



EMPLOYMENT TERMINATION AND THE LAW

A guide for employers and employees

In the United States, most private sector, non-union employees are employees at will. This means that they are hired for an indefinite period of time, as opposed to the specific length of time for which a contracted employee is hired. In the case of an employee at will, either the employer or the employee can terminate the employment relationship at any time, without notice, for almost any reason or for no reason at all. In recent years, however, laws and court decisions have affected the ability of employers to terminate at-will employees, and this has increased protection for a number of non-contract employees.

Even if employment appears to be at will, employment cannot be lawfully terminated if:

- The termination is the result of discrimination or a violation of statute. Under federal statutes such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act and the Americans with Disabilities Act, employees are protected from discrimination on the basis of race, color, religious creed, national origin, sex, age (40 and older) and disability or handicap. In addition to the above protected classifications, the Massachusetts Fair Employment Practices Law (G.L. c. 151B) protects employees from discrimination on the basis of sexual orientation, while other state statutes, such as the Massachusetts Equal Rights Act, may also provide remedies for terminated employees. Other federal statutes, like the Family and Medical Leave Act, Fair Labor Standards Act, Employment Retirement Income Security Act, National Labor Relations Act, Workers' Compensation Act and Occupational Safety and Health Act, if applicable, may also provide remedies for terminated employees. Terminations resulting from retaliation or sexual harassment may also be violative of statute.
- The termination is in violation of the terms of an implied contract of employment. An implied or express contract not to terminate employment, except for cause or until certain steps are taken, may exist where the terms of a personnel manual or employee handbook limit the reasons for termination or where an employer has promised

to follow certain procedures before termination. Additional considerations include the existence of annual salary agreements or commission and bonus provisions. Promises or assurances of long-term employment may also eliminate or limit the employer's right to terminate at will and a promise for a definite period of employment may be renewed for an additional period if employment continues.

- The termination prevents the employee from receiving a benefit, such as a bonus or commission that has been earned or is about to be earned. The employment relationship includes an implied covenant of good faith and fair dealing, and the termination of an employee by an employer in order to avoid paying the employee what he or she has earned or is on the verge of earning, or to prevent a benefit from vesting, or a termination which is accomplished for the purpose of achieving any of these forbidden results, may breach the implied covenant.
- The termination is accomplished under circumstances that violate public policy. This may occur if the employee is terminated for refusing to do something that public policy forbids, and that the employer has, nonetheless, requested the employee do. (An example of this would be when an employer asks an employee to commit perjury or to otherwise violate the law.) This may also occur if an employer refuses to allow an employee to do something that public policy encourages or permits. (An example of this would be when an employer does not allow an employee to take time off for jury duty or for the purpose of cooperating with a law enforcement authority's investigation of the employer.) However, an employee who is terminated for refusing to carry out the employer's internal policy decisions may not have a wrongful termination claim.
- The termination punishes an employee for having joined with other employees in trying to improve their wages or working conditions. Under laws enforced by the National Labor Relations Board and the Massachusetts Labor

Relations Commission, public employees and non-supervisory private employees (unionized or not) have certain rights to join together to try to improve working conditions or compensation. However, employee group protest activities are not protected if they constitute an illegal type of strike or if employees violate other legitimate work rules.

- Employees may have other claims arising out of their termination. These include: breach of contract; defamation (the written or verbal communication of false information about the employee); invasion of privacy (communication of private information such as medical status to unauthorized persons); intentional infliction of emotional distress (when the employer acts in an outrageous manner—although workers' compensation may provide the exclusive remedy for such a claim); and unlawful interference with employment.

A successful challenge to wrongful termination by an at-will employee may include recovery for back pay, front pay, reinstatement of employment, emotional distress damages, punitive damages and attorneys' fees.

WHAT YOU CAN DO AS AN EMPLOYEE

If you believe that you have been, or are about to be, wrongfully terminated from your job, there are a number of steps you can take:

- Make a contemporaneous record of events, including interviews or conversations regarding your termination. Make a list of witnesses who may be helpful in supporting your case.
- Consult a lawyer. Employment law is a complex and ever-changing field. Do not try to go it alone. There are very short complaint filing periods for some statutory claims. For example, the period for filing under the Massachusetts discrimination statute is limited to only six months.
- Consult a state or federal agency for advice. The Massachusetts Commission Against Discrimination or the Federal Equal Employment Opportunity Commission are good places to

start if you believe you have been the victim of discrimination. They can advise you as to whether you should—and if you should—when you must, file. Refer to the resources at the end of this pamphlet for contact information for these agencies.

- Obtain a copy of your company's written personnel policies. These may contain valuable information about your employer's hiring and firing practices.
- Obtain a complete copy of your personnel file. You are entitled to a copy of your personnel file under Mass. G.L. c. 149, § 52C.

WHAT YOU CAN DO AS AN EMPLOYER

The most effective way to protect yourself and your company from claims of wrongful termination is to prevent such terminations from taking place.

- Establish formal personnel policies with the assistance of employment counsel. Know and follow your policies.
- Though it may sound obvious, treat your employees fairly and be consistent in your employment practices, including termination practices.
- If you intend to reserve the right to terminate any employee "at will," make sure this condition is stated explicitly in the company's personnel manual or in the employment contract itself. Do not make the personnel manual the subject of the hiring interview or negotiations and do not make promises you do not intend to keep.
- Distribute or post required notices of the laws against employment discrimination and hold training sessions for all company managers and supervisors.
- Document all discipline and performance issues. Make sure performance evaluations are done in a timely manner, are accurate, honest and in writing. Inform employees where improvement is needed.

- Thoroughly review the facts and circumstances leading to a possible termination decision and make sure all of the factors that could give rise to wrongful termination claims have been considered. Only discuss the termination with employees who have a need to know. If needed, consult employment counsel.
- Even if you have reserved the right to terminate employment at will, do not. There should always be a documented, bona fide business reason for terminating employment.
- Make sure your absenteeism rules do not run counter to provisions of the Family and Medical Leave Act.

RESOURCES

For more information, or to obtain legal assistance regarding a wrongful termination claim, contact:

Massachusetts Commission Against Discrimination

(617) 994-6000 or (413) 739-2145
mass.gov/mcad

Equal Employment Opportunity Commission

(800) 669-4000
eeoc.gov

National Labor Relations Board

(617) 565-6700
nlrb.gov

Massachusetts Labor Relations Commission

(617) 727-3505
mass.gov/lrc

This pamphlet is issued as a public service of the Massachusetts Bar Association and does not constitute legal advice, which can only be given by an attorney. The contents of this pamphlet pertain only to the laws of Massachusetts at the time of publication.

Legal assistance is available through the Massachusetts Bar Association services listed below.

Dial-A-Lawyer

Call and speak to an attorney, free of charge, on the first Wednesday of every month.
5:30–7:30 p.m. (617) 338-0610

Lawyer Referral Service

Open Monday through Friday, from 9 a.m. to 4:45 p.m., the Lawyer Referral Service (LRS) helps solve legal problems by referring callers to lawyers or appropriate agencies. The LRS does not offer legal advice. There is no charge to use the service. Contact the LRS at:
Boston area: (617) 654-0400
Toll-free: (866) MASS LRS (866) 627-7577
TTY: (617) 338-0585
E-mail: LRS@massbar.org
Web site: MassLawHelp.com

Legal Fee Arbitration Board

When your attorney's fee is in dispute, call:
Statewide: (617) 338-0552
E-mail: FAB@massbar.org
Web site: MassBar.org/LawHelp

MassLawHelp.com

Free legal information and online referrals to attorneys is available on the MBA's Web site at MassLawHelp.com.

Speakers Bureau

Whether you're looking to educate your group or class about a particular area of law or trying to add variety to your regular meetings, the MBA Speakers Bureau is your solution. Speakers Bureau attorneys are available for free presentations on a wide variety of legal topics.
Statewide: (617) 338-0571
E-mail: communityservices@massbar.org

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