



Employment Auditor's Notepad

PROTECTING "AT WILL" EMPLOYMENT

In California, there is a legal presumption that absent a contract for employment for a specified term, the employee is an "at will" employee, meaning the employment relationship may be terminated by either side, with or without notice, for any reason or no reason, so long as it is not an illegal reason. This presumption, however, can be overcome by evidence of a promise (oral or written, express or implied) that employment will only be terminated for cause. Here are some tips to protect the "at will" employment status from subsequent attack:

- Have an at will policy in your handbook which specifies that the at will nature of the employment may only be altered in writing, signed by both parties;
- Require your employees to acknowledge receipt of the employment handbook (which has a copy of the at will policy in it);
- Train your managers not to make any statements that could be construed as promises of future employment.

It Is The Employee's Responsibility To Initiate The Interactive Process

Generally speaking, an employer must provide reasonable accommodations to a disabled employee. However, an employer does not need to provide any and every requested accommodation. Employers can choose between equally effective accommodations, or where appropriate, may determine no reasonable accommodation is possible.

In *Milan v. City of Holtville* the California Court of Appeal concluded that an employer was not liable for the failure to make a reasonable accommodation because the employee had the burden of starting in the interactive process and the employee had not done so.

Plaintiff Milan suffered a work-related injury and began a leave of absence. Milan never requested an accommodation or contacted her employer to state her intention to return to work. Rather, she accepted benefits to be retrained in a different position, and began taking courses for a new position. Reversing Milan's trial court victory, the court ruled that the employee, not the employer, is responsible for starting the interactive process.

The duty of good faith requires the injured employee to directly express her interest in retaining her job to her employer. Only after she had done so would her employer have an obligation to engage with her with respect to possible accommodations. In conclusion, where "an employer has not received any communication from an employee over a lengthy period of time, and after the employee has been given notice of the employer's determination that the employee is not fit, an employer is not required . . . to initiate any discussion of accommodations. Imposition of such a duty under those circumstances would contradict the express terms of the statute which requires that the employee initiate the interactive process."

However, employers should still heed the court's caution that "no magic words are necessary, and the obligation arises once the employer becomes aware of the need to consider an accommodation."

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