YOU CAN’T FIRE ME! STATE COMMON LAW EXCEPTIONS TO EMPLOYMENT-AT-WILL

Kevin P. Harrison†

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† The Author is a J.D. Candidate (2013) at Wake Forest University School of Law and an alumnus of Miami University (2010), where he graduated with a B.S. in Business and a B.A. in Political Science. This article is the result of the encouragement and support of his family and friends. For that, the Author would like to express tremendous gratitude. The Author would like to give special thanks to Drs. Joshua Schwarz and David Walsh, whose exceptional teaching and scholarly work in this area inspired me to explore it, to the Honorable Judge Daniel Haughey, Dr. Daniel Herron, Gus Lazares and Katie Wallrabenstein, whose advice and friendship have always driven me to work harder and strive higher, and most of all to my parents, Mark and Patti, and my son Ryan, whose constant love and support is the fuel for all I do.
ABSTRACT

Since its inception approximately 135 years ago, the doctrine of employment-at-will offered near universal protection for employers who discharged non-union employees without an express contract containing provisions that specify employment for a definite duration and/or termination only for good cause. However, after spending close to sixty years enforcing the maxim that these “at-will” employees could have no recourse against their employer upon being discharged, the landscape changed.

In 1959, California became the first state to begin eroding the employment-at-will doctrine. Though the initial reaction around the country to this incursion was tepid at best, it ultimately marked the beginning of close judicial examination of the doctrine’s foundational rationales and implications. This examination eventually culminated in a revisionary revolution spanning from the mid-1970s to the early 1990s. What resulted was a reshaping of the employment-at-will doctrine, primarily based on three rationales for restricting employers’ ability to freely terminate the employment relationship.

Since the end of that revolution however, there has been very little change in the degree of recognition each theory has achieved. The basis of claims available against employers under each theory has also remained constant in each jurisdiction. What is surprising in the face of such constancy is that employers appear to be either unaware of the nuances of the three exceptions or gambling that they will not be hurt by them. With wrongful discharge claims sharply rising in these difficult economic times, this comment will explore the current state of the employment-at-will doctrine and provide guidance to employers about how to tweak traditional approaches to human resource practice in order to avoid running afoul of the three primary exceptions that impinge on their freedom to fire.
I. INTRODUCTION

Due in large part to the Great Recession and current sluggish economic growth, Americans are more focused now than at any time in recent memory on the world of work. Those who remain unemployed are necessarily focused on the availability of employment. But for those who have a job, the lurking question is whether that job (and the income and stability associated with it) is truly secure.

Underlying employees’ fears is the seemingly boundless power of most businesses to fire employees whenever and for whatever reasons they want. While they may not know this fear in their collective gut by name, it is not without strong legal merit. Since the late 1800’s, an employer’s power to terminate the employment relationship has been expansive for all but a few select classes of employees. For almost half that time, it was indeed almost limitless. In the modern business world, however, an employer’s power is not as vast as it seems, and certainly not as unfettered as it once was.

Unfortunately for many employers, their decision-makers may also be equally unaware of the limits on their power to terminate the employment relationship. Others may have the knowledge, but lack the desire to adapt their traditional policies and practices. Regardless of the reason(s), any employer that stays static or adopts an outdated approach to human resource management is making a dangerous legal and reputational gamble that could have significant consequences for both employer and employee. The purpose of this comment is to explore discharge as it applies to the majority of United States employees and guide employers through the proactive changes and reactive decisions that can be made to ensure that the dangers of state common law claims relating to discharge are avoided.

II. A BRIEF HISTORY OF EMPLOYMENT-AT-WILL IN THE UNITED STATES

In the United States, the doctrine of “employment-at-will” refers to the presumption that where no definite term is included in an employment contract, the relationship will be one of indefinite duration that can be terminated at any time by either the employer or the employee. Such relationships leave employers “free to discharge individuals ‘for good cause, or bad cause, or no cause at all.’”

1 MARK A. ROTHSTEIN, ANDRIA S. KNAPP, & LANCE LIEBMAN, CASES AND MATERIALS ON EMPLOYMENT LAW 738 (1987) (quoting State ex rel. Bushman v. Vandenberg, 280 P.2d 344, 348 (Or. 1955)).
The American version of the doctrine was born in 1877 in a treatise on “master-servant” relations by a New York attorney, Horace Gray Wood. According to Wood, the American rule was “inflexible that a general or indefinite hiring is prima facie a hiring at will.” Over time, Wood’s rule was gradually adopted throughout the United States. It continued to be enforced and went virtually unquestioned by American courts for the next eighty-two years.

In 1959, the California Court of Appeals’ decision in Petermann v. International Brotherhood of Teamsters was the first to carve out an exception to the doctrine of employment-at-will. The court based this departure from decades of precedent on public policy considerations. In Petermann, an employee was terminated after being instructed to commit perjury and subsequently testifying truthfully. In carving out the first exception, the court initially limited it to situations where an employee refused an order to violate a criminal statute, stating that:

To hold that one’s continued employment could be made contingent upon his commission of a felonious act at the instance of his employer . . . is patently contrary to the public welfare . . . [t]he public policy of this state requires that every impediment . . . to the above objective, must be struck down when encountered.

While it would take an additional fifteen years for another court to take up the torch, the Petermann decision would ultimately prove to be the marker of a forty-year long revolution across the United States eroding the employment-at-will doctrine, primarily through the adoption of three general common law exceptions.

III. ERODING EMPLOYMENT-AT-WILL: PRIMARY COMMON LAW EXCEPTIONS

Though the Petermann decision was the first chink in the armor of employment-at-will, it was not without its limitations. Its narrow

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3 Id. at 25 (quoting H. Wood, A Treatise on the Law of Master and Servant § 145, at 272 (1877)).
4 Id. at 25-26.
6 Id.
7 Id. at 26.
8 Id. at 27.
coverage of only a refusal to perform criminal acts at the behest of an employer limited the applicability of the public policy considerations that served as its underpinnings on more general principles. What Petermann accomplished immediately, however, was to invite scrutiny toward the application of the employment-at-will doctrine in the context of employee discharges. Ultimately, this scrutiny led to the adoption of three primary common law exceptions to the doctrine: (1) the public policy exception, (2) the implied contract exception, and (3) the implied covenant of good faith and fair dealing.

A. The Public Policy Exception

The public policy exception, born in Petermann, was the first to take root in the United States. Though it was not adopted by another jurisdiction until fourteen years after Petermann, it proliferated widely throughout the United States, primarily in the 1980s.

While it exists in various forms depending on the jurisdiction, two cases decided in the doctrine’s formative years articulated the basic rationales for granting the public policy exception. In 1974, the New Hampshire Supreme Court became the first to consider the exception from a broader perspective in Monge v. Beebe Rubber Co.:

In all employment contracts, whether at will or for a definite term, the employer’s interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public’s interest in maintaining a proper balance between the two. . . . [A] termination by the employer of a contract of employment at will which is motivated by bad faith or malice based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract.

This view embodies one of the bases for establishing the public policy exception, namely the public interest in promoting economic

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10 See Petermann, 344 P.2d at 27.
11 Id.
13 See Petermann, 344 P.2d at 27.
16 Id.
efficiency and stability in spite of the doctrine of employment-at-will when the circumstances of discharge are particularly egregious (“the economic perspective”). The Monge decision is also noteworthy for its failure to clearly adopt a particular exception. This was especially problematic due to its vague language and emphasis on fairness as opposed to the emphasis on public policy in Petermann.17 Eventually, any confusion was resolved by a subsequent New Hampshire decision clarifying that Monge represented New Hampshire’s recognition of a unique form of the public policy exception.18

The other, more prevalent rationale came in a summative statement regarding the growth of the public policy exception and its development across the nation. In 1980, the California Supreme Court described the exception’s evolution as being founded in “a variety of factual settings in which a discharge clearly violated an express statutory objective or undermined a firmly established principle of public policy.”19 This is an expression of the other fundamental basis for the public policy exception – frustration of the goals and objectives of previously adopted policy (“the frustration perspective”), which was made even more explicit by the same court in 1992.20

B. The Implied Contract Exception

The implied contract exception was first recognized in 1980 in two jurisdictions which were, remarkably, over 1500 miles apart. First, in a single page decision, the New Mexico Supreme Court held that a public employer’s personnel guide provided the basis for an implied-in-fact contract to discharge only after following delineated procedures.21 Only four months later, the Michigan Supreme Court issued a thirty-six page opinion, holding that “employer statements of policy . . . can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create [such rights] . . . although . . . signed by neither party, [and able to be] unilaterally amended by the employer without notice.”22 Fortunately, though different rules still apply in different

17 See id. at 552.
18 See Howard v. Dorr Woolen Co., 414 A.2d 1273, 1274 (N.H. 1980) (“We construe Monge to apply only to a situation where an employee is discharged because he performed an act that public policy encouraged, or refused to do that which public policy would condemn.”)
jurisdictions, the implied contract exception is easier to reduce to definition than the other two primary exceptions. At its core, jurisdictions that recognize this exception hold that factual circumstances surrounding employment, including oral and written representations made to employees or company policies or procedures disseminated or made known to employees can create a contract between employers and employees which modifies the at-will relationship.  

C. The Implied Covenant of Good Faith and Fair Dealing

The third primary common law “exception” to the doctrine of employment-at-will is the implied covenant of good faith and fair dealing. Easily the least widely adopted of the three, it is premised on the idea that “neither party to a contract should be allowed to take actions that have the effect of denying the other party the benefits of the contractual relationship.”

Despite only achieving adoption in a strong minority of jurisdictions, its existence traces back to two locations. First, in Fortune v. National Cash Register Co., the Massachusetts Supreme Judicial Court imputed the implied covenant of good faith and fair dealing, which other courts had found to be present in other types of contracts, to a particular employment contract. While the court appeared to decline recognition of the exception based on the implied covenant of good faith and fair dealing, subsequent cases have construed Fortune to do just that, albeit in a narrow sense. The more popular source for the exception, however, arises out of the Restatement (Second) of Contracts. According to § 205, “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”

Some jurisdictions have matched their law regarding employment contracts to this language, holding that the phrase “every contract”
includes “contracts” for employment-at-will. However, in declining to adopt the exception, some courts have considered such arrangements outside what the Restatement contemplates, because they are too likely to encourage excessive judicial intervention in discharges of at-will employees, or are subsumed by the public policy exception.

D. Question of Damages

One additional consideration for employers that is intimately related to the exceptions themselves is the exposure to different types of damages. Generally, the majority of courts have recognized that claims under the three exceptions described permit recovery either in contract or tort. For example, every jurisdiction that recognizes the implied contract exception at common law has found it sounds in contract (as the name implies). Additionally, all but one jurisdiction addressing the breach of the implied covenant of good faith and fair dealing exception at common law find that it sounds in contract. That jurisdiction is also the only deviant jurisdiction that heavily restricts its allowance for tort damages to very specific factual circumstances. Most jurisdictions also tend to recognize these exceptions by holding that they provide a basis for a generalized claim of either breach of contract or wrongful discharge.

The public policy exception, however, tends to be more of a mixed bag. Some jurisdictions have found that imposing tort damages would be too harsh to employers, and have accordingly restricted recovery to

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35 Id.
36 Nevada is the only jurisdiction to not find this. See K-Mart Corp. v. Ponsock, 732 P.2d 1364, 1368 (Nev. 1987) (holding that the only basis for recovery based on a breach of good faith is in tort liability).
37 Id.
contractual remedies. Others recognize the exception as a basis for a generalized cause of action for wrongful discharge, typically sounding in tort, or find such discharges to be so egregious that tort damages are warranted (typically requiring malice or a similar standard).

Though these principles generally hold true, there are also outlier jurisdictions where the handling of lawsuits relating to these exceptions can be even more advantageous to employees. For example, some jurisdictions also permit employees to recover punitive damages, though usually only where malicious intent is found. Others extend the implied contract exception even where the facts do not establish a contract, but meet the elements required for promissory estoppel under state law.

A breakdown of the number of states recognizing each type of damages appears, by exception, in Table 3.1:

<table>
<thead>
<tr>
<th>TYPE OF DAMAGES</th>
<th>IMPLIED CONTRACT</th>
<th>GOOD FAITH &amp; FAIR DEALING</th>
<th>PUBLIC POLICY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Contract</td>
<td>38</td>
<td>8</td>
<td>7</td>
</tr>
<tr>
<td>Tort</td>
<td>0</td>
<td>1</td>
<td>33</td>
</tr>
<tr>
<td>Compensatory</td>
<td>0</td>
<td>1</td>
<td>32</td>
</tr>
<tr>
<td>Punitive</td>
<td>0</td>
<td>1</td>
<td>20</td>
</tr>
<tr>
<td>Unclear</td>
<td>0</td>
<td>2</td>
<td>2</td>
</tr>
</tbody>
</table>

Table 3.1

It should be noted that jurisdictions that recognize punitive damages obviously also recognize compensatory damages, so the sum of those sub-categories does not equal the number of jurisdictions recognizing tort damages.

Additionally, some states recognize both contract and tort-based claims, meaning that the sum of the “bold” categories does not equal

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the number of jurisdictions recognizing the exception.\textsuperscript{44} States that either: (1) did not explicitly recognize punitive damages or (2) recognized them pursuant to statute rather than one of the three exceptions, are excluded from the punitive damages count. Montana is entirely excluded because damages are assessed according to statute.\textsuperscript{45}

E. Prevalence of the Exceptions

Over time, a majority of states have come to recognize two out of the three primary common law exceptions discussed above. A summary of the number of states recognizing each exception is present in Table 3.2 below:

<table>
<thead>
<tr>
<th>STATUS</th>
<th>IMPLIED CONTRACT</th>
<th>GOOD FAITH &amp; FAIR DEALING</th>
<th>PUBLIC POLICY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Recognized</td>
<td>38</td>
<td>10</td>
<td>41</td>
</tr>
<tr>
<td>At Common Law</td>
<td>37</td>
<td>9</td>
<td>40</td>
</tr>
<tr>
<td>By Statute\textsuperscript{46}</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Not Recognized</td>
<td>12</td>
<td>39</td>
<td>9</td>
</tr>
<tr>
<td>Rejected</td>
<td>12</td>
<td>36</td>
<td>9</td>
</tr>
<tr>
<td>No Decision</td>
<td>0</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>Unclear</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
</tbody>
</table>

Table 3.2

For the purposes of this comment’s analysis, a state is considered to have recognized the exception if it has adopted the exception in any form. A state is considered to have not recognized the exception if it has: (1) explicitly rejected it, (2) considered the exception and failed to adopt it, or (3) issued a clarifying decision fully over-ruling a decision previously believed to have adopted the exception. A state’s stance is regarded as unclear where its language regarding the exception

\textsuperscript{44} See infra Appendix A– Jurisdictional Breakdown.


\textsuperscript{46} Id.
appears in dicta or where the court has ruled on a case where the issue was addressed, but failed to adopt, reject, or defer a decision explicitly.

F. Current Trends

As the numbers in Table 3.2 reveal, the number of jurisdictions recognizing each exception today is almost identical to what it was in the seminal 1996 study of the topic by Professors Walsh and Schwarz.\textsuperscript{47} Indeed, the only differences between the numbers in Table 3.2 and the 1996 study are that one less jurisdiction recognizes the public policy exception (with its status no longer unclear in any states) and one more jurisdiction has rejected the implied covenant of good faith and fair dealing in employment contracts.\textsuperscript{48}

This reality is troubling in a number of ways for employers. First, the statistics on the increase in employee lawsuits and related losses are troubling to say the least. According to a 2007 study on employment-related lawsuits and jury verdicts, wrongful termination claims in state courts increased 260 percent from 1986 to 2006.\textsuperscript{49} In addition to the sheer increase in the volume of claims, employers must be concerned about the cost of damages as well. Over the same time period, thirty-nine percent of cases resulted in compensatory damages.\textsuperscript{50} When cases settled in the most recent five year period covered by the study (2001-2006), settlement amounts skyrocketed by 138 percent.\textsuperscript{51}

While these statistics do not focus solely on litigation using one of the three exceptions outlined in this article, they still reveal an increasing amount of adversarial litigation initiated by former employees and increasing costs associated with such litigation. Even more discouraging is that none of these statistics take into account the substantial legal costs associated with resolving the cases.

Interestingly, however, the recognition of these three exceptions has not been entirely beneficial to employees. For example, a 2003 study revealed that state recognition of all three exceptions is inversely-related to employee wages, being correlated with decreased

\textsuperscript{47} See Walsh, supra note 12, Table 1 at 652.
\textsuperscript{48} Compare Walsh, supra note 12, Table 1 at 652 with supra Table 3.2.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
wages of up to three percent. Numerous studies have also been conducted on the effect of the recognition of the exceptions on employment levels, a broad review of which leads to mixed conclusions. A 1992 study using aggregate data gathered from state employment statistics concluded that adopting such exceptions “reduced state employment levels by as much as 7 [percent].”

However, “[s]ubsequent analyses . . . using industry-level and household-level data . . . find either modest negative effects . . . or no effects of dismissal protections on employment levels.” A 2007 study using data from specific firms revealed that effects were marginally positive on employment levels when the implied covenant of good faith and fair dealing was read into employment contracts, but not statistically significant as to the other exceptions when considering both manufacturing and non-manufacturing employers. However, the study also concluded that the impact of introducing exceptions weighed more heavily on employers in the manufacturing sector, leading to workforce reductions in those industries. Perhaps more significantly though, the “effects were largest in the first three years following adoption and diminished thereafter,” indicating that the impact of the exceptions on employment levels may be largely behind us, barring their adoption by additional jurisdictions.

IV. General Approaches to Crafting Exception-Conscious Policy

Given the increase in wrongful termination claims that has taken place in recent years, it is imperative that employers be aware of the existence of these exceptions and their contours. However, mere knowledge is not enough. Employers must be proactive to ensure that their current policies and practices do not run afoul of these exceptions and to educate decision-makers about their implications. Because the exceptions vary based on the law of individual states, any approach must be tailored to the law of specific jurisdictions while accommodating business needs. This section will propose three conceptual approaches to insulating businesses from liability under the

52 Timothy M. Shaughnessy, How State Exceptions to Employment-at-Will Affect Wages, 24:3 J. LAB. RES. 447.
54 Id.
55 Id. at F205-08.
56 Id. at F202.
57 Id. at F212.
exceptions. Then, with those ideas already in mind, the next section will focus on specific actions employers can take to avoid each exception individually.

A. The “One-Size-Fits-All” Approach

As the name implies, this approach is the least nuanced. It does not differentiate between employers of different sizes, in different industries, or with different geographic employment footprints (“GEFs”). However, its simplicity and restrictiveness make it effective. The first step is for the employer to identify its GEF by listing all states in which it currently has employees or foresees hiring employees in the next five years. This list effectively sets the jurisdictional boundaries of law that must be reviewed. Upon completion of the list, the employer should identify the most restrictive jurisdiction with regard to each exception and establish policies and practices that will allow it to comply with each standard. By doing so, the employer should be able to avoid liability under any interpretation of the three exceptions, provided decision-makers act in accord with the approach in terminating employees. It also allows the employer to maintain a uniform set of policies, practices, and procedures (“PPPs”) across its entire business. It should be emphasized that for employers with a GEF entirely within one state, this is the only justifiable approach.

B. The “Custom Tailored” Approach

While the foregoing approach is arguably the most effective, it is also the least flexible. Another approach is for employers to compartmentalize by jurisdiction. For example, if an employer has a twenty state GEF, it will have twenty different sets of PPPs (one for each state). This approach is arguably the most effective because it allows the employer to account for the nuances in the law of each jurisdiction and avoid burdening its operations with restrictions that may not apply in each state. There are two major drawbacks to this approach. First, it is much more resource intensive. For example, the employer must train its employees and decision-makers differently in each state, requiring different training materials and possibly additional personnel. Second, the employer gives up uniformity of PPPs across the company. This can cause related consequences such as decreasing the ease of transferring employees from one state to another.
C. The Multi-Factor Approach

A third approach is to use a multi-factor balancing model for establishing PPPs. It must be said at the outset that to do so is innately riskier than either of the previously-discussed approaches because it involves taking a calculated risk with respect to one or more of the three exceptions. However, the benefit is that it allows employers to utilize more flexible PPPs that best fit their business, while still maintaining company-wide uniformity.

Use of the multi-factor approach begins with an employer evaluating three factors: (1) GEF, (2) size (in terms of the number of employees), and (3) industry. These employer-centric factors will ultimately determine which of five risk levels the defendant falls in.

Analyzing the risk level begins with determining the employer’s GEF risk class. The key considerations here include: (1) whether the employer’s GEF extends to multiple geographic regions and (2) whether the employer’s GEF includes a high-risk state. For the purposes of this analysis, the high-risk states are: Arizona, California, Colorado, Louisiana, Massachusetts, Michigan, Montana, Nevada, and South Carolina. GEF risk classes based on these considerations are listed in Table 4.1 below:

<table>
<thead>
<tr>
<th>GEF CLASS</th>
<th>CHARACTERISTICS</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Multi-regional GEF – AND – GEF includes high risk state(s)</td>
</tr>
<tr>
<td>B</td>
<td>Multi-regional GEF – OR – GEF includes high risk state(s)</td>
</tr>
<tr>
<td>C</td>
<td>NEITHER</td>
</tr>
</tbody>
</table>

The next factors, size and industry are considered in tandem. This is done because neither is alone dispositive in determining risk of employment-related litigation. For example, a small business that operates in a particularly thorny industry may have a similar risk class to a large business that operates in relatively “safe” industry. In assessing the relevance of industry in the tandem, the key considerations are: (1) whether the industry is “highly regulated”, (2) whether the industry is “particularly susceptible” to employee fraud, deceit, crime, or other misconduct, and (3) whether the employer is involved in manufacturing operations. For the purposes of determining Size-Industry (“S-I”) risk class, “highly regulated” industries include: finance, securities, insurance, medical, private utility providers, commodities, government contractors,
telecommunications, and construction. “Particularly susceptible” industries include: finance, securities, insurance, medical, and government contractors. S-I risk classes based on the foregoing are listed in Table 4.2 below:

<table>
<thead>
<tr>
<th>S-I CLASS</th>
<th>SIZE</th>
<th>INDUSTRY</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>ANY</td>
<td>Highly regulated – AND – particularly susceptible</td>
</tr>
<tr>
<td>B</td>
<td>100+</td>
<td>Highly regulated – OR – particularly susceptible; MFG.</td>
</tr>
<tr>
<td>C</td>
<td>100+</td>
<td>Highly regulated – OR – particularly susceptible; No MFG.</td>
</tr>
<tr>
<td>D</td>
<td>&lt; 100</td>
<td>Highly regulated – OR – particularly susceptible; No MFG.</td>
</tr>
<tr>
<td>E</td>
<td>&lt; 100</td>
<td>Highly regulated – OR – particularly susceptible; No MFG.</td>
</tr>
</tbody>
</table>

Table 4.2

At this point, the employer should use Table 4.3 below to identify the overall risk level of the business.

<table>
<thead>
<tr>
<th>RISK LEVEL</th>
<th>GEF CLASS</th>
<th>S-I CLASS</th>
</tr>
</thead>
<tbody>
<tr>
<td>V</td>
<td>A</td>
<td>A</td>
</tr>
<tr>
<td>IV</td>
<td>B</td>
<td>A</td>
</tr>
<tr>
<td>III</td>
<td>B</td>
<td>B or C</td>
</tr>
<tr>
<td>II</td>
<td>C</td>
<td>D</td>
</tr>
<tr>
<td>I</td>
<td>C</td>
<td>E</td>
</tr>
</tbody>
</table>

Table 4.3

Finally, the employer should then balance their risk category against a fourth factor, the jurisdictional nuances of the exceptions, to identify the PPP strategy that best fits the employer’s needs and the demands of the jurisdiction, keeping in mind that higher risk levels should compel accommodation of greater business restrictions.

V. CRAFTING POLICY FOR SPECIFIC EXCEPTIONS

Of course, choosing a broad PPP development strategy like those described above is only part of the equation. Actually creating PPPs that will defeat the exceptions is another task entirely. This section will focus on the core challenges that each exception poses to employers and then propose solutions to those challenges.
A. The Public Policy Exception – Difficult by Definition

At first glance, beating the public policy exception might seem as simple as complying with state law. However, despite its widespread acceptance, a clear definition has proved remarkably elusive. Even one of the most oft-cited cases regarding the exception stated that “there is no precise definition of the term.”\(^{58}\) The broader definition that gained a significant degree of acceptance was provided in the same case:

In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State’s constitution and statutes and, when they are silent, in its judicial decisions. Although there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal . . . a matter must strike at the heart of a citizen’s social rights, duties, and responsibilities before the tort will be allowed.\(^{59}\)

However, states with a more restrictive view define public policy much more narrowly, “refus[ing] to create a public policy exception . . . in the absence of a statute defining the public policy”\(^{60}\) or finding that a “narrow [public policy] exception covers only the discharge of an employee for the sole reason that the employee refused to perform an illegal act.”\(^{61}\) This definitional problem is the core challenge to employers and their decision-makers in drawing the line between an acceptable firing and one that will expose the employer to liability.

The easy answer is of course to never fire an employee under circumstances where doing so might be considered “in bad taste.” However, this ignores the classic employment law question – what is one to do when an employee who was already on thin ice (possibly already terminable) engages in potentially protected activity that causes them to violate the employer’s PPPs?

Fortunately, there are many proactive measures that can be taken. In the case of almost any termination, a consistent paper trail can prove to be an invaluable shield against an ultimate finding of liability. Whether the employee was a “good”, “bad”, or “average” employee

\(^{59}\) Id. at 878-79.
\(^{61}\) Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985).
prior to termination, documentation can help demonstrate that an employer acted based on proper motives. Even if an employer is found to have violated public policy in discharging an employee, documentation can still be helpful because it can serve to convince the judge or jury that the discharge was less egregious and should thus result in a diminished damages award. For this reason, it is critical to train supervisors, managers, and executives to maintain proper documentation for an employee’s personnel file and establish a culture where keeping employee paperwork up-to-date is demanded rather than merely requested.

Another helpful tactic is to reward employees for performing actions which “public policy” might smile upon. Though some of these examples are already required in certain states, ideas include paid time off for jury duty and voting or bonuses for reporting potential workplace hazards that are followed up on and corrected or fraud that is identified and handled.

Attention should also be given to areas that are ripe for application of the public policy exception, such as workers’ compensation and whistleblowing. Some of the earliest post-Petermann adoptions of a form of the public policy exception arose out of workers’ compensation disputes. Additionally, the majority of states now have whistleblower protection laws and these laws have been cited as being protected from discharge under the public policy exception. This makes it imperative for businesses to be employee-friendly in these areas and to develop specific PPPs to address them. With respect to whistleblowing in particular, an effective program, which would include a telephone tip line that is staffed 24/7, never uses voicemail, and includes measures to protect anonymity (to the extent legally possible), is a win-win for employers. According to a 2002 study, twenty percent of American workers “possess personal knowledge of workplace fraud . . . and thirty-nine percent are more

62 See, e.g., ALASKA STAT. § 15.15.100 (2012) (requiring employers to provide paid time off when a voter does not have sufficient time to vote outside of work hours); ALA. CODE § 12-16-8 (2012) (requiring employers to pay full-time employees their normal compensation when on jury duty); 13 COLO. CODE REGS. § 71-126 (2011) (requiring employers to pay employees regular wages for the first three days of jury service).


64 Tim Burnett, Why Your Company Should Have a Whistleblowing Policy, SAM ADVANCED MGMT. J. 37, 38 (Autumn 1992).

65 Dave Slovin, Blowing the Whistle, INTERNAL AUDITOR, June 2006, at 45, 46-47.
likely to report fraud if they could remain anonymous.\textsuperscript{66} This leaves little excuse for employers not to incorporate such programs into their PPPs whenever feasible, especially given that doing so can simultaneously cut down on exposure to problems under the public policy exception.

**B. Communicating Your PPPs – An Implied Contract Weapon?**

Up until now, this comment has spoken only of employers developing PPPs, not communicating them.\textsuperscript{67} That is because the thirty-eight states that now recognize the implied contract exception in some form do so most popularly when employers have communicated their PPPs to employees. This means communicating PPPs (formally or informally; orally or in writing) is risky business – so risky that if done incorrectly, it can completely destroy the protection given to employers by the employment-at-will doctrine. So should employers stop communicating PPPs at all? Absolutely not. But it is important to limit them in some respects and to go about communicating them in the right way.

Easily the most common scenario in which courts hold employers liable under the implied contract exception is where employers have communicated that termination will take place only “for good cause” (or similar language).\textsuperscript{68} However, others have gone even further, including permitting employees to recover based on their mere reliance on employer statements or assurances.\textsuperscript{69}

The reality is that most cases based on the implied contract exception arise out of handbooks, manuals, policy statements, and the like that are disseminated by employers. In these cases, the best solution can be accomplished in three simple steps. First, include in all such publications a clear and prominent disclaimer stating: (1) that the employee is an at-will employee, (2) that at-will employees can be terminated at any time, for any reason, at the discretion of either the employer or the employee, and (3) that nothing in the particular document should be construed to alter the employee’s at-will status. In the more typical case of a handbook or manual, this disclaimer should be placed, at minimum, on the very first page, on the very last page, and directly above the signature line of any acknowledgement.

\textsuperscript{66} Id. at 46.

\textsuperscript{67} See discussion supra Part IV.


page (if this is not the first or last page). Numerous jurisdictions have found such disclaimers to be effective in obliterating the implied contract exception’s applicability. However, it should be noted that this is not uniformly true. In Michigan, for example, “when a policy manual contains both assurances of job security and a disclaimer, it remains a question for the jury as to which governs.” Hiring personnel should also be directed to avoid giving anecdotal accounts along the lines of keeping a position “as long as you do your job,” as this type of phrase has been specifically found problematic before.

C. Keeping the Covenant – Good Faith and Fair Dealing

The least recognized exception is also fortunately one of the easiest for employers to handle. When addressing the implied covenant of good faith and fair dealing as applied to the employment context, almost all jurisdictions that recognize the exception have required a showing of “bad faith” before permitting recovery. This essentially means following the rules established for dealing with the public policy exception and making good hiring and promotion decisions so that individuals with authority over termination are not the kind who would act to deprive individuals of earned pay, benefits, or commissions or engage in other vengeful or abusive termination practices. Indeed, only one jurisdiction ever truly recognized the implied covenant of good faith and fair dealing as a significant restriction on employers. In Cleary v. American Airlines, the California Court of Appeals briefly held, under very specific facts, that the implied covenant along with employer promises and the employee’s history with the company could bar the employer from terminating him for anything other than good cause. However, after the decision was roundly criticized for its excessive breadth, it was quickly restricted by the California Supreme Court after only eight

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76 Id. at 729.
years.  

VI. CONCLUSION

While the three exceptions discussed in this note operate to limit the extent of employers’ abilities to terminate as freely as they did in the employment-at-will heyday, the exceptions are not incredibly vast in scope or unnavigable if given due consideration. What is critical for employers to do to ensure they are not bit by the exceptions in court is to take the time to understand the applicability and contours of the exceptions in jurisdictions where they operate, assess the risk the exceptions pose to them, and develop and implement strategies targeted at avoiding liability by way of training and nuanced PPPs.

For employers and readers who wish to better understand these exceptions from the ground up, Appendix A to this comment contains a listing of jurisdictions (except Montana) including the exceptions they recognize, a case recognizing each exception, in the case of the implied covenant of good faith and fair dealing and public policy exceptions, whether the exception sounds in contract, tort, or both, and whether punitive damages are available (as described above).

\[\text{\scriptsize 77 See generally }\text{ Foley v. Interactive Data Corp., 765 P.2d 373, 401 (Cal. 1988).}\]
## APPENDIX A – JURISDICTIONAL BREAKDOWN

### Alabama
- **Implied Contract**: YES – Hoffman-LaRoche, Inc. v. Campbell, 512 So.2d 725 (Ala. 1986)
- **Good Faith**: YES – Hoffman-LaRoche, Inc. v. Campbell, 512 So.2d 725 (Ala. 1986) (unclear)
- **Public Policy**: NO

### Alaska
- **Good Faith**: YES – Mitford v. deLasala, 666 P.2d 1000 (Alaska 1983) (contract)
- **Public Policy**: NO (Subsumed by good faith)

### Arizona

### Arkansas
- **Good Faith**: NO
- **Public Policy**: NO

### California
- **Implied Contract**: YES – Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988)
Colorado
Good Faith: NO
Public Policy: YES – Martin Marietta Corp. v. Lorenz, 823 P.2d 100 (Colo. 1992) (tort)

Connecticut
Good Faith: NO

Delaware
Implied Contract: NO

Florida
Implied Contract: NO
Good Faith: NO
Public Policy: NO

Georgia
Implied Contract: NO
Good Faith: NO
Public Policy: NO

Hawaii
Good Faith: NO

Idaho
Implied Contract: NO
<table>
<thead>
<tr>
<th>State</th>
<th>Implied Contract</th>
<th>Good Faith</th>
<th>Public Policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indiana</td>
<td>NO</td>
<td>NO</td>
<td>YES – McClanahan v. Remington Freight Lines, Inc. 517 N.E.2d 390 (Ind. 1988) (tort)</td>
</tr>
<tr>
<td>Kentucky</td>
<td>NO</td>
<td>NO</td>
<td>YES – Firestone Tire &amp; Rubber Co., v. Meadows, 666 S.W.2d 730 (Ky. 1983) (tort w/ punitives)</td>
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<td>Louisiana</td>
<td>YES – Thebner v. Xerox Corp., 480 So. 2d 454 (La. App. 3d Cir. 1985)</td>
<td>UNCLEAR</td>
<td>UNCLEAR</td>
</tr>
<tr>
<td>Maine</td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
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</tbody>
</table>
Maryland
Good Faith: **NO**

Massachusetts

Michigan
Good Faith: **NO**

Minnesota
Good Faith: **NO**
Public Policy: **YES** – Phipps v. Clark Oil & Ref. Corp., 408 N.W.2d 569 (Minn. 1987) (tort w/ punitives)

Mississippi
Implied Contract: **YES** – Bobbitt v. Orchard, Ltd., 603 So.2d 356 (Miss. 1992)
Good Faith: **NO**
Public Policy: **YES** – Perry v. Sears, Roebuck & Co., 508 So.2d 1086 (Miss. 1987) (tort)

Missouri
Implied Contract: **NO**
Good Faith: **NO**
Public Policy: **YES** – Amaan v. City of Eureka, 615 S.W.2d 414 (Mo. App. en banc 1981) (tort w/ punitives)
Nebraska
Good Faith: **NO**

Nevada
Implied Contract: **YES** – Southwest Gas Corp. v. Ahmad, 668 P.2d 261 (Nev. 1983)
Public Policy: **YES** – Hansen v. Harrah’s, 675 P.2d 394 (Nev. 1984) (tort w/ punitives)

New Hampshire
Good Faith: **NO**

New Jersey
Good Faith: **NO**
Public Policy: **YES** – Pierce v. Ortho Pharm. Corp., 417 A.2d 505 (N.J. 1980) (*contract OR tort w/ punitives at plaintiff’s election*

New Mexico
Good Faith: **NO**

New York
Implied Contract: **NO**
Good Faith: **NO**
Public Policy: **NO**
<table>
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<th>State</th>
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<th>Good Faith</th>
<th>Public Policy</th>
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<td>Amos v. Oakdale Knitting Co., 416 S.E.2d 166 (N.C. 1992) (tort)</td>
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<td>North Dakota</td>
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<td></td>
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<td></td>
<td>Krein v. Marion Manor Nursing Home, 415 N.W.2d 793 (N.D. 1987) (tort w/ punitives)</td>
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<tr>
<td>Ohio</td>
<td>YES</td>
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<td>Oklahoma</td>
<td>YES</td>
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<td>Oregon</td>
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<td>Nees v. Hocks, 536 P.2d 512 (Ore. 1975) (tort w/ punitives)</td>
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<tr>
<td>Pennsylvania</td>
<td>YES</td>
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<td>Rhode Island</td>
<td>NO</td>
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</tbody>
</table>
South Carolina

South Dakota
Good Faith: NO

Tennessee
Good Faith: NO
Public Policy: YES – Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984) (tort w/ punitives)

Texas
Implied Contract: NO
Good Faith: NO
Public Policy: YES – Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985) (tort w/ punitives)

Utah
Good Faith: NO
Public Policy: YES – Retherford v. AT&T Commc’ns, 844 P.2d 949 (Utah 1992) (tort w/ punitives)

Vermont
Good Faith: NO
Virginia
Good Faith: NO

Washington
Good Faith: NO

West Virginia
Good Faith: NO

Wisconsin
Good Faith: NO

Wyoming
Good Faith: NO

END OF APPENDIX A