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By Robert Murphy

In this current business and economic climate, employers should consider junking the “at-will” rule in favor of employment contracts. For over 100 years, most people working in the United States have been employed at-will, meaning an employee can be fired at any time and for any reason, or no reason, with or without cause. It also means that an employer can change its personnel policies at any time without notice to the employee. It’s difficult to imagine a more precarious relationship from the employee’s point of view.

This may sound like a great benefit to employers. But 35 years of practice as an employment lawyer has taught me that the at-will rule makes no sense and often does more harm than good. Many employers, particularly those in service industries where low turnover is a positive -- hospitality and health care come to mind -- are better served by entering into employment contracts with their employees. Here is why:

I have never known a company to terminate any employee “for no reason.” There is always a reason, and it should be reflected in the employee’s file. Firing for no reason defies logic – and, more importantly, is just plain wrong. What employer would want to establish a working environment that celebrates the right to be arbitrary?

Also, the at-will rule has actually contributed to sloppy management because having the right to terminate “for no reason at all” makes documenting disciplinary cases or following the employer’s policies -- or even reading those policies -- meaningless. This can cost a company millions of dollars in legal fees and damages. Juries don’t like companies that fail to follow their own policies and they particularly don’t like employers who fire employees “for no reason at all.”

And finally, employees don’t like working for employers who treat them arbitrarily. Morale and productivity drop while interest in unionization and employment litigation increases.

The supposed benefits of the at-will rule are essentially limited to the litigation arena, where the rule is useful as defense against breach of contract claims. However, very few plaintiffs base their lawsuits exclusively on breach of contract. There are many other potentially more lucrative avenues of attack -- e.g., discrimination, wrongful termination, retaliation, whistle blower, etc. -- so dismissing the contract claim is unlikely to dispose of the suit. Therefore, other than as an argument to support a pretrial motion to dismiss a contract claim, the at-will rule is actually a detriment.

What about the other half of the at-will rule that says you can change policies without notice? That’s worth something. Right? Wrong. What sense does it make to formulate or change personnel policies without notice to your employees? How can they comply if they don’t know what the rules are?

The bottom line is the at-will rule does more harm than good. It creates a sense of insecurity among employees and it discourages supervisors and employees from reading and complying with employer policies. It encourages unionization -- likely to be a bigger issue than ever now that Barack Obama has been elected -- and promotes an unacceptable level of carelessness in disciplinary cases. All of these things result in higher turnover and lower productivity.

In contrast, an employment contract provides a recruiting advantage over most of an employer's competitors, deters unionization, promotes a greater sense of security among employees and improves productivity. More importantly, it allows the employer to take the moral high ground because giving employees a written guarantee that they will not be treated arbitrarily simply makes sense, particularly if the employer's counsel drafts the contract

So, if employment contracts are so great, why isn't everyone using them? In part, most employment lawyers still advise their clients to employ people at-will because that's what they were taught. Additionally, as noted above, the value of such contracts is less apparent in industries where high turnover is unavoidable or considered a positive factor.

The employment agreements my firm has drafted provide for binding arbitration by a neutral third party as the exclusive method of resolving certain disputes. Since this is the one provision of employment agreements that seems to be the most controversial and has attracted the most attention in the courts, it is important to understand exactly how arbitration works.

Arbitration agreements are completely lawful provided they include certain features. At one time, there was great reluctance by some judges to enforce such agreements because it was felt they were imposed on employees and lacked the guarantees of fairness that would be present in a judicial setting. However, in recent years, the trend has been to embrace arbitration as an effective alternative to other forms of litigation provided the arbitration agreement incorporates certain provisions.

For example, the arbitrator must have the same powers as a judge and jury and be able to award the same damages -- including back pay, reinstatement, attorney fees and punitive damages. In addition, arbitrations must be conducted in accordance with guarantees of fairness similar or identical to those that apply in civil litigation; and the employer must pay all of the arbitrator's fees and expenses, although the other costs of the arbitration can be apportioned as they would be if the parties were in court. Finally, the agreement must be binding on both parties.

Why should an employer prefer arbitration to civil litigation? Primarily because arbitration is much faster and cheaper than going to court. With arbitration, final resolution of an employment dispute can be accomplished in a few months, while it can take years to get to trial. The less obvious answer is that plaintiffs' lawyers cannot use the high cost of litigation to leverage settlement of frivolous claims and are therefore less likely to take the case in the first place.

What about the administrative and operational costs to an employer? Won't arbitration open Pandora's box and cause a flood of claims? The answer depends, on how the arbitration agreement is written and on the "culture" of the company. Although an arbitration agreement can be broadly drawn to cover all forms of employment disputes, many arbitration agreements cover only certain kinds of disputes. For example, the agreement may be limited to terminations, employment discrimination and certain claims for compensation and/or benefits. Claims based upon subjective dissatisfaction or other less substantial concerns would not be covered.

More importantly, in our experience, employers who have adopted arbitration have done so as part of employment agreements that are a reflection of their employment culture. Arbitration is a symbol of the company's commitment to fairness, which typically results in companies being non-union, with very little employment litigation. These companies have learned it is better to encourage employees to complain to the company about the company rather than forcing them to go to lawyers and union organizers with their complaints.

This may be a very good time for employers to re-examine their relationship with their employees. After decades of decline, unions are looking forward to legislative changes that will make it easier than ever for them to organize. At the same time, the economic downturn is likely to result in a significant increase in employment litigation. In times like these, the at-will rule may prove to be an expensive and counterproductive anachronism.

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