency to handle these matters). Once the complaint is filed, the employer has 21 days to respond to the charges.

However, the time for filing a complaint is suspended should the employee choose to participate in the employer's internal grievance procedures. The filing deadline remains suspended until the employee receives written notice that internal procedures are complete.

How is a dispute settled? Unless otherwise agreed, disputes are heard before an arbitrator. The state agency is responsible for adopting rules concerning the qualifications of arbitrators. Traditional court rules, such as discovery (gathering evidence) and legal representation, apply in the arbitration proceeding. The person who files the action has the burden (and the expense) of proving whether or not the employer had good cause for the termination.

The parties may agree, however, to settle any disputes through private arbitration. Since META does not explain who pays for private arbitration, this should be covered when the parties agree to private arbitration. The parties can also agree to skip arbitration altogether and settle the dispute in court.

What can an employee recover?

There are two remedies for wrongful termination: reinstatement with back pay, and severance pay. Attorney's fees are awarded to employees who win, or to employers if the employee filed a frivolous action.

Can the arbitrator's decision be appealed? The decision of the arbitrator may be rejected or modified in court. Appeals must be filed within 90 days of the arbitrator's decision. The court will only change the decision if the appealing party can show some misconduct by the arbitrator, such as taking a bribe or exceeding authority.

What else does META require? The act requires that a copy of META be posted in the workplace. META also provides sanctions for employers who take retribution on employees filing complaints or testifying at META hearings. If an employer takes retribution, the injured employee can also file a civil action in court, where the employer is subject to punitive damages.

How can employers guard against these claims?

- Post the standards that employees are required to meet. To be effective, however, standards must be consistently enforced without discrimination.
- Create a paper trail. Record incidents of employee misconduct, poor job performance, and tardiness. Also document employee reprimands.
- Communicate openly with employees about problems to prevent claims before they arise. Employees who feel cheated and abused are more likely to bring claims than satisfied workers.

Statutes similar to META should be appearing in many states in the next few years. Keep a lookout: The rules as you know them may be changing. ■

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