

Dore v. Arnold Worldwide Inc.

How to document at-will employment relationships **Interviewed by Usha Viswanathan**

Among lawyers, words are more than tools of persuasion — they also hold people to agreements. Correct usage is never more important than when writing contracts. For proof, look at court dockets, which are filled with cases that pit litigants in battle for rights presumed but never clearly expressed in writing.

In August, the California Supreme Court addressed the words that should be used to create “at-will employment” and provided some long-awaited guidance to employers who wish to create and preserve at-will employment relationships with their employees.

Smart Business spoke with Tom Reilly, a partner at Newmeyer & Dillion LLP, about the court’s ruling and the precautions employers should take when informing new hires and employees that their employment is “at will.”



Tom Reilly
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What is at-will employment and why is it important to employers?

At-will employment means the employer retains the right to terminate the employment relationship with or without cause and that the employee has no recourse against the employer for breach of contract based upon the termination. There may still be other statutory or common-law claims arising from the termination of an at-will employee, such as claims for illegal discrimination or discharge in violation of public policy, but not breach of contract.

Have California employers experienced problems in maintaining at-will employment relationships with their employees?

Yes. California Labor Code Section 2922 provides that an ‘employment having no specified term may be terminated at the will of either party on notice to the other.’ In the 1980s, however, California courts ruled that Section 2922 created a mere presumption of at-will status which — in the absence of an express, written at-will agreement — may be overcome by oral assurances of continued employment or an implied-in-fact contract requiring good cause for termination. As a result, diligent

employers made sure their employees signed written at-will employment agreements, imbedded in employment applications, offer letters, employee handbook acknowledgments and other documents.

Some employers struggled with the language used in such documents. They felt that telling an employee or applicant he or she could be terminated without cause was too harsh. They attempted to construct softer sounding at-will provisions, such as, ‘You retain the option to terminate your employment at any time and the company retains the same right.’ Employers who failed to state clearly that at-will employment could be terminated without cause were often unsuccessful when they attempted to enforce their at-will agreements in defense of wrongful termination claims.

What effect will *Dore v. Arnold Worldwide Inc.* have on the ability of an employer to create and enforce at-will employment agreements?

In *Dore v. Arnold Worldwide Inc.*, the Supreme Court ruled that a provision in an employer’s offer letter describing the employment as at will and explaining that the employer retained ‘the right to termi-

nate ... employment at any time,’ was sufficient to preserve the employer’s prerogative to terminate the employment with or without cause. This is a positive development for California employers because the Supreme Court demonstrated a willingness to enforce at-will agreements that are worded with reasonable clarity. The case also firmly established that a properly worded at-will agreement will bar claims for breach of contract and, in some cases, fraudulent inducement.

Can companies continue to use softer language in their offer letters and other employment documents?

In *Dore*, the court ruled that it was sufficient for an employee to acknowledge in writing that the employment was at will and could be terminated at any time. However, we do not recommend soft-pedaling an issue as important as at-will employment. In his concurring opinion in *Dore*, Justice Carlos R. Moreno intimated that merely saying the employment could be terminated upon notice would be insufficient to create an at-will employment. No employer wants to be the next test case. It is always better for an employer to explain that ‘at will’ means the employment relationship may be terminated at any time, with or without cause.

Employers who want to create and maintain at-will employment relationships should also ensure that their clearly worded at-will statements are presented consistently in employment documents signed by their employees, such as employment applications, offer letters and employee handbook sign-off sheets. Moreover, agreements regarding at-will employment should specify that they are intended to be the parties’ final agreement on the subject and that they can be amended only by another written agreement signed by the employee and an officer of the company.

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