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## Advice to California Employers: An Overview of Wrongful Discharge Law and How to Avoid Potential Liability

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# Advice to California Employers: An Overview of Wrongful Discharge Law and How to Avoid Potential Liability

## I. INTRODUCTION

Wrongful discharge law has been an area of tremendous growth in California. Recent decisions on both the supreme court<sup>1</sup> and appellate court<sup>2</sup> levels have dramatically limited the traditional concept of employment at will. As recent jury verdicts have indicated,<sup>3</sup> an ill-advised termination may result in employer liability amounting to hundreds of thousands of dollars. In light of the increased risk of wrongful discharge liability, it is essential that employers stay informed of current laws and take preventative steps to reduce the risk of possible litigation.

This article will summarize the evolution of wrongful discharge from the traditional concept of employment at will to current judicial limitations of that doctrine. Second, various methods by which an employer can reduce the risk of incurring wrongful discharge liability will be discussed. Once an employer has a working knowledge of the basic legal principles, a few changes in its employment policies may greatly decrease the risk of litigation.

## II. TRADITIONAL EMPLOYMENT AT WILL

California has traditionally followed the "at will" doctrine in its treatment of employment termination. The at will doctrine, as codified,<sup>4</sup> states that "an employee could be fired for a good reason, a bad reason, or no reason at all."<sup>5</sup> The doctrine was developed following

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1. *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

2. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

3. See *infra* notes 48-49 and accompanying text.

4. CAL. LAB. CODE § 2922 (West Supp. 1985). "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month." *Id.*

5. *Baxter & Wohl, Wrongful Termination Lawsuits: The Employers Finally Win a Few*, 10 EMPLOYEE REL. L.J. 258, 259 (1984).

California cases which have applied the at will doctrine include: *Swaffield v. Uni-*

the Civil War during a period of rapid industrial development which fostered a wide-spread laissez faire economic attitude.<sup>6</sup> The prevailing interest concerned employers' ability to run their businesses as they saw fit.<sup>7</sup> As a result, employers traditionally have had unfettered discretion to terminate their employees at will. However, this may be limited by contract<sup>8</sup> or statute.<sup>9</sup>

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versal Eesco Corp., 271 Cal. App. 2d 147, 76 Cal. Rptr. 680 (1969); *Marin v. Jacuzzi*, 224 Cal. App. 2d 549, 36 Cal. Rptr. 880 (1964); *Mallard v. Boring*, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960).

6. For a more complete history of the employment at will doctrine, see *Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1416-19 (1967); Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 AM. BUS. L.J. 467 (1980); Krauskopf, *Employment Discharge: Survey and Critique of the Modern At Will Rule*, 51 UMKC L. REV. 189 (1983); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1824-28 (1980).

7. Comment, *Wrongful Termination of Employees at Will: The California Trend*, 78 Nw. U.L. REV. 259, 284 (1983).

8. Employees could always protect their employment status through an express contractual agreement limiting the employer's ability to terminate the employee. However, courts found such contractual agreements invalid unless supported by some consideration other than the services to be rendered. See, e.g., *Levy v. Bellmar Enters.*, 241 Cal. App. 2d 686, 690, 50 Cal. Rptr. 842, 844-45 (1966) ("assuming that appellant and respondents had entered into a direct oral or written contract . . . nevertheless such contract, being for an indefinite period, might be terminated by either party unless supported by some further consideration bargained for and given by appellant in addition to his rendition of the services required of him by the employment contract itself."); *Lynch v. Gagnon*, 96 Cal. App. 512, 519, 274 P. 584, 586 (1929) ("employment based upon a consideration can only be rightfully terminated under conditions which render it reasonably just and proper to do so"); *Brown v. National Elec. Works*, 168 Cal. 336, 143 P. 606 (1914) (agreement by employer, in consideration of a purchase of certain shares of stock at a fixed price, to employ purchaser at a stated salary, without specifying duration of employment, was held to imply a continuance of employment for a reasonable time, and contract would be breached if employee is discharged sooner without good cause).

9. Modernly, there are several federal statutory limitations on the employer's discretion to terminate at will. See, e.g., Labor Management Relations Act of 1947, 29 U.S.C. § 158 (1982) (prohibits employment discrimination for engaging in or refusing to engage in concerted activities, or for asserting rights under the Act); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 215(a)(3), 216(b) (1982) (prohibits employment discrimination for asserting rights under the Act); Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1982) (prohibits employment discrimination based on race, color, national origin, sex, or religious preference, or for asserting rights under the Act); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 623, 631, 633(a) (1982) (prohibits employment discrimination based on age regarding employees aged 40 to 70 years, or for asserting rights under the Act); Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c) (1982) (prohibits discrimination for asserting rights under the Act); Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1140, 1141 (1982) (prohibits employment discrimination for asserting rights under the Act, and prohibits discharge of employees to prevent vesting of pension rights); Clean Air Act, 42 U.S.C. § 7622(a) (1982) (prohibits discharge of employees initiating or testifying in proceedings against their employers for violating the Act); Federal Water Pollution Control Act, 33 U.S.C. § 1367 (1982) (prohibits discharge of employees because of garnishment for any one indebtedness); Jury Systems Improvements Act of 1978, 28 U.S.C. § 1875 (1982) (prohibits discharge of employees for jury service); Energy Reorganization Act of 1974, 42

The at will doctrine began to erode, however, during the mid-1900's. This erosion was prompted by the inequality of bargaining power between the employee and the employer, and by the growing economic dependence of the employee on the employer.<sup>10</sup> The first major inroad into employment at will occurred as early as 1959 in the case of *Petermann v. International Brotherhood of Teamsters, Local 396*.<sup>11</sup> The court espoused a "public policy" exception to the at will doctrine thereby prohibiting termination of an employee for refusing to commit perjury.<sup>12</sup>

The at will doctrine was further limited in 1972 when a court of appeal recognized an implied covenant against discharge except for

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U.S.C. § 5851 (1982) (prohibits discharge of employees who participate in proceedings in furtherance of the Act); Federal Railroad Safety Authorization Act of 1980, 45 U.S.C. § 441(a), (b)(1) (1982) (prohibits employers from discharging employees who file complaints or initiate proceedings relating to enforcement of federal railroad safety laws, or who refuse to work based on reasonable belief that conditions are dangerous).

Additionally, there are various state statutory restrictions on the employer's ability to terminate employees at will. See, e.g., California Fair Employment and Housing Act, CAL. GOV'T CODE §§ 12900-12996 (West 1980 & Supp. 1985) (prohibits employment discrimination based on race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex, or as to persons over forty years of age, based on age, or for asserting rights under the statute); Workers Compensation and Insurance Act, CAL. LAB. CODE § 132a (West Supp. 1985) (prohibits discrimination against employees who are injured in the course of employment); California Occupational Safety and Health Act of 1973, CAL. LAB. CODE §§ 6310, 6312 (West Supp. 1985) (prohibits retaliation for complaining to a governmental agency as to safety conditions or initiating or testifying in a proceeding regarding safety violations); CAL. LAB. CODE § 432.2 (West Supp. 1985) (misdemeanor to condition employment or continued employment on taking a polygraph or lie detector test).

10. As employment became more and more scarce, employees became more and more dependent upon employers for their economic security. As such, nonunionized employees lacked the bargaining power to protect themselves from unjust dismissal. Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 BUS. LAW. 1, 5 (1984).

Additionally, with the advent of pension plans, retirement benefits, and other seniority related benefits, individual employees "are no longer separate economic units with complete mobility and freedom of decision." Comment, *supra* note 7, at 264-65 (footnote omitted).

11. 174 Cal. App. 2d 184, 344 P.2d 25 (1959). In this case, the union discharged Petermann, one of its employees, immediately following the employee's refusal to make false statements before a legislative committee investigating the union. *Id.* at 187, 344 P.2d at 26.

12. The court stated:

[i]t would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute.

*Id.* at 188-89, 344 P.2d at 27.

good cause.<sup>13</sup> It must be noted, however, that the court found in the language of the written employment contract that the employee was to be terminated only for cause.<sup>14</sup> Similarly, in *Rabago-Alvarez v. Dart Industries, Inc.*,<sup>15</sup> the court recognized an implied covenant against discharge without good cause where the employee had left a position of sixteen years in reliance on the employer's assurances of permanent employment as long as her work efforts were satisfactory.<sup>16</sup>

These initial encroachments into the employment at will doctrine led to three landmark cases which created potentially wide-reaching exceptions to at will employment in California.<sup>17</sup> These three theories are: (1) violation of public policy,<sup>18</sup> (2) implied covenant of good faith and fair dealing,<sup>19</sup> and (3) implied-in-fact promise.<sup>20</sup>

### III. PUBLIC POLICY THEORY

The most widely accepted theory of wrongful termination is based upon the public policy cause of action.<sup>21</sup> *Tameny v. Atlantic Richfield Co.*,<sup>22</sup> the first of the three landmark cases, stands for the theory that an employee who has been terminated for reasons contrary to public policy may institute an action against the employer sounding in tort.<sup>23</sup> In *Tameny*, a public policy violation resulted from the

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13. *Drzewiecki v. H & R Block, Inc.*, 24 Cal. App. 3d 695, 101 Cal. Rptr. 169 (1972). In *Drzewiecki*, the plaintiff was terminated after refusing to agree to a reduction in his salary after investing his time and energy into making the business profitable. *Id.* at 700, 101 Cal. Rptr. at 172.

14. *Id.* at 705, 101 Cal. Rptr. at 175. The court placed emphasis on the agreement between the parties that plaintiff would not be terminated unless he "improperly conducted the business." *Id.* at 704, 101 Cal. Rptr. at 175.

15. 55 Cal. App. 3d 91, 127 Cal. Rptr. 222 (1976).

16. The court stated:

contracts of employment in California are terminable only for good cause if either of two conditions exist: (1) the contract was supported by consideration independent of the services to be performed by the employee for his prospective employer; or (2) the parties agreed, expressly or impliedly, that the employee could be terminated only for good cause.

*Id.* at 96, 127 Cal. Rptr. at 225.

17. *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (public policy exception); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (implied covenant of good faith); *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (implied-in-fact promise).

18. See *infra* notes 21-28 and accompanying text.

19. See *infra* notes 29-37 and accompanying text.

20. See *infra* notes 39-47 and accompanying text.

21. *Lopatka*, *supra* note 10, at 7.

22. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980). In *Tameny*, plaintiff had been employed for fifteen years as a retail sales representative for defendant in charge of management relations between various service station dealers in his territory. Plaintiff claimed he was discharged from this position for refusing to participate in defendant's illegal scheme to fix retail gasoline prices. *Id.* at 169, 610 P.2d at 1331, 164 Cal. Rptr. at 840.

23. The court stated that "if the cause of action arises from a breach of a promise

employer discharging the employee for refusing to engage in an illegal price fixing scheme. Thus, the *Tameny* court created a "cause of action where there is 'bad cause,' but not where there is 'no cause.'"<sup>24</sup> The plaintiff has the burden of proving that the employer's motive for the discharge was wrongful, i.e., that it contravenes public policy.<sup>25</sup>

Although violation of public policy has become a widely recognized cause of action, the question remains how far the courts are willing to go in deciding what constitutes such a violation. In almost all cases which have recognized the public policy theory, plaintiffs have been able to show that the theory has been embodied in some statutory authority.<sup>26</sup> However, the courts in both *Tameny* and *Petermann* suggested that a cause of action may exist absent such statutory support.<sup>27</sup>

In *Tameny*, the court also suggested that an employee may have a tort cause of action for an employer's breach of the implied covenant of good faith and fair dealing. However, the court refused to decide the issue, relying instead on the public policy exception to the at will doctrine.<sup>28</sup> Later that year, however, the appellate court in *Cleary v. American Airlines, Inc.*,<sup>29</sup> took the lead from *Tameny* and established such a cause of action.

#### IV. IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The implied covenant of good faith and fair dealing has rarely been

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set forth in the contract, the action is *ex contractu*, but if it arises from a breach of duty growing out of the contract it is *ex delicto*." *Id.* at 175, 610 P.2d at 1334, 164 Cal. Rptr. at 843-44 (emphasis in original) (citing *Eads v. Marks*, 39 Cal. 2d 807, 811, 249 P.2d 257, 260 (1952), which, in turn, quoted *Peterson v. Sherman*, 68 Cal. App. 2d 706, 711, 157 P.2d 863, 866 (1945)).

The prohibition against discharging an employee for refusing to violate a law or statute stems from a duty imposed by law to promote the public welfare, not from an express or implied contractual agreement between the parties. Comment, *supra* note 7, at 266.

24. Miller & Estes, *Recent Judicial Limitations on the Right to Discharge: A California Trilogy*, 16 U.C.D. L. REV. 65, 82-83 (1982) (citing *Payne v. Western & Atlantic R.R. Co.*, 81 Tenn. 507, 519-20 (1884) (overruled on other grounds)).

25. Miller & Estes, *supra* note 24, at 82.

26. *Id.* at 80-83.

27. In *Petermann*, 184 Cal. App. 2d at 188, 344 P.2d at 27, the court stated that "the right to discharge an employee . . . may be limited by statute or by considerations of public policy." (emphasis added). Additionally, in *Tameny*, 27 Cal. 3d at 173, 610 P.2d at 1333, 164 Cal. Rptr. at 842, the court seemed to suggest that "public policy" may be determined by the concept of "sound morality."

28. *Tameny*, 27 Cal. 3d at 179 n.12, 610 P.2d at 1337 n.12, 164 Cal. Rptr. at 846 n.12.

29. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

applied in a wrongful discharge case.<sup>30</sup> However, the doctrine provides that “[t]here is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.”<sup>31</sup>

*Cleary v. American Airlines, Inc.*,<sup>32</sup> the second of the three landmark cases, recognized a cause of action for breach of the implied covenant of good faith and fair dealing. The theory was expanded to encompass a cause of action for both breach of contract and tort.<sup>33</sup> The court found that termination after eighteen years of employment, coupled with the employer’s failure to abide by its own employer grievance procedures violated the implied covenant of good faith and fair dealing.<sup>34</sup> The *Cleary* court, however, failed to delineate guidelines for determining the circumstances under which the good faith covenant would justify an employee action for wrongful discharge.<sup>35</sup>

The *Cleary* case was a dramatic expansion of wrongful discharge law since it was supported only by dicta in *Tameny*.<sup>36</sup> Cases following *Cleary* have construed the implied covenant of good faith and fair dealing much less broadly.<sup>37</sup>

Although the *Cleary* court failed to enunciate guidelines for future litigants as to the requisite factors underlying a claim for breach of

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30. Lopatka, *supra* note 10, at 17.

31. *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 453, 168 Cal. Rptr. 722, 728 (1980) (emphasis in original) (quoting *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 658, 328 P.2d 198, 200 (1958)).

32. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980). In *Cleary*, plaintiff was employed by defendant for eighteen years allegedly under the terms of an oral contract. The terms of employment included a regulation expressing the defendant employer’s grievance and discharge policy. Plaintiff’s complaint alleged that he was discharged as a result of his union organizing activities and in violation of defendant’s own grievance and discharge procedures. *Id.* at 447-48, 168 Cal. Rptr. at 724.

33. *Id.* at 456-57, 168 Cal. Rptr. at 730.

34. *Id.* at 455-56, 168 Cal. Rptr. at 729. The court stated that “the longevity of the employee’s service, together with the expressed policy of the employer. . . preclud[ed] any discharge of such an employee by the employer without good cause.” *Id.*

35. See *Miller & Estes, supra* note 24, at 83-97, for a complete discussion of *Cleary* and its impact on California wrongful discharge law.

36. See *supra* note 28 and accompanying text.

37. See *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984) (dismissal of vice president/treasurer employed for three and one half years pursuant to a stock option agreement expressly defining the employment to be terminated at will did not support a cause of action for breach of the implied covenant of good faith and fair dealing since plaintiff did not establish longevity of employment or defendant’s failure to follow its own policy concerning adjudication of employee disputes); *Crosier v. United Parcel Serv., Inc.*, 150 Cal. App. 3d 1132, 198 Cal. Rptr. 361 (1983) (dismissal of a male managerial employee of 25 years for cohabitating with a female employee in violation of an unwritten company fraternization rule did not support a cause of action for breach of the implied covenant of good faith and fair dealing).

the implied covenant of good faith and fair dealing, the appellate court in *Pugh v. See's Candies, Inc.*,<sup>38</sup> established a clear test for such a determination. The *Pugh* court, however, refused to base its ruling on the implied covenant of good faith and fair dealing. Instead, the court relied on a pure contract theory of implied-in-fact promise.

## V. IMPLIED-IN-FACT PROMISE

The theory of implied-in-fact promise, although not as widely accepted as the public policy exception to employment at will, "is potentially [the most] pervasive and perilous"<sup>39</sup> of the three theories recognized in California. In essence, the doctrine enables courts to examine the "totality of the circumstances" surrounding an employment relationship to determine whether an express or implied-in-fact promise existed, limiting the employer's ability to terminate the employee at will.<sup>40</sup>

*Pugh v. See's Candies, Inc.*,<sup>41</sup> the third of the three landmark cases, acknowledged a cause of action based on implied-in-fact promise. The court's analysis was significant in that it treated the California labor statute<sup>42</sup> as being a mere presumption that employment contracts are terminable at will; such a presumption is rebuttable by an express or implied agreement to the contrary.<sup>43</sup> Additionally, the *Pugh* decision, although relying on contract law, did not require the traditional contract prerequisites of mutuality of obligation or independent consideration.<sup>44</sup> Instead, the court looked solely to an im-

38. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).

39. Lopatka, *supra* note 10, at 17.

40. See Miller & Estes, *supra* note 24, at 97-102, for a complete discussion of the theory of implied-in-fact promise.

41. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981). In *Pugh*, plaintiff had worked for defendant for thirty-two years and had worked his way up from dishwasher to vice president in charge of production and a member of the board of directors. Plaintiff had frequently been told that his future was secure as long as he did a good job and was loyal to the company. Additionally, it had been the company's policy not to terminate administrative personnel except for good cause. Three months after having been congratulated for increased production in the company's newsletter, plaintiff was discharged. He was given no explanation for the firing except for a comment that "[t]hings were said by people in the trade that have come back to us." *Id.* at 317, 171 Cal. Rptr. at 919. Plaintiff was also told to "look deep within [him]self" to find the reason for his dismissal. *Id.*

42. CAL. LAB. CODE § 2922 (West Supp. 1985). See *supra* note 4 for the complete text of § 2922.

43. *Pugh*, 116 Cal. App. 3d at 324-25, 171 Cal. Rptr. at 924.

44. *Id.* at 325-26, 171 Cal. Rptr. at 924-25. The *Pugh* court stated that "[a] contract which limits the power of the employer with respect to the reasons for termination is no less enforceable because it places no equivalent limits upon the power of the em-

plied-in-fact promise to terminate only for "good cause."<sup>45</sup> In so doing, several factors which may support a cause of action based on implied-in-fact promise were acknowledged: "the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged."<sup>46</sup>

Although it was recognized that employers must have discretion in their termination policies concerning managerial and confidential employees,<sup>47</sup> *Pugh* represents a willingness to permit courts to engage in a relatively broad ad hoc inquiry into the existence of an implied-in-fact promise. Consequently, employers must be aware that any statement to an employee, whether inadvertent or intentional, whether oral or written, may subsequently be construed by a jury to be an implied-in-fact promise providing a basis for wrongful discharge liability.

As a result of the recent judicial developments which have substantially limited the employer's ability to terminate its employees at will, the employer is faced with a greatly increased risk of liability in a wrongful discharge action. Statistics have revealed that between January 1980 and February 1984, plaintiffs have prevailed in approximately sixty percent of such wrongful discharge actions and have been awarded punitive damages sixty percent of the time.<sup>48</sup> The average compensatory damage award was \$173,050 and the average punitive damage award was \$396,650.<sup>49</sup> In light of such statistics, employers should re-evaluate and restructure their personnel policies and procedures in order to minimize the risk of defending a wrongful discharge action, or if necessary, to increase the possibility for a successful defense of such an action.

## VI. PREVENTATIVE MEASURES

At the outset, it must be noted that an employer can never be

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ployee to quit his employment." *Id.* at 325, 171 Cal. Rptr. at 924. The court additionally stated:

*"We embrace the prevailing viewpoint that the general rule (requiring independent consideration) is a rule of construction, not of substance, and that a contract for permanent employment, whether or not it is based upon some consideration other than the employee's services, cannot be terminated at the will of the employer if it contains an express or implied condition to the contrary."*

*Id.* at 326, 171 Cal. Rptr. at 925 (emphasis in original) (quoting *Drzewiecki v. H & R Block, Inc.*, 24 Cal. App. 3d 695, 703-04, 101 Cal. Rptr. 169, 174 (1972)).

45. *Pugh*, 116 Cal. App. 3d at 330, 171 Cal. Rptr. at 927-28.

46. *Id.* at 327, 171 Cal. Rptr. at 925-26 (footnotes omitted).

47. *Id.* at 330, 171 Cal. Rptr. at 928.

48. Greenan, *The Problems of Wrongful Termination*, CAL. LAW., Aug. 1984, at 29.

49. *Id.*

guaranteed complete freedom from potential wrongful discharge liability. However, there are many precautions which can be taken to help minimize the risk of such liability. Thus, the employer should carefully review its entire personnel policy from the initial interview to the final termination proceeding.

#### A. *Hiring Considerations*

##### 1. Treatment of Prospective Employees

It is extremely important that the employer decide the type of employment relationship needed before the hiring process begins. Basically, an employer has two alternatives: (1) to establish a "good cause" discharge policy, or (2) to establish a pure at will relationship.<sup>50</sup> The "good cause" policy may be beneficial for employee morale, which may, in turn, lead to a more efficient work environment. However, such a policy invites a jury to second guess the employer as to what constitutes "good cause." On the other hand, an employment at will policy may produce morale problems which, in turn, may lead to greater inefficiency, while at the same time affording the employer greater discretion in its termination decisions.

After the employer has chosen a viable employment policy, it becomes important to establish an organized hiring process. What occurs between the employer's hiring coordinator and a prospective employee during this process may force the employer into an undesired employment relationship.

First, the employer should thoroughly screen all applicants. Prior work history should be carefully researched and references should always be contacted. The employer, by doing so, may discover trouble areas before the employment relationship begins.

Second, management must instruct those involved in the hiring process to refrain from making any comments to an applicant which may imply an employment policy different from the one desired.<sup>51</sup> Inadvertant remarks by an interviewer may provide an otherwise at will employee with the basis for a successful lawsuit upon termina-

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50. Connolly, Murg & Scharman, *Abrogating the Employment-At-Will Doctrine: Implications for an Employer's Personnel Policies and Handbooks*, 2 PREVENTIVE L. REP. 53, 55 (1983) [hereinafter cited as Connolly].

51. For example, if the employer desires to preserve an at will employment relationship, interviewers should be instructed to *not* say such things as "You will have a job as long as you do your work" or even "as long as you perform satisfactorily." Moon, *Avoiding Liability for Wrongful Discharge—Management Planning and Litigation Tactics*, 62 MICH. B.J. 780 (1983).

tion. In light of this possibility, an employer may want to provide checklists for each interviewer with instructions not to stray from the policies set forth in that checklist. Also, each interviewer should be instructed to thoroughly explain the employer's policies to each applicant.

One other trouble area involves employment applications. These applications should be reviewed to detect any express or implied employment guarantees not specifically intended by the employer. It may also be desirable to insert a disclaimer into the application form. Such a disclaimer would emphasize that the employment is to remain at will.<sup>52</sup>

## 2. The Employment Agreement

Even more important than the safeguards set forth above are the terms and conditions agreed upon by the employer and employee at the time of hire. It is essential that the employee completely understand the type of employment relationship into which he or she is entering. The employer may choose one of several methods in which to accomplish such an understanding.

First, an employer may create a disclaimer. The disclaimer may specify an at will relationship. Also, the disclaimer should state that the at will provision is binding and that no other written or oral statements may be interpreted as superseding that provision. The employer should have the employee read and sign the disclaimer before beginning work. Disclaimers should be placed in bold print in employment applications,<sup>53</sup> employee handbooks and manuals.<sup>54</sup> It

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52. For a more thorough discussion of disclaimers, see *infra* notes 53-54 and accompanying text.

53. A successful disclaimer was included in a Sears employment application in *Novosel v. Sears, Roebuck & Co.*, 495 F. Supp. 344 (E.D. Mich. 1980):

*In consideration of my employment, I agree to conform to the rules and regulations of Sears, Roebuck and Co., and my employment and compensation can be terminated, with or without cause, and with or without notice, at any time, at the option of either the Company or myself. I understand that no store manager or representative of Sears, Roebuck and Co., other than the president or vice-president of the Company, has any authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing.*

*Id.* at 346 (emphasis in original).

Recently, a California Court of Appeal in *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984), determined a disclaimer in a stock option agreement to be valid:

*Nothing in this Stock Option Agreement or in the Plan shall confer upon the Employee any right to continue in the employ of the Trust or the Advisor or shall interfere with or restrict in any way the rights of the Trust or the Advisor, which are hereby expressly reserved, to discharge the Employee at any time for any reason whatsoever, with or without good cause.*

*Id.* at 473 n.1, 199 Cal. Rptr. at 616 n.1 (emphasis in original).

54. A sample disclaimer for use in employee handbooks is as follows:

In consideration of my employment, I agree to confirm [sic] to the rules and

must be noted, however, that although disclaimers are an effective means of creating and preserving employment policies, they may also create undesirable morale problems among employees. Additionally, disclaimers will only serve as protection against liability for implied-in-fact promises<sup>55</sup> or breach of the implied covenant of good faith and fair dealing.<sup>56</sup> Disclaimers will not prevent liability arising from a public policy theory<sup>57</sup> or a tort action.<sup>58</sup>

A second alternative is to enter into an employment contract with the employee. Such contracts should clearly set forth the rights and liabilities of both parties. If desired, the grounds for terminating the contract by either party should be expressed; otherwise, the contract should provide that the employment is to be at will. The contract should also provide for an inexpensive and convenient method of resolving disputes, such as binding arbitration. It may also provide for liquidated damages in the event of breach. As with a disclaimer, the employment contract should state that it alone reflects the bargain of the parties and that no other oral or written statement may supersede its provisions.

The employer should be aware, however, of the possible disadvantages of using a contract. Statistical studies indicate that California juries are sympathetic to employees in wrongful discharge actions.<sup>59</sup> Thus, an employment at will contract is likely to be viewed as unconscionable or as a contract of adhesion,<sup>60</sup> since the employer is usually

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regulations set forth in this booklet, and that my employment and compensation can be terminated, with or without cause, and with or without notice, at any time, at the option of either the company or myself. I understand that no representative of the company, other than its president, has any authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing.

Moon, *supra* note 51, at 780-81, for additional sample disclaimers.

55. For a discussion of implied-in-fact promise, see *supra* notes 39-47 and accompanying text.

56. For a discussion of implied covenant of good faith and fair dealing, see *supra* notes 29-37 and accompanying text.

57. For a discussion of public policy theory, see *supra* notes 21-28 and accompanying text.

58. In addition to the three prevailing wrongful discharge theories, public policy violation, implied-in-fact promise, and implied covenant of good faith and fair dealing, employers are liable under various ancillary tort theories. See, e.g., *Pirre v. Printing Devs. Inc.*, 468 F. Supp. 1028 (S.D.N.Y. 1979) (defamation); *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894 (D.N.J. 1978) (intentional interference with contractual relations); *Lagies v. Copley*, 110 Cal. App. 3d 958, 168 Cal. Rptr. 368 (1980) (intentional infliction of emotional distress); *Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (negligent infliction of emotional distress).

59. See *supra* note 48-49 and accompanying text.

60. A contract of adhesion is "[a] standardized contract, imposed and drafted by

in a superior position to bargain with the employee.

An alternative to both a disclaimer and an employment contract is an employee statement.<sup>61</sup> The statement should be read and signed by the employee. However, the employee statement may be vulnerable to interpretation as an adhesion contract, as is an employment contract.

In addition to memorializing the agreement of the parties, an employer must review its employee handbooks and manuals to avoid guarantees of only "just cause" terminations. Courts are likely to construe provisions in handbooks and manuals as binding against the employer.<sup>62</sup>

It is also important to expressly state that the employment manual is to be non-contractual.<sup>63</sup> If termination procedures are discussed,

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the party of superior bargaining strength, that relegates to the other party only the opportunity to adhere to the contract or to reject it . . . ." Murphy, *A Review of Personnel Policies and Procedures for At-Will Employees*, 3 CAL. BUS. L. REP. 113, 114 (1982).

61. An example of an employee statement is as follows:

Employee Statement

Note: This is a legal document. Do not sign it unless you have read and understand the entire statement and agree that its contents are true.

I, (*Employee Name*), having been hired as an employee of (*Employer Name*), (*the company*) as of (*date*), hereby certify that:

1. I understand that I am *not* being hired for any definite period of time. Even though I will be paid my wages on a (*weekly, monthly, etc.*) basis, I understand that this does *not* mean I am being hired for a definite period of time.

2. I understand that because I am not being hired for any definite period of time, I will be an employee at will and I can be fired at any time, with or without cause, for any reason which does not violate a public policy of this state. I also understand that I may leave my job at any time for any reason provided I first give at least two (2) weeks notice to the personnel office.

3. I understand that company policy requires me to be hired as an employee at will and that this policy cannot be changed except in a written document signed by me and the (*appropriate officer*) of the company.

4. I have been given an opportunity to ask questions regarding company rules and my status as an employee at will. No representative of (*employer name*) has made any promises or other statements to me which imply that I will be employed under any other terms than stated above.

5. I agree that all disputes relating to my employment with the company or the termination thereof shall be submitted to arbitration before an arbitrator who is a member of the American Arbitration Association. I understand that I may be represented by counsel in such proceedings and *I agree that arbitration shall be the exclusive method of resolving all disputes relating to my employment with the company or the termination thereof.*

Executed at (*city*), California, County of \_\_\_\_ on (*date*),  
(*employee signature*).

*Id.* at 115 (emphasis in original).

62. See *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 613-15, 292 N.W.2d 880, 892 (1980) (a legally enforceable promise could arise from statements made at the time of hire or from statements contained in an employee manual).

63. If the manual or handbook contains a section on employment terminations, the employer should include a provision such as the following: "This section on employee termination has been drafted for the guidance of supervisory employees. It is not intended that it shall form a contract between the Company and its employees.

the employer should reserve for itself broad discretion preserving "the right to terminate for 'any reason not prohibited by law' or for 'any legitimate business reason.'"<sup>64</sup>

If the employer decides to revise its handbooks and manuals to more clearly reflect a particular employment policy, signatures from all present employees should be obtained. Obtaining such signatures may prevent possible liability arising from previous provisions implying greater employment security than intended. It is also wise to provide for salary or benefit increases to those having signed an acknowledgment of the new revisions. Such increased benefits or salaries may provide consideration for the new agreement.<sup>65</sup>

### *B. The Ongoing Employment Relationship*

Employers can do much to reduce the risk of potential litigation through an organized program involving employee evaluations and disciplinary procedures. An organized program is important to ensure that employees are treated equally and fairly. Evaluations should always be honest and candid, and should indicate both the strengths and weaknesses of the employee. Each evaluation should be in writing and should be reviewed by a superior before being disclosed to the employee. The evaluation should be signed by the employee and placed on file with the employer. Such evaluations are an important defense in cases of wrongful discharge actions since they can provide a record by which to justify the employee's termination.

A practice of discipline and warning before termination can also prove effective in avoiding employer liability for wrongful discharge. First, an employee who receives counselling or warnings may improve his or her performance, thereby avoiding termination altogether. Even if the employee fails to improve, records of disciplinary

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Rather, it describes Company's general philosophy concerning termination decisions." Baxter, *Managing the Risks in Firing Employees*, NAT'L L.J., Sept. 12, 1983, at 20, col. 1.

64. *Id.*

65. As an added precaution, employees could be required to sign a contract such as the following:

In consideration for the \_\_\_\_\_ dollar salary increase for 19\_\_\_\_, the parties mutuall [sic] understand and agree that the employment shall be terminable at the will of either party and without notice or warning. This contractual provision shall supercede [sic] and all preexisting employment contracts, personnel policies, oral promises, and unilateral understandings that the employment relationship may be terminated only for cause or only after certain procedures have been followed.

Connolly, *supra* note 50, at 56.

efforts will show good faith on the part of the employer. However, an employer must be careful to be discrete when engaging in discipline, since any accidental publication to a third person may possibly result in a defamation action.

### C. Termination

Once the necessity of termination arises, the employer must be careful to avoid conduct which might become actionable. The employer should take precautions to avoid angering, hurting or humiliating the employee. Termination, in itself, may be a very painful process for the employee.

First, the termination decision should be reviewed by an impartial reviewer who has knowledge of the law and who has authority to overturn an ill-advised termination. The reviewer should be aware of the possible danger areas which are likely to result in litigation. A checklist of possible pitfalls should be compiled.<sup>66</sup> An independent review of each termination decision will not only reduce suspicious terminations, but will also indicate to a judge or jury that the employer has acted in good faith.

Once a termination decision has been evaluated, it should be communicated to the employee in the most delicate manner possible. The employee should be informed by a disinterested supervisor in person, *not* in writing. The employee should briefly be informed of the reasons underlying the termination, and should be given an opportunity to express his feelings regarding the matter. However, under no circumstances should this opportunity be allowed to develop into a shouting match. The supervisor should be compassionate, yet firm, and the termination decision must be disclosed to the

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66. A checklist of problem areas should include:

1. Any statutory violations, such as age, race, or sex discrimination.
2. Whether there have been representations made to the employee that may reasonably be interpreted to imply an employment relationship other than at will.
3. Whether all provisions stated in the employee handbook have been complied with.
4. Whether there are any possible violations of public policy (for example, has the employee been asked to engage in any unlawful activities, or has the employee recently exercised an unpopular legal right?).
5. Has the employee been warned or disciplined?
6. Is there any good reason for the employee's poor job performance?
7. What is the overall job record of the employee?
8. Has the employee just returned to work from a leave of absence involving sickness or disability?
9. How long has the employee been employed?

Swerdlow, *Wrongful Discharge: A California Management Labor Lawyer's Perspective and Preventive Recommendations*, PREVENTIVE L. REP. 26, 28 (1983). See also Baxter, *Managing the Risks in Firing Employees*, NAT'L L.J., Sept. 12, 1983, at 21, col. 1.

employee in private to avoid humiliation, anger, and a possible defamation lawsuit.

During the exit interview, the employer may obtain a separation agreement. A separation agreement releases the employer from any and all liability it may otherwise have to the employee. In exchange, the employer must tender to the employee some form of consideration, such as severance pay. It is necessary to inform the employee that he or she is not obliged to sign the agreement, and it is necessary to insure that the employee realizes that by signing the agreement the employee is giving up all possible claims against the employer. The problem associated with using a separation agreement is that it may educate the employee as to his or her rights and might indicate to the employee that the employer has a guilty conscience. Therefore, the employer must carefully weigh the benefits and the risks involved in adopting such a policy.

#### VII. CONCLUSION

In light of the recent changes in California wrongful termination law,<sup>67</sup> employers are faced with an ever growing uncertainty as to when an employee may be discharged without incurring liability. Since these laws are constantly evolving, an employer should remain informed of current law both in California and in other jurisdictions.

The employer should engage in preventive measures which reflect, as much as possible, current decisions in this area. The employer's actions should include thoroughly delineating the employment relationship, carefully following an established graduated disciplinary procedure, and terminating an employee only as a last resort. Above all, the employer should strive toward a system which treats all employees equally and fairly. An employee who feels he has been treated fairly will be less likely to initiate a lawsuit in the event of termination.

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67. See *supra* notes 21-49 and accompanying text.

