Employment at Will

Most of the corporations in the United States use the Rule of “Employment-at-Will”.

Important

Definition 10.1: Employment at Will

In the absence of an employment contract to the contrary, an employer generally has the right to dismiss an employee **at any time for any reason**, even a lousy reason, so long as the reason **doesn’t violate the law**.

On the flip side, this means employees can quit at any time for any reason.

In other countries, there may exist contractual relationship with **mandatory notice and separation/redundancy payments**.

- In France, employers must give one month of notice a head of time
- In the U.S., there is usually a 2-week courtesy period but is not required by law

Recently, the U.S. law has carved out more exceptions to employment at will, while at the same time, U.S. companies are working harder to be clear that the rule applies to employees.

Illegal Reasons of Discharge

Below is a short summary of the reasons:

Summary

1. Unlawful Discrimination
    - U.S. protected groups: race, color, religion, gender, national origin, age 40 & over, disabled, etc.
2. Contract violation
    - Union agreements
    - Written agreements (e.g. Harbaugh/UM contract)
    - Verbal agreements (often enforceable if < 1 year)
3. Miscellaneous federal and state law
    - Wrongful discharge (common law)

- Statutory whistle blowing (statute)

Other than these reasons, an employee can be fired *at will* or for a *just cause*.

Wrongful Discharge

There are three broad categories:

1. Public policy
2. Implied contracts
3. Good faith & fair dealing

Public Policy

Under public policy, it constitutes a violation if an employer fires an individual for the following circumstances:

- **NOT committing a crime** on behalf of the employee
- For whistle-blowing or reporting activities on the crime
  - For remedy, the employee can either chooses to get the job back (usually not), or accept 30% of the crime's payout
- For asking something that they are entitled to
  - E.g. salary

Implied Contract

To establish an implied contract for an employee, we need to show the following three elements.

1. The employee is a long-time employee in good standing, and
2. They don't have **written employee contracts**,
3. And have relied on assurances that one **CAN'T be fired** for any reason that there is evidence showing that this is a **for-cause relationship**

> **Note**
>
> An employee is viewed as an **for-cause** employee by default.
>
> - If an at-will contract was established, then the relationship is **at-will**: meaning that the company can fire for any lawful reason

- Otherwise, or given an **implied contract**, the relationship is **for-cause**: meaning that the company can only fire for specified conditions in the contract

Good Faith & Fair Dealing

Employers must act in good faith when firing an employee.

- Cannot fire for **preventing them from getting right before** what they are/will be entitled to
  - E.g. bonuses, stocks

Hence, firms barely fire employees before their payout dates.

Employee Privacy, NLRA

Recall the elements of **invasion of privacy**:

> ### Intrusion (on seclusion)
>
> Another privacy-related tort. This requires that a plaintiff needs to prove that there is
>
> 1. Objectionable prying
>   - E.g. eavesdropping, wire-tapping, snooping, and any objectionable prying
> 2. Reasonable expectation for privacy in which the intrusion takes place
>   - E.g. Home, private spaces
>
> ---

In the employment law context, **objectionable** will be determined by considering the extent of the **business' interest in intruding**.

- The higher the business interest, the less objectionable the intrusion is
  - E.g. personal matter is of **LOW** business interest, thus objectionable

Firms can enforce a reasonable expectation of privacy within **reasonable parameters**.

Protected Concerted Activity

The National Labor Relations Act of 1935 (NLRA) is essentially a legal framework for unions and unionizing. It protects **all employees**, regardless of unions, except for managers or

supervisors.

- Managers: who can sanction or supervise with their own judgement

> **Important**
>
> **Definition 10.2**: Concerted Protected Activity
> For an activity to be a concerted protected activity it must both be:
>
> 1. Engaged in with or on the **authority of other employees**; and
> 2. **Not solely** on behalf of the employee himself

A common example of this is to discuss conditions and terms of employment.

> **Note**
>
> Note the following **DOES NOT APPLY** to independent contractors.

> **Important**
>
> **Definition 10.3**: NLRA: Protected Concerted Activity
> Most private sector employees who are **NOT** supervisors have the right to engage in "concerted activities or other acts of mutual aid or protection".
>
> In other words, it is llegal to discipline (e.g. fire, demote, suspend) an employee for engaging in **protected concerted activity**. This will be an **unfair labor practice**.

Employers can make rules **governing employee conduct**, but they must ensure that the rules do not violate the employees' Section 7 rights (Protected Concerted Activity).

- Example of rules that are generally **lawful**:
  - Civility rules – "Behavior that is rude, condescending, otherwise socially unacceptable" toward other employees is prohibited
- Example of rules that are generally **unlawful**:
  - Confidentiality rules related to wages, benefits, or working conditions – Employees shall not disclose "any information pertaining to the wages, commissions, performance, or identity of employees..."

- Some rules **warrant more scrutiny** (balance legitimate justifications for rule v. adverse impact on employee rights)
    - Rules regarding disparagement or criticism of the employer

The National Labor Relations Board (NLRB) is responsible for enforcing these rules in workspace.

Civil Rights

Civil rights are rights to **participate in a society**, with equality.

The foundation of non-discriminative laws traced back to the 13th amendment (1865).

1. **13th Amendment (1865)**: Abolished slavery within United States.
2. **Civil Rights Act of 1866**
    - Established that all persons born in the United States, regardless of race, color, or "previous condition of slavery or involuntary servitude," were entitled to basic rights of citizenship in the United States
3. **14th Amendment (1868)**
    - Granted citizenship to all persons “born or naturalized” in United States instituted the “Due Process” and “Equal Rights” protections
4. **15th Amendment (1870)**
    - Prohibited discrimination in right to vote based on race, color or former servitude
5. **Civil Rights Act of 1964**
    - Forms modern civil rights foundation: prohibits discrimination on the basis of race, color, religion, sex, or national origin in housing, employment, education
        - Other civil laws model on this

Our focus today will be the Title VII and employment under Civil Rights Act of 1964.

Title VII: Federal Prohibitions on Discrimination

In general, the act is **NOT** a protection of some particular group, but a general protection of all people.

Important

Definition 10.4: Title VII

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on the **five categories**: **race, color, religion, sex, and national origin**, or characteristics intrinsically tied to these groups on connection with compensation, terms, conditions, or privileges of employment.

Stereotypes and false views based on these five groups are also **NOT ALLOWED**.

- E.g. firing women because they will have to take care of children

In other words, *discrimination* based on traits other than these are legal in employment.

Discrimination

There are two types of discrimination in employment.

Disparate Treatment

Intentional and direct discrimination because of the five categories. Note that a mixed reasoning also applies.

- E.g. some discriminatory statement along with some valid argument is also a discrimination

Defense

To defend against a disparate treatment claim, one will apply the **BFOQ defense**.

Important

Definition 10.5: BFOQ Defense

Employer must establish that membership in a desired class is necessary to successfully do the job. The essence of work will be undermined if taken a different policy.

The desired class, however, **DOES NOT** apply to race/color.

The necessity may be present in the following scenarios:

- Personal and privacy concerns
  - Baby-givers need to be the same sex
- Authenticity
  - Males selling Men's apparels

It is, however, still discriminatory even if the discrimination stems from **customer preferences**.

Disparate Impact

It is illegal discrimination if the employer's application of a **neutral criteria** has the effect of disadvantaging a significant proportion of people in a protected category.

- E.g. height for female

To demonstrate disparate impact, we would also need to show **adverse employment actions**, i.e. anything that demeans or degrades one's career.

Defense

To defend against a disparate impact claim, one will apply the **business necessity defense**.

> **Important**
>
> **Definition 10.6**: Business Necessity Defense
>
> Employet must establish that the criteria is:
>
> 1. **Related to safe and efficient job performance** and consistent with **business necessity**, and
> 2. **NO less** discriminatory alternative exists.

Usually the second point could undermine the first point in such defense.

> **Note**
>
> Note that civil rights do not trump the constitution. That being said, the first amendment applies and **does NOT** prohibit Title VII's selective regulation fighting words or expressed views that are inherently discriminatory.

Harassment

There are also two types of harassments.

Quid Pro Quo Harassment

Important

Definition 10.7: Quid Pro Quo Harassment

Sexual harassment that requires:

1. An adverse action by the superior (intentional isn't enough), and
2. Proposal of **sexual contact extended** by the superior and is **denied** by the employee and in retaliation the adverse action

For Quid Pro Quo harassment, the **employer** is **ALWAYS liable**.

Hostile Work Environment

Important

Definition 10.8: Hostile Work Environment

A **hostile work environment** is a workplace where there are sufficiently severe and pervasive instances of harassment and discrimination against protected characteristics.

Note that there is no need to prove **adverse action** because it is adverse inherently. Hostile work environment covers more behaviors and employers can make their defense.

Defense

- If created by **co-worker**:
  - Employer **LIABLE** if it **knew or should have known** about the harassment but failed to stop it.
- If created by **supervisor**:
  - **Tangible** job action:
    - Employer is **LIABLE**.
  - **NO tangible** job action:
    - Employer is **LIABLE** unless it can prove:
      1. Employer took **reasonable care to prevent** and correct harassing behavior, and

2. Employee unreasonably failed to take advantage of preventive or corrective opportunities.