



## Employment-At-Will: Is It Still Relevant?

What is an employment-at-will relationship? It is a relationship between an employer and employee that is not governed by a collective bargaining agreement or another type of written contract. The parties to the arrangement are free to terminate the relationship at any time for any reason. A 1983 decision by the New York Court of Appeals, *Murphy v. American Home Products Corp.*, repeated the "long-settled rule that where an employment is for an indefinite term, it is presumed to be a hiring at-will which may be freely terminated by either party at any time for any reason or even for no reason."

However, the rights of employers to terminate employees are limited by laws relating to such areas as:

- state and federal nondiscrimination provisions
- "whistle-blower" prohibitions
- reprisals for filing worker's compensation claims
- protective laws regarding the right to refuse to commit perjury
- suits for harassing or abusive actions
- suits for wrongful discharge
- occupational safety and health protections
- nondiscrimination provisions for those serving in the military or National Guard

- breach of any implied contracts in handbooks or employment contracts
- breach of an "implied covenant of good faith and fair dealing"
- some state judiciary limitations upholding "common law" challenges to at-will terminations
- violation of "public policy"

Even in the states where employment-at-will is still the law, the practical use of the concept is becoming more limited by court decisions. Two recent cases involving the Supreme Court give examples of how employment-at-will is being diminished.

The U.S. Supreme Court further eroded employment-at-will when it held in 1998 that employees may sue under federal law if their employment relationship is "interfered with" due to their agreeing to testify against their employer. A home health care company, Health Master, Inc., which received large Medicare reimbursements, employed the employee. The company was under investigation by the federal government for Medicare fraud. The employee agreed to testify and cooperate with the investigation. Before the case came to trial the employee was terminated. The employee alleged that this

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was retaliation for his assisting in the investigation. The employee had filed his lawsuit under an 1871 law, Chapter 42, Section 85 of the U.S. Code, 187. This law prohibits actions meant to “deter by force, intimidation or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully and truthfully or to injure such party or witness in his person or property on account of his having so attended or testified.”

Also in December 1998 the U.S. Supreme Court held in another case that an employment-at-will employee may sue using a Reconstruction era law that prohibits racial discrimination in the “making and enforcement” of contracts. The Eleventh Circuit Court of Appeals dismissed a suit because they ruled that the employee was an employee-at-will and could therefore be terminated at any time, with or without cause. The overturning of this decision is another case where a type of wrongful termination case has been decided by the courts based on laws or statutes not employment related. The Fifth Circuit and the Supreme Court held that even though the employee was an at-will employee a “contractual” relationship still existed between the employer and her.

These decisions emphasize that companies must take certain actions:

- Have explicit employment-at-will language in their handbooks
- The at-will verbiage needs to be easily observable, possibly in bold or italics
- Statement guaranteeing fair dealings must be carefully crafted and followed
- Companies need to have their consultant or attorney check their employment-at-will language and

handbooks for implied contracts

- Employment-at-will language needs to be repeated or cross-referenced in the progressive discipline, introductory period (formerly probationary period), and termination sections of the employee handbook.
- A signed acknowledgment including the employment-at-will language is preferable
- Train supervisors in what to say and what not to say
- Allow supervisors to suspend, but have all terminations reviewed by a trained professional

When drafting employment-at-will language, employers will have a natural tension between concerns for employee relations issues and having the best possible language for employment-at-will. The following policies demonstrate this point.

### **Sample policy #1**

*Although we hope you are happy here, all employees have a right to resign if it is in their best interest. The company has a commensurate right to take actions in the company's best interest. In other words, the company is an employment-at-will employer.*

This sample tends to acknowledge the need to be tactful and understand how employees may react to employment-at-will language. Some consultants and attorneys feel that this language is not quite explicit enough and recommend language similar to the following:

### **Sample policy #2**

*This company is an employment-at-will employer. All employees are employed for an indefinite period. You may resign if you feel it is in your best interest. Management reserves the right to terminate employees at any time, for any reason, with or without*

*Employment, continued on fold-in panel*

# Ride the Horse in the Direction It's Going

Organizations must change to survive and prosper. Diversification can mean many things to an organization, including adding, changing, or deleting core products, and merging or acquiring other business entities. While business leaders recognize the need for diversification, they often fail to plan for how employees will react. It usually results in creating work-related stress.

Mario Andretti once said, "If everything seems fine, you're just not going fast enough." This is a common way of thinking in many businesses. When companies look for challenges, growth, and other opportunities such as diversification, they count on employees to carry out our new plans and strategies. However, organizational leaders become surprised when employees are less enthusiastic than the planners of the change. Employees suffer from the invisible epidemic that antibiotics can't

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## A better-informed population means a better chance for change.

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help and physicians can't see, even with the aid of a microscope: stress.

Most of us would probably agree that we face greater pressures today than perhaps at any other time. We hear tales of people being burned out, used up, and overloaded. Too many great employees are just plain tired, have been overdosed on change, and are sick of the ambiguity and uncertainty in their lives. The bad news is that today is just a warm-up for tomorrow. What we are experiencing now will soon be called "the good old days."

How can we keep up with the information and technology we use everyday? It is said that 80 percent of

the world's technological advances have taken place since 1900. There was more information produced in the 30-year span between 1965 and 1995 than in the preceding 5000-year period between 3000 B.C. and 1965. A better-informed population means a better chance for change, and change and stress are connected. Simply put, life isn't going to get any easier.

A message we must convey to employees is that they have a stake in trying to control their own stress. None of us can count on someone else to come along and relieve us of our stress. We have to put ourselves in charge of managing work pressure. There is a good chance that we are the only ones who can or will do much to lighten our psychological load. Here are some examples of mistakes employees will make when confronted with change:

- Resist change
- Act like a victim
- Try to play the new game under the old rules
- Try to cut back into a low-stress mode
- Try to control the uncontrollable
- Choose their own rate of change
- Slow down the work pace
- Fear the future
- Pick the wrong battles
- Psychologically unplug from the job
- Avoid new assignments

Here are examples of healthy ideas to help everyone cope with change:

- The organization must change if it is to survive. Therefore, ride the horse in the direction that it is going. Rather than banging your head against the wall, adopt the practice of instant alignment.
- Don't yield to self-pity. Stand proud, pick up the pieces and get moving.
- Study your new situation and figure out how your game has changed. Decide which aspects of your job are

priorities. Leverage your effectiveness.

- There really is no such thing as a low stress organization that will survive over the long term. Change how you relate to the stress.
- Change what you can, but don't struggle with the issues you have no chance to change. Yogi Berra said, "If people don't want to come out to the park, nobody's gonna stop them."
- Keep in step with the rate of change in the organization. Don't lag behind because it is always harder to play catch-up.
- Speed up. Cover more ground. Maximize your own personal productivity.
- Instead of worrying about bad things that might happen, get busy and try to create the future you want. The best insurance policy for tomorrow is to make the most of today.
- Pick battles that are large enough to matter, small enough to win.
- Fall in love with your job again. You took it for some good reason and liked it when it was new and exciting. Try to keep the romance alive.
- Look for new challenges and reach for new assignments.

If all of us as employers and employees take responsibility for our stress created by change, recognize that stress is real, and work toward stress survival, we will have taken a giant leap toward healing ourselves and our businesses.

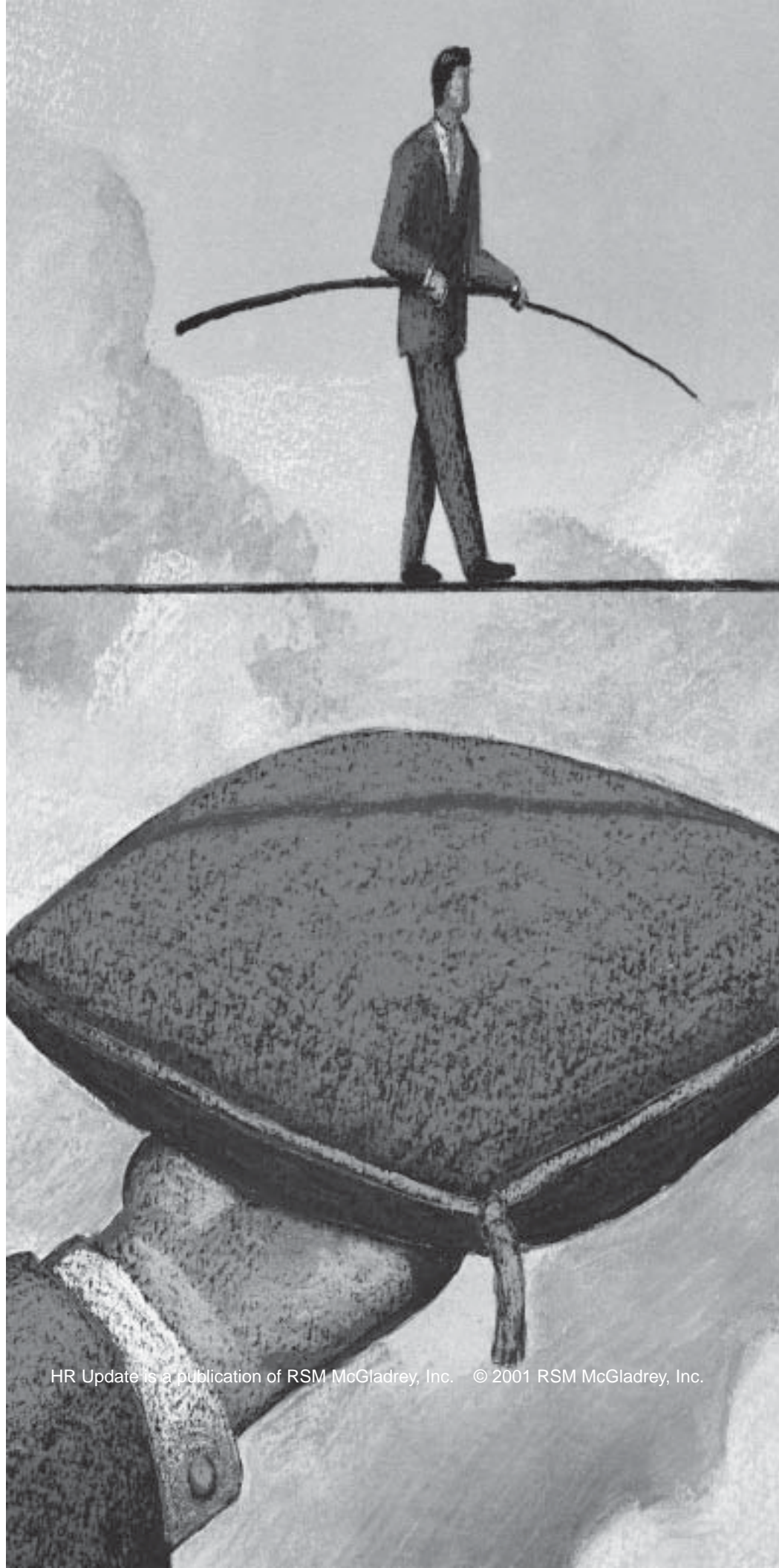
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*notice. No company representative can modify the employment-at-will policy or write a policy for any employee which is contrary to the policy without the written approval of the President. This policy is not to be modified by any statement in the employee handbook*

The second policy is more explicit about the employee being terminated at any time.

No matter which policy is used, supervisors need to be cautioned about not making statements, written or verbal, that are contrary to this policy. Employers should also avoid the use of the term "just cause." This might restrict the right of the employer to terminate under an employment-at-will policy. The handbook should also state that where grounds for termination are stated, they are not all-inclusive and do not restrict the company's ability to terminate at-will.



# Cushioning the Blow of Layoffs with Outplacement Services

According to most HR professionals, their least favorite responsibility is terminating employees. It is never an enjoyable task, especially when terminations or layoffs are due to an economic slowdown. Everyday we hear news stories about more layoffs; some are minor, but others are massive with an employee reduction of up to 20,000 employees in some cases. Downsizing or right-sizing is an effective method of cutting costs in lean economic times, but how can you and your organization make the transition less harsh for the employees you need to terminate? How can you still cut costs, reduce unemployment benefits, keep litigation lawyers at bay, and maintain a reputation as a caring employer? Outplacement may be a solution.

Outplacement counseling may include all or some of the following:

- Assistance in accepting the job loss, both intellectually and emotionally
- A full personality, interest, and work style evaluation with a professional
- Guidance in developing a job search plan that considers functional area and discipline, financial requirements, interests, and aspirations
- Help in developing an understanding of the job

search process, job sources such as employment agencies, and the best approach to each

- Guidance in the development of a complete, concise, accomplishments-oriented resume
- Assistance in developing correspondence that will best attract the attention of potential employers
- Coaching on the interview process, stressing preparation and attention to detail, to ensure maximum exposure to individual skills and achievements
- Providing guidance in offer negotiations including relocation, benefits, and other issues
- Advice and counsel regarding joining a new organization and assuming new duties and responsibilities

Maintaining a positive relationship with former employees is important for a couple of reasons. First, you may want to hire them back when things turn around for the economy and your company's financial position. Second, maintaining an image of a company that has a social conscience and cares about its former employees will assist with future hiring efforts.

When faced with pressure and stress of current and future layoffs, consider the benefits that outplacement services will offer, not just to your former employees, but to your organization's image as a whole.

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