

BASIC EMPLOYMENT LAW FOR PHYSICISTS

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DISCLAIMER

1. Any opinion offered today is solely that of the author and not of any institution with which he may be affiliated.
2. The law relating to employment can be especially variable for different jurisdictions. If you have a question, be sure to consult a lawyer, accountant or other financial advisor who is familiar with your particular locality. In other words, seek competent advice always.
3. The purpose of this talk is to introduce you to the issues and help you form appropriate questions to your advisors. It is not meant to be a complete treatise on the subject.

Basic Contract Law

- ▣ 1. Contracts is a two semester course in the first year of law school.
- ▣ 2. The consideration for the type of contract we're talking about today is most often a promise for a promise - I promise you that I will do the work you request; you promise me that you will pay me an agreed sum for each pay period and any benefits that might be part of the deal.
- ▣ 3. We can look a little deeper into the consideration and representations that support this contract and see some very fundamental variations
 - A. At Will
 - B. Not At Will
 - A specific agreement as to time or termination
 - Independent Contractor
 - Other special purpose agreements

At Will

- ▣ The “at will” rule was first stated in an 1877 treatise by Horace Gay Wood. In general it says:

An employer or an employee may unilaterally terminate the employment relationship at any time, for any reason, absent a prior agreement to the contrary.

Hirsch, Secunda & Bates, Understanding Employment Law, Second Edition (Lexis Nexis 2014) citing Wood, Master and Servant 263-84 (1877)

What Does That Mean For You?

- ▣ 1. It means exactly what it says
- ▣ 2. The employee **DOES NOT** need to have or state a reason to leave.
- ▣ 3. The employer **DOES NOT** need to have or state a reason to terminate the employee.
- ▣ 4. Go read your employment agreement again (if you have a written agreement). Or read the Employee Handbook.
- ▣ 5. If you’re feeling a bit uncomfortable, you should be. However the fact that a party can do something doesn’t mean they will.

Typical Employee Handbook Statement

- ▣ **AT-WILL EMPLOYMENT**
- ▣ Employer has the right to modify or terminate any or all of the policies, procedures and benefits outlined in this Handbook, in whole or part, at any time, with or without notice. This Handbook is not intended to create, nor is it to be construed to constitute, a contract between Employer and any one or all of its employees. **No employee of Employer is employed for any definite period of time. That is, each employee is free to terminate his or her employment with Employer at will, at any time, with or without cause or advance notice, and Employer is equally free to terminate the employment of any employee, at will, at any time, with or without cause or advance notice.** Nothing in this Handbook, or other document or statement, whether oral or written, shall change this employment-at-will relationship. In addition, no management official is authorized to make any oral assurance or promise regarding any condition of employment, including the promise to continue employment.

That might be the rule, but

- ▣ Prohibited bases for employment termination
 - Age, gender, race, religion, disability, national origin, sexual preference – any Constitutional or statutorily protected status
 - Statute of limitations
 - How does this get handled?
 - What about retaliation

Harassment
 Workplace Environment
 Qui Tam

That might be the rule, but....

- Your employer may be exempt
 - An employer can be exempted from either the scope/coverage of the particular statute at issue, or from being subject to some of the particular statutory provisions.
 - Need to find out what laws apply and which don't. You cannot assume coverage.
 - Here are some examples:
 - Fair Labor Standards Act (FLSA) – we all know that child labor laws exist, but farmers are exempt
 - Religious institutions can discriminate on the basis of religion for some employees working on religious or secular activities.
 - Small Employer exemptions
 - Questions concerning status as a "joint" employee, or possibly a "leased" employee.
 - So status and coverage for a particular statute is critical.

Employment Law

The field of employment law is in essence the study of exceptions to the "At Will" rule.

What's Your Real Risk?

- ❑ It isn't being laid off because of a Constitutionally protected status, or getting involved in a class action lawsuit.
- ❑ It isn't getting involved in a qui tam action and retiring because of a large recovery on the penalty.
- ❑ It's simply this - things change and you just may get changed with them.
- ❑ No lawsuit
- ❑ No award
- ❑ No recourse
- ❑ On the other hand, it's entirely possible you're the one who wanted out.

Factors to Consider on Termination For Any Reason

- ❑ The Appendix here is a listing of items you need to review for applicability to your situation, approximately 20 slides.
- ❑ The listing is not exhaustive
- ❑ Each individual provision does not necessarily apply in your case
- ❑ These are not only useful in reviewing your situation on terminating employment, but also when reviewing a contract offer from a new employer.

You've been terminated. Now what?

- ❑ We can't review each item in the termination preparation list because of the obvious time constraints.
- ❑ We can talk about a few that are particularly important.
- ❑ We can talk about a few that can be traps for the unwary.

Insurance

- Health and Related Policies
 - COBRA Notice and comparison with Exchange policies available
 - Check lapse/termination date and eligibility date for new coverage (generally 30 days) to avoid gaps.
 - Check for employer contribution/incentive payment eligibility and contribution dates (Wellness and other programs); other Wellness Benefits.
 - Impact on dependents, spouse coverage

Insurance

- Long Term Disability policy – termination, continuation, transferability
- Short Term Disability policy – termination, continuation, transferability
- FSA – balance remaining and availability/termination
 - Can you max out this account before eligibility expires?
 - Tax impact and ability to establish a second account later in the year
- HSA – account balance
 - Has or is an employer contribution due?
 - Check on tax impact of terminating contributions, or tapping this resource

Insurance

- Life Insurance
 - Availability and transferability of group term coverage
 - Availability and transferability of dependent term coverage
 - Any accrued value for the policy if not group term – nature and availability
 - Eligibility for future coverage by other carriers
 - Other policies you may have with a cash value established

Insurance

- Professional and Other Liability Coverage
 - Is there a claim possible which is related to the termination?
 - Is the policy claims made or occurrence?
 - Tender of defense
 - Tail coverage
 - Notice of claim to insurer
 - Hold harmless or Indemnification issues
 - Statute of Limitations
 - Disclosure(s)
 - Who pays for what policy and for what period?
 - What does the employer policy cover in this situation?

Retirement Accounts

- Retirement Accounts
 - Impact on vesting your 401(k), 403(b), 457(b) or any version of Roth IRAs.
 - Is there an employer contribution due to any 401(k), 403(b), 457(b) or other pension plan. If so, has it been made or will it be made? Full amount or pro rata?
 - Does your plan allow you to take a loan against the principal if necessary?

Employment Agreement Traps

- Non-competition clauses
 - Is there one, and does it apply to you?
 - Limited in geographic scope?
 - Limited in time?
 - Buyout clause?
 - Enforceability in your jurisdiction
 - If employer is terminating you, does that create an estoppel from asserting the non-compete?

Employment Agreement Traps

- ▣ Work Product and Intellectual Property Assignments
- ▣ ASSIGNMENT OF WORK PRODUCT. I agree I will promptly make full written disclosure to Employer and will hold in trust for the sole right and benefit of Employer, and I hereby assign to Employer, or its designee, all my right, title and interest in and to any and all inventions, original works of authorship, developments, concepts, improvements or trade secrets, of whatever nature and whether or not patented or registered under copyright or similar laws, which I may solely or jointly with others conceive or develop or reduce to practice, or cause to be conceived or developed or reduced to practice, during the period of time I am in the employ of Employer (collectively referred to as "Work Product"); and I further agree the foregoing shall also apply

Employment Agreement Traps

- ▣ There are more
 - ▣ Confidentiality
 - ▣ Non - disparagement
 - ▣ Customer and other lists

Evaluations and Recommendations

- ▣ You need to know the employer policy and approach to personnel evaluations
- ▣ You need to know the employer policy and approach to recommendations by staff or administration
- ▣ You need to know how, when and if those policies get enforced
- ▣ You need to remember that "no comment" is a two way street

Voluntary vs. Involuntary

- ❑ If you voluntarily separate from your employment you are most likely waiving your entitlement to unemployment benefits.
- ❑ If you are involuntarily dismissed, you can apply for benefits but understand
 - The benefit entitlement requirements differ by jurisdiction
 - The program may require you to do a number of things that aren't particularly pleasant
 - The employer is entitled to contest your eligibility for the program which may precipitate litigation, and a public record.
 - You should get competent legal advice, if possible, before you get too far involved so that you know what you can expect

The Exit Interview

- ❑ The Miranda Warnings are not required, but it is something you should think about if this is an unfriendly separation
- ❑ You have a right to remain silent
 - There isn't going to be anything in your contract that requires you to comment on conditions at your employment
 - If you do say something, you are guaranteed that it will be played back to you in the event there is litigation of any type after your separation.
 - If you do agree to the interview, you should seek competent legal advice first unless it is a friendly separation.



Appendix A: An Itemization of Issues to Consider for Employment Termination Situations

What follows is an outline of some of the topics you need to consider when evaluating your position during an employment termination. It also happens to be a good list of items to consider in any employment negotiation when you are evaluating a contract offer.

It is not exhaustive, but does cover the major topics and hopefully demonstrates why professional advice, whether legal, tax or investment, is needed to guide your decision.

Notice of Termination

For cause, or not?

What does your written agreement say?

About notice?

About terms?

What does the employee manual say?

About notice?

About terms?

What is your pay period - weekly, bi-weekly, monthly or other?

What law governs - local, state or federal?

Is this a special situation?

Termination of business

Termination of position

Size and nature of Employer

Is the employer exempt?

Insurance Issues

Health and Related Policies

COBRA Notice and comparison with Exchange policies available

What is available outside your employer sponsored plan now that the ACA is fully implemented?

Check lapse/termination date and eligibility date for new coverage (generally 30 days) to avoid gaps.

Check for employer contribution/incentive payment eligibility and contribution dates (Wellness and other programs); other Wellness Benefits.

Impact on dependents, spouse coverage

Long Term Disability policy - termination, continuation, transferability

Short Term Disability policy - termination, continuation, transferability

FSA - balance remaining and availability/termination
Can you max out this account before eligibility expires?
Tax impact and ability to establish a second account later in the year

HSA - account balance
Has or is an employer contribution due?
Check on tax impact of terminating contributions, or tapping this resource

Life Insurance

Availability and transferability of group term coverage

Availability and transferability of dependent term coverage

Any accrued value for the policy if not group term - nature and availability

Eligibility for future coverage by other carriers

Other policies you may have with a cash value established

Professional and Other Liability Coverage

Is there a claim possible which is related to the termination?

Is the policy claims made or occurrence?

Tender of defense

Tail coverage

Notice of claim to insurer

Hold harmless or Indemnification issues

Statute of Limitations

Disclosure(s)

Workers Compensation Issues?

Notice

Statute of Limitations

Fellow Servant rule, third party actions

Salary Issues

Salary due to be paid

Severance pay, offers and offsets

Is a full Release of claims required?

If so, legal consult definitely advisable

Is the agreement contingent on any condition?

Timing of termination during pay period

Incentives or Bonus due - Timing again

Answering inquiries about previous work after separation from employment - Non-disclosure or Non-disparagement provisions of your agreement.

Your organization will have a policy on this - what is it?

Vacation/PTO account

Are you required in the employee manual to settle for a percentage buyout?

PTO due for current pay period included?

Sick Leave/FMLA account

Reimbursed

Employee manual provisions for settlement

More on offsets

Is there a moving expense advance still due?

Any other repayments due?

Signing bonus agreement impacted by separation?

Any provisions of the employment agreement/employee manual which tie final paycheck and notice together?

Retirement Accounts

Impact on vesting your 401(k), 403(b), 457(b) or any version of Roth IRAs.

Is there an employer contribution due to any 401(k), 403(b), 457(b) or other pension plan. If so, has it been made or will it be made? Full amount or pro rata?

Does your plan allow you to take a loan against the principal if necessary?

If not, can you create your own self-directed plan with a roll over and accomplish your goal. Financial advisor assistance needed.

Consider the tax impact and penalties associated with certain activities inside retirement accounts.

Meetings and Travel agreements

Is there travel or meeting reimbursement due

Employment agreement applicability of travel and meeting provisions - buyout possible?

Employment Agreement Traps

Non-competition clauses

Is there one, and does it apply to you?

Limited in geographic scope?

Limited in time?

Buyout clause?

Enforceability in your jurisdiction

If employer is terminating you, does that create an estoppel from asserting the non-compete?

Intellectual Property clauses

Particularly dangerous for individual employees

Research, patents and copyright issues

Non-disclosure agreements

Understand what a non-disclosure provision means

Understand, also, that an enforcement action may result in not only being in court, but paying the employer's attorney fees.

License, Registrations and Recommendations

Will this separation impact any professional license you possess?

How will separation be handled with respect to hospital or other privileges, if your organization grants those.

Will the employer be reporting any type of activity to any outside entity as a result of this separation?

Will this separation impact any registration or membership you currently possess?

What is the HR or corporate policy on recommendations and comment?

If HR does comment, what do they intend to say about you?

If HR does not comment on any employee, enforceability and penalty?

Availability of employee records/evaluations to third parties?

Exit Interviews

Miranda warnings are not required, but should be - anything you say really will be held against you if an issue arises!

Only do this after advice of counsel if the separation is not voluntary.

Personal Property and Employer Property

Employer furnished technical equipment - hardware and software. Return it, or buy it. Appraised value? Tax consequences.

Forms, records and HIPAA.

Absolutely no PHI off premises.

Any trade secret claim possible?

Any other intellectual property, copyright or patent issue possible?

Employee data and records stored on employer equipment

Employee personal property located on premises - if you can't fit it in a box today, you have too much "stuff" on site

Whatever you have "stored" on the company server, assume that IT will lock it up, and IT will read it at their leisure. If it's their server, it's their info. You have NO right of privacy as a general rule.

Radiation exposure, health and financial records of employee

Make certain your address is updated with HR for end of year W2, and with any group insurance carrier or investment firm.

Litigation, Arbitration and Unemployment

Voluntary separation

Involuntary separation

Unemployment compensation requirements for your jurisdiction

Do not assume that you sign up, and a small check just arrives in the mail. The eligibility requirements, and conditions to remain eligible, can be quite onerous.

Claim and counterclaim/ defense - the employer can hit back.

Impact on the coming job search

Wrongful termination litigation

Elements of lawsuit

What protected status do you believe is at issue?
Damages - what is the case worth

Hostile work environment ?

Qui Tam actions

Retaliation

Practical considerations

Financial
Availability of attorney fees as an award
Impact on job search
Impact on family
Delay and closure
