

HR 101: A Three-Part Series,
Part III – Termination Essentials
Session 10

2016 Employment Law Conference – *Strength in Balance*

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Agenda

- Introduction
- At-Will Employment
- Protected Classes/Discrimination
- Hidden Termination Issues
- Lawful Terminations
- Effectuating the Termination

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"At-Will" Employment

YOU ARE AN "AT WILL" EMPLOYEE. THAT MEANS THAT I CAN FIRE YOU WHENEVER I WANT, AND THERE'S NOTHING YOU CAN DO ABOUT IT.

WHATEVER... I QUIT.

YOU DIDN'T SAY THAT IT WORKED BOTH WAYS. WHAT'S THE FUN IN THAT?

HUMAN RESOURCES

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The Myth of "At-Will" Employment

The "at-will" employment doctrine has eroded over time and claims are often asserted based on alternate legal theories

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Exceptions to "At-Will" Employment

At-Will Doctrine:
CA Labor Code § 2922
(Terminated at the will of either party on notice to the other)

Exceptions:
Written or oral agreements

Implied-in-fact promise not to discharge without good cause

- CBA's
- Promissory Estoppel

Cotran v. Rollins Hudig Hall Int'l, Inc. (1998) 17 Cal 4th 93

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Unlawful Terminations

- ✓ Protected Classes
 - ✓ Federal vs. California law

FEDERAL			
Race	Color	Religion	Gender
National Origin	Age	Disability	Genetic Information
Sex	Pregnancy	Veteran Status	

CALIFORNIA			
Race	Color	Religion	Sex
Gender	Gender Identity	Gender Expression	Pregnancy
Childbirth	Breastfeeding	National Origin	Ancestry
Disability	Medical Condition	Age	Genetic Information
Marital Status	Military Status	Veteran Status	Sexual Orientation

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Unlawful Terminations *Continued*

- ✓ Protected Activities
 - ✓ Definition
 - ✓ Examples
 - ✓ FEHA's Amendment (effective January 1, 2016)

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Unlawful Terminations *Continued*

- ✓ Timing
 - ✓ 1 day after attorney accused company of retaliating against employee for filing a previous EEOC charge. (*O'Neal v. Ferguson Construction Co.* (10th Cir. 2001) 237 F.3d 1248)
 - ✓ 7 weeks after court administrator refused to acquiesce to retaliatory treatment of another employee. (*Thomas v. City of Beaverton* (9th Cir. 2004) 379 F.3d 802)
 - ✓ 42 and 59 days after EEOC hearings (*Miller v. Fairchild Indust.* (9th Cir. 1989) 885 F.2d 498)

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Unlawful Terminations *Continued*

- ✓ **Timing**
 - ✓ 20 months after filing EEOC complaint. (*Clark County School Dist. v. Breeden* (2001) 532 U.S. 268)
 - ✓ 4 months after filing of administrative complaint for sex discrimination. (*Hughes v. Derwinski* (7th Cir. 1992) 967 F.2d 1168)
 - ✓ 18-months after sexual harassment complaint and 10 months after wage and hour complaint. (*Villarimo v. Aloha Island Air, Inc.* (9th Cir. 2002) 281 F.3d 1054)

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Hidden Termination Issues



Disability-Caused Misconduct

- **If conduct based on a disability/was termination because of disability?**
- *Humphrey v. Memorial Hospitals Association* (9th Cir. 2001) 239 F.3d 1128 (attendance issues caused by OCD)
- *Kimbrow v. Atlantic Richfield Company* (9th Cir. 1989) 889 F.2d 869 (excessive absenteeism caused by migraines)

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Hidden Termination Issues *Continued*



No-Fault Attendance Policies

- **Such policies may run afoul of disability discrimination laws unless exceptions are made to accommodate qualified individuals with disabilities**

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Hidden Termination Issues *Continued*



Exhaustion of FMLA/CFRA Leave

- **Additional leave may be a reasonable accommodation**
- *Don't forget the interactive process*

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Hidden Termination Issues *Continued*



Illegal Drug Tests

- **Testing restricted in CA**
- **What about random/post-accident or reasonable suspicion testing?**
- *Smith v. Fresno Irrigation District (1999) 72 Cal.App.4th 147*

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Regretfully, we have to let you go.

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Legitimate Business Reasons for Termination

- 1 Layoff
- 2 Sub-par performance
- 3 Failure to follow supervisorial directions
- 4 Stealing company property or the property of others
- 5 Engaging in workplace conduct that violates the law
- 6 Failing to comply with company policies and procedures

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Questions to Consider Before Termination

Is the termination linked to a protected category or protected activity?

Does the evidence support the employer's legitimate business reason(s) for the termination?

Is there any evidence the employee can rely upon to attack the employer's legitimate business reason(s) and establish pretext for discrimination or retaliation?

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Termination Examples

- Sally is a new production line employee who was hired two months ago;
- One week after hire, Sally told her supervisor that she is pregnant and will need maternity leave;
- Sally's manager has complained that Sally is "not working out;"
- Sally is the only woman in production, and has complained to HR that the men are not welcoming;
- Sally's supervisor does not want to waste his time by coaching or training her;
- Sally is terminated and replaced by a man.

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Termination Examples

- John has been a customer service rep for 25 years;
- He has a history of personal conflict with other employees;
- John has never been counseled for these altercations;
- A year ago John started missing work due to back pain;
- John's manager became irritated by his frequent absences and asked John to bring in a doctor's note;
- John's manager has not asked other employees to bring in doctor's notes after being absent;
- John got into a verbal altercation with another employee;
- John was terminated.

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Schwab
"WILLOUGHBY, YOU SHOULD FEEL HONORED TO BE PART OF THE SOLUTION."

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The Termination

- ✓ Articulate the legitimate business reason(s) for the termination and verify that the reason(s) is supported by the documentation
- ✓ Have a suitable level of manager, director, or executive conduct the termination to demonstrate respect to the employee
- ✓ Have an unbiased witness present when the employee is informed of the termination
- ✓ Conduct the termination in a professional, dignified, and confidential manner

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The Termination *Continued*

- ✓ Clearly inform the employee that he or she has been discharged and identify his or her last day of employment
- ✓ Do not stray from the employer's legitimate business reasons in explaining the termination to the employee
- ✓ Listen to the employee's side of the story, and be prepared for an emotional reaction
- ✓ Avoid defensive comments, personal attacks, or accusations
- ✓ Provide the employee's final paycheck, including all vacation pay and wages owed, on his or her last day of work

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Thank You

Question & Answer
Session
