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THE RECORDER

# California Narrows At-Will Employment Window

**By Joseph Lovretovich**
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One of the fundamental tenets of employment law is that, unless the parties have negotiated and signed a contract to the contrary, all employment is "at-will": Employers can fire workers for any or no reason. According to California Labor Code section 2922, "An employment, having no specified term, may be terminated at the will of either party on notice to the other."

But in the worker-friendly Golden State, no business would even think about firing employees without good—and well-documented—reasons. The state's at-will fabric has, over the past decade, become riddled with holes. Today, it barely holds together—and the holes will soon be widening. In the mediation process, employers can no longer simply rely on the at-will doctrine.

In recent years, California's at-will doctrine has become subject to a long and growing list of exceptions. More than two dozen protected categories and protected activities are currently recognized under the law. Employers are barred from taking any adverse employment actions—including demotion, discipline, or firing—based on any protected categories or actions.

**Rebuttable Presumption**

Commencing Jan. 1, 2024, California will be going one step further to limit the at-will doctrine. SB 497 will create a rebuttable presumption of retaliation if an employer takes an adverse employment action against an employee within 90 days of that employee engaging in any protected conduct.

Courtesy photo

**Joe Lovretovich of Signature Resolution.**

What does this portend for companies seeking to take action against their employees? The new statute should greatly enhance and expand the ability of employees to bring employment-related claims, and these claims will more often be insulated from motions for summary judgment.

Companies are currently prohibited from retaliating against workers who engage in certain protected activities. Labor Code Section 1102.5 bars retaliation for reporting potential violations of state or federal law or for refusing to participate in an activity that might violate the law. But this still leaves a wide range of employee conduct not protected against retaliation.

The new law essentially puts the onus on the employer to prove that it had no nefarious intent when it took adverse action against an employee. By covering every possible protected activity, the law

leaves little room for error. Employees who suggest that they might file a claim with the Labor Commissioner, even if no claim is ever filed, are engaging in protected activity, as are those who serve jury duty or attend parent-teacher conferences.

Protection extends to workers who have been victims of felonies or spousal abuse, as well as those who choose to wear pants at work. The employer may also not retaliate against an employee because that employee's family member has or is believed to have engaged in conduct prohibited under the law.

Violations of the new law carry a civil penalty up to $10,000 per employee, along with reasonable attorney's fees, to be awarded to the employee who was retaliated against. The 90-day window will likely cause companies to delay negative employment actions. They might, for example, now wait six months to fire the worker who jotted down the Labor Commissioner's phone number during a lunch break or the female employee who one day chose to wear pants to work.

**At-Will and Implied Contracts**

Despite the universal nature of the at-will doctrine, it is ultimately dependent on the facts of the case, and the presumption can be overridden. In Guz v. Bechtel National (100 Cal. Rptr. 2d 352, 24 Cal. 4th 317, 8 P.3d 1089 (2000)), the California Supreme Court held that "the employer's personnel policies and practices may become implied-in-fact terms of the contract between employer and employee," and when this happens "the employer's failure to follow such policies when terminating an employee is a breach of the contract itself."

Employers who identify duties and obligations of their workforce and management in their handbooks can, therefore, expect to see contract claims being asserted more often against them. Even without a presumption of retaliation, employees may be able to assert common law claims for breach of implied covenant based on language in an employee handbook or other evidence showing that they were working under something other than at-will employment status.

Plaintiff attorneys must proceed with caution in bringing such claims, however. Those contract-based claims could allow a jury to reach a compromise verdict that would negate attorney fee awards—awards that drive a lot of these claims in mediation.

Even as California's at-will doctrine continues to be narrowed, employers can take steps to preserve the presumption of at-will status for their employees. Written policies and offer letters to employees can be drafted to clearly state that all employment is at-will and that employees are hired on an at-will basis, subject to termination by either party with or without notice at any time.

Commencing Jan. 1, employers should be doubly cautious when taking negative action against workers, documenting the basis for their actions and noting the date of infractions or other performance issues. With the grab-bag of protected activities now so full, companies will need to be especially careful as they navigate their employment decisions.

As employment cases are brought to mediation, skillful mediators will now need to navigate competing employer, employee and insurance interests, weigh the legal ramifications of the new at-will laws, and fully assess the risks and benefits to all parties.

**Joe Lovretovich** *is a neutral with Signature Resolution with more than 46 years of experience in employment law, personal injury, premises liability, product liability, wrongful death, legal malpractice, education law, school bullying and disability insurance law. As an employment and personal injury attorney, he represented both plaintiffs and defendants in his practice.*