EMPLOYMENT CONTRACT CLAIMS

[4:1] **Scope:** This Chapter deals primarily with claims for wrongful termination based on alleged breach of an express or implied employment contract, as distinguished from claims based on statutory violations or tort law.

Cross-refer: Other employment contract issues are discussed in other chapters of this Practice Guide:
— *Compensation* issues are discussed in *Ch. 11 (Compensation)*;
— *Remedies* for breach are discussed in *Ch. 17 (Remedies)*; and
— *Defenses* to employment contract claims are discussed in *Ch. 15 (Preemption Defenses)* and *Ch. 16 (Other Defenses)*.

A. EMPLOYMENT PRESUMED AT WILL

1. [4:2] **Labor Code §2922:** "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." [Lab.C. §2922 (emphasis added)]

   Thus, an agreement for "permanent employment," or "lifetime employment," or even "for so long as the employee chooses" is deemed at will. Having no specified term, the employment is terminable at the will of either party, even if the employee's salary is negotiated annually. [*Foley v. Interactive Data Corp.* (1988) 47 C3d 654, 678, 254 CR 211, 224]

   a. [4:3] **Presumption:** The statute creates a presumption that the employment is at will. Because it is based on public policy considerations, the presumption affects the burden of proof (Ev.C. §605). Therefore, the burden is on the employee to prove the employment was not at will by evidence of a contract, express or implied, for a fixed term or to terminate only for cause. [*Haycock v. Hughes Aircraft Co.* (1994) 22 CA4th 1473, 1488-1489, 28 CR2d 248, 257; *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 CA4th 1359, 1389, 88 CR2d 802, 826-827]

   b. [4:4] **Effect:** Absent proof of a contrary agreement or other limitation on the employer's right to terminate, an employer may discharge at any time, with or without notice, and for any lawful reason. [*Guz v. Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 335-336, 100 CR2d 352, 364-365; *Dore v. Arnold Worldwide, Inc.* (2006) 39 C4th 384, 389, 46 CR3d 668, 671-672]

      (1) [4:5] **Motive immaterial:** Where the employment is at will, the employer's motive for termination and lack

of care in doing so are generally irrelevant. Thus, it is immaterial that the employer acted in "bad faith" or "without probable cause." [*Guz v. Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 351, 100 CR2d 352, 377; *McGrory v. Applied Signal Tech., Inc.* (2013) 212 CA4th 1510, 1533, 152 CR3d 154, 172—"Since an employer does not require good cause to terminate an at-will employee, . . . an employer need not either articulate or substantiate its reasons, except to provide an advance refutation for any inference that the true reason was illegal"]

(2) [4:6] **Fair treatment not required:** The employer is not required to treat all employees alike: "[T]he employer may act peremptorily, arbitrarily, or inconsistently." [*Guz v. Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 350, 100 CR2d 352, 375]

[4:6.1] ***PRACTICE POINTER FOR EMPLOYEES:*** While an at-will employee may be treated arbitrarily and can be fired for any reason, an at-will employee cannot be fired for a *reason that violates the law*. It is important to determine whether other employees, not in the same "protected group," received more favorable treatment under the same or similar circumstances.

[4:6.2-6.4] *Reserved.*

(a) [4:6.5] **No "bad faith" liability:** The implied covenant of good faith and fair dealing implied in every contract does not impair the employer's right to terminate at-will employees, or to demote them or cut their pay. [*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 CA4th 338, 355-357, 112 CR3d 455, 471-472—evidence that employer prevented at-will employee from performing his duties by failing to provide necessary resources did not affect employer's right to terminate]

(3) [4:7] **No warning or procedural safeguards required:** Moreover, the employer may act without warning and without providing specific protections such as fair procedures, objective evaluation or preferential reassignments. [*Guz v. Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 350, 100 CR2d 352, 375; *McGrory v. Applied Signal Tech., Inc.* (2013) 212 CA4th 1510, 1536, 152 CR3d 154, 175—at-will employee not entitled to advance notice or hearing before termination]

c. [4:8] **Extends to demotions, pay cuts, and unilateral changes to dispute resolution policies:** The employer's right to terminate an at-will employee includes the right to insist on prospective changes in the terms of that employment. Thus, there is a *presumption* that an at-will employee may be demoted

or experience a pay cut prospectively at any time, or the dispute resolution policy could be modified. The employee impliedly accepts such changes in the terms of employment by continuing the employment. [See *Schachter v. Citigroup, Inc.* (2009) 47 C4th 610, 619, 101 CR3d 2, 10; *DiGiacinto v. Ameriko-Omserv Corp.* (1997) 59 CA4th 629, 634-636, 69 CR2d 300, 304-305; *Diaz v. Sohnen Enterprises* (2019) 34 CA5th 126, 131, 245 CR3d 827, 831—employee who received notice of unilateral change to employer's dispute resolution policy requiring arbitration impliedly consented by continuing employment; *see also* ¶*4:150*]

[4:9] ***PRACTICE POINTER FOR EMPLOYERS:*** Rather than relying on the statutory presumption of at-will employment, employers should have at-will employees sign express written contracts agreeing that they are at-will employees and that their employment may be terminated at any time without cause or notice.

The express written agreement should include an integration clause (stating it is the parties' entire agreement as to the subject of at-will employment), and should void all modifications unless they are in writing and signed by the employer or a designated representative; *see* ¶*4:84 ff.*

2. [4:10] **Promises Dependent Upon Continued Employment:** An employer's promise of benefits to an at-will employee after a specified length of employment (e.g., a bonus after six months) does not affect the employer's right to terminate the employee. However, if the employee is *discharged without cause* before completion of all of the terms of the bonus agreement, the employee may recover *at least a pro-rata share* of the promised bonus. This result "is consistent with contract law principles prohibiting efforts by one party to a contract to prevent completion by the other party." [*Schachter v. Citigroup, Inc.* (2009) 47 C4th 610, 622, 101 CR3d 2, 12]

   a. [4:10.1] **Compare—*voluntary* termination:** On the other hand, employees who *voluntarily* leave their employment before the bonus calculation date are not entitled to receive their bonus. [*Schachter v. Citigroup, Inc.* (2009) 47 C4th 610, 621-622, 101 CR3d 2, 11-12]

   b. [4:11] **Stock options dependent on continued employment?** A terminated at-will employee has no right to stock options that had not yet vested and were dependent on the continuation of employment. [*Oracle Corp. v. Falotti* (9th Cir. 2003) 319 F3d 1106, 1111 (applying Calif. law)—stock option agreement gave Employer's "Compensation Committee" authority to determine when Employee ceased to be employed for stock option purposes; *Falkowski v. Imation Corp.* (2005) 132 CA4th 499, 510, 33 CR3d 724, 733—nonvested stock options forfeited upon sale of employer to another company where plan required "continuous status as an employee"]

[4:11.1-11.4] *Reserved.*

(1) [4:11.5] **Same result with voluntary termination:** Employees who voluntarily terminate their employment before their restricted stock is fully vested have no right to compensation for the shares forfeited, even if the unvested stock was acquired *in lieu of wages*. [*Schachter v. Citigroup, Inc.* (2009) 47 C4th 610, 621-622, 101 CR3d 2, 12]

(a) [4:11.5a] **Compare—stock options:** One appellate court observed that simply because the Supreme Court held in *Schacter (¶4:11.5)* that restricted stock is wages does not mean that stock options are also wages. [*Shah v. Skillz Inc.* (2024) 101 CA5th 285, 314-315, 320 CR3d 175, 200-201—since stock options grant holder a contractual right to buy shares of stock later at agreed upon price, an aggrieved employee may sue for breach of contract to recover value of lost options]

(2) [4:11.6] **No Labor Code violation:** The *forfeiture* of *unvested* stock acquired in lieu of wages arguably does not violate statutes (Lab.C. §§201, 202) requiring immediate payment of "wages" upon termination of employment. [*Schachter v. Citigroup, Inc.* (2009) 47 C4th 610, 622, 101 CR3d 2, 12; *Shah v. Skillz Inc.* (2024) 101 CA5th 285, 290, 314-315, 320 CR3d 175, 180, 200-201—stock options are contractual rights to buy shares of stock and do not constitute "wages" under Labor Code]

c. [4:12] **Sales commissions dependent on continued employment?** Employment termination (whether voluntary or involuntary) does not necessarily impede an employee's right to a sales commission *where no other action is required on the employee's part* to complete the sale leading to the commission payment: "This concept has been colorfully described as 'He who shakes the tree is the one to gather the fruit.' " [*Schachter v. Citigroup, Inc.* (2009) 47 C4th 610, 622, 101 CR3d 2, 12]

But employees have no right to commissions on transactions concluded after termination of their employment where the employment agreement makes commissions payable "so long as [employee] remains employed with the Company." Absent evidence of any alternative meaning, "the written employment agreement precludes plaintiff from collecting additional commissions post-termination." [*Nein v. HostPro, Inc.* (2009) 174 CA4th 833, 850, 95 CR3d 34, 49]

(1) [4:12.1] **Unconscionable?** At least one case holds such a provision unenforceable as unconscionable. [*Ellis v. McKinnon Broadcasting Co.* (1993) 18 CA4th 1796, 1805-1807, 23 CR2d 80, 85—provision forfeiting advertising

sales commissions if salesperson terminated before employer received payment for advertising held unconscionable; but see *American Software, Inc. v. Ali* (1996) 46 CA4th 1386, 1393-1395, 54 CR2d 477, 481-482 (contra)—similar provision held *not* unconscionable and criticizing *Ellis*]

(2) [4:12.2] **Quantum meruit recovery for services rendered?** According to one case, there is no authority allowing recovery for the reasonable value of services rendered where a salesperson's right to commissions is forfeited under the employment contract. [*Nein v. HostPro, Inc.* (2009) 174 CA4th 833, 854, 95 CR3d 34, 52]

(3) [4:12.3] **No Labor Code violation:** A salesperson's right to commissions depends on the terms of the employment contract. If no commissions are due under the contract, the employer's failure to pay commissions does not violate the Labor Code. [*Nein v. HostPro, Inc.* (2009) 174 CA4th 833, 853, 95 CR3d 34, 51]

(4) [4:12.4] **Compare—termination to avoid payment of accrued commissions:** Discharging an employee in order to avoid paying commissions, vacation pay and/or other amounts due the employee violates a "fundamental public policy" of this state and may be actionable as a tort. [See *Gould v. Maryland Sound Indus., Inc*. (1995) 31 CA4th 1137, 1148, 37 CR2d 718, 724; *and* ¶*5:243*]

Such pretextual terminations also may breach the implied covenant. *See discussion at* ¶*4:346.*

[4:13-14] *Reserved.*

3. [4:15] **Employee's Burden to Rebut At-Will Presumption:** The presumption that the employment was at will affects the burden of proof at trial. The employee must rebut the presumption by proving the employment was *not* at will. The at-will presumption is sufficient to submit the case to the jury even if the employer presents no evidence on this issue. [*Haycock v. Hughes Aircraft Co.* (1994) 22 CA4th 1473, 1488-1490, 28 CR2d 248, 257-258; *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 CA4th 1359, 1386, 88 CR2d 802, 823-824]

[4:16] ***PRACTICE POINTER FOR EMPLOYERS:*** Even if the employee's rebuttal evidence is weak, it is risky for employers to rely entirely on the presumption of at-will employment in jury trials of wrongful termination cases. Jurors, who are more often employees than employers, may be sympathetic to evidence that the employer expressly or implicitly promised not to terminate without good cause. Therefore, instead of relying entirely on Lab.C. §2922 at trial, employers should be prepared to prove "good cause" or other grounds to justify the termination.

[4:17-19] *Reserved.*

4. [4:20] **Limitations on At-Will Employment:** The statutory presumption of at-will employment does not apply to all types of employment or in all cases. For example:

   a. [4:21] **Collective bargaining agreements:** Collective bargaining agreements (which cover a relatively small percentage of the work force) generally protect union employees from discharge without "just cause." [*Pugh v. See's Candies, Inc. (Pugh I)* (1981) 116 CA3d 311, 320-321, 171 CR 917, 921 (disapproved on other grounds by *Guz v. Bechtel Nat'l, Inc.* (2000) 24 C4th 317, 100 CR2d 352); *Dickeson v. DAW Forest Products Co.* (9th Cir. 1987) 827 F2d 627, 630]

   [4:22-24] *Reserved.*

   b. [4:25] **Statutes prohibiting discrimination:** Employers are prohibited by federal and state laws from terminating employees on the basis of their age, race, sex, religion, disability, etc. These statutes include the Civil Rights Act of 1866 (42 USC §1981); the Civil Rights Act of 1964 (42 USC §§2000e to 2000e-17); the Americans with Disabilities Act (ADA) (42 USC §§12101 to 12213); the Age Discrimination in Employment Act (ADEA) (29 USC §§621 to 634); and the California Fair Employment and Housing Act (FEHA) (Gov.C. §§12940(a), 12941).

   Cross-refer:
   — See detailed list of federal and state statutes regulating employment discrimination at ¶*1:35 ff.*
   — Employment discrimination generally is covered in *Ch. 7 (Employment Discrimination—In General).*

   c. [4:26] **Other statutes limiting discharge or discipline:** Other state laws prohibit discharging or disciplining an employee for:

   - The employee's political affiliation. [Lab.C. §§1101, 1102]
   - Filing a complaint with the Labor Commissioner or making a written or oral complaint that the employee is owed wages. [Lab.C. §98.6]
   - Filing a workers' compensation claim. [Lab.C. §132a]
   - Complaining re workplace safety. [Lab.C. §6310; see *Lujan v. Minagar* (2004) 124 CA4th 1040, 1046, 21 CR3d 861, 866—statute also prohibits discharge of employees whom employer fears will complain of safety violations in the future; see also *Freund v. Nycomed Amersham* (9th Cir. 2003) 347 F3d 752, 758 (applying Calif. law)]
   - "Whistleblowing" (disclosing employer's illegal acts to governmental authorities) or filing or assisting a *false claims action* against the employer. [Gov.C. §12653(b); Lab.C. §1102.5(b); see *Hoefer v. Fluor Daniel, Inc.* (CD

CA 2000) 92 F.Supp.2d 1055, 1056—state false claims statute does not protect federal whistleblowers]

- An earnings assignment order for enforcement of support obligations. [Fam.C. §5290]
- Conduct protected under the Labor Code *except* conduct in *direct conflict* with the employer's "essential enterprise-related interests" that would "actually constitute a material and substantial disruption of the employer's operation." [Lab.C. §98.6(c)(2)(A)]

  Protected conduct *includes:*
  - — lawful conduct during nonworking hours away from the employer's premises (Lab.C. §96(k), *see* ¶*5:154*);
  - — filing a claim or testifying in proceedings before the Labor Commissioner; and
  - — suing the employer to collect civil penalties pursuant to the "Labor Code Private Attorneys General Act" (Lab.C. §2699 et seq., *see* ¶*17:760*). [Lab.C. §98.6(a)]
- Refusing to participate in any activity that would result in a violation of state or federal law, rule or regulation. [Lab.C. §1102.5(c)]
- Taking time off, after reasonable notice to the employer, for family care or medical leave as provided by the California Family Rights Act. [Gov.C. §12945.2(*l*)]
- Taking time off, after reasonable notice to the employer, for jury service, or to appear in court as a witness, or to seek relief from domestic violence, sexual assault or stalking. [Gov.C. §12945.8 (amended eff. 10/1/25) (formerly Lab.C. §§230, 230.1)]
- Taking time off to attend judicial proceedings relating to a crime in which the victim was the employee, an immediate family member (as defined) or a registered domestic partner. [Lab.C. §§230.2, 230.5 (both amended eff. 10/1/25) (both "sunset" dates 1/1/35)]
- The employee's status as a victim of domestic violence, sexual assault or stalking, if the victim provides notice to the employer or the employer has actual knowledge of the status. [Gov.C. §12945.8]
- Taking time off to appear at a child's school when requested by a teacher when the employee's child has been suspended (Lab.C. §230.7); or, after reasonable notice to the employer and for a limited number of hours, to participate in school activities of a child in kindergarten or grades 1-12. [Lab.C. §230.8]
- Taking time off to perform emergency duty as a volunteer firefighter or reserve police officer or emergency rescue personnel. [Lab.C. §230.3]

- Military duty or training. [Mil. & Vet.C. §394]
- A physician-employee's advocating medically appropriate health care for a patient. [Bus. & Prof.C. §2056(c)]
- A record of *arrest* or detention that *did not result* in criminal conviction, including while subject to the process and jurisdiction of juvenile court law. [Lab.C. §432.7(a); but see *Pitman v. City of Oakland* (1988) 197 CA3d 1037, 1042-1044, 243 CR 306, 308-310—employer may ask about arrest and may conduct own investigation into possible employee misconduct but cannot use arrest alone for disciplinary purposes]
- Illiteracy that does not affect the employee's satisfactory job performance. [Lab.C. §1044]
- Disclosing the amount of their own wages. [Lab.C. §232]
- Disclosing information about the employer's working conditions. [Lab.C. §232.5]
- Threat of wage garnishments or garnishment of wages for payment of one judgment. [Lab.C. §2929(b)]

There are also federal statutes to consider, including:

- Employers may not discharge an employee for exercising rights under the federal Family and Medical Leave Act (FMLA). [29 USC §2612(a) (held unconstitutional in part on sovereign immunity grounds by *Coleman v. Court of Appeals of Maryland* (2012) 566 US 30, 43-44, 132 S.Ct. 1327, 1338; *see* ¶*12:87*); see *Xin Liu v. Amway Corp.* (9th Cir. 2003) 347 F3d 1125, 1132]
- Persons who serve (or have served or have applied to serve) in the military may not be denied employment, reemployment, retention in employment, etc. on the basis of military service; and employers may not discriminate or take adverse action against such persons for exercising their rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA). [38 USC §4311]
- Employers may not discharge or discipline employees for union membership or union activity or other exercise of rights under the National Labor Relations Act. [29 USC §§151-169; see *Trompler, Inc. v. NLRB* (7th Cir. 2003) 338 F3d 747, 749—employer committed unfair labor practice by firing workers who walked off job in protest against supervisor's misconduct; see also *Double Eagle Hotel & Casino v. NLRB* (10th Cir. 2005) 414 F3d 1249, 1260—unlawful to discipline employees for sharing salary information or other terms and conditions of employment]
- Employers may not "injure" an employee witness "in his person or property" for testifying in federal court. [42 USC §1985(2)] (This means even at-will employees are

protected from discipline or discharge for responding to a federal subpoena; see *Haddle v. Garrison* (1998) 525 US 121, 126, 119 S.Ct. 489, 492.)

- Employers may not discharge an employee solely because the employee is or has been a debtor in bankruptcy under the Bankruptcy Code. [11 USC §525(b); see *In re Majewski* (9th Cir. 2002) 310 F3d 653, 656—employee who stated he intended to file for bankruptcy *not* protected]
- Employers may not discharge an ERISA plan participant "for the purpose of interfering with the attainment of any right to which such participant may become entitled" under the plan (e.g., retirement benefits, health insurance, disability insurance, etc.). [29 USC §1140; see *Kimbro v. Atlantic Richfield Co.* (9th Cir. 1989) 889 F2d 869, 880-881]
- Employers who issue publicly-traded securities may not discharge or otherwise retaliate against employees for reporting the employer's violation of federal securities laws ("whistleblowing"). [18 USC §1514A; *see* ¶*5:1681 ff.*]

(1) [4:27] **Statutes protecting particular types of employees:** Other statutes may protect the jobs of particular types of employees. For example:

- *Janitorial and building service employees* may not be terminated without cause for 60 days following a change in building service contractors. [Lab.C. §1061(b)(1)]

(2) [4:28] **Severability doctrine:** Although provisions of an employment contract that violate a statute are void, courts have the power to enforce the remainder of the contract: "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." [Civ.C. §1599; see *Marathon Entertainment, Inc. v. Blasi* (2008) 42 C4th 974, 992-993, 70 CR3d 727, 740-741 (severing provision for commissions for talent agent services because plaintiff lacked required state license, but enforcing provision for commissions for personal manager services, for which no license required)]

Severance is *not mandatory*, however, and its application in a particular case is subject to equitable considerations: "Civil Code section 1599 grants courts the power, not the duty, to sever contracts in order to avoid an inequitable windfall or preserve a contractual relationship where doing so would not condone illegality."

[*Marathon Entertainment, Inc. v. Blasi* (2008) 42 C4th 974, 992, 70 CR3d 727, 740]

[4:29] *Reserved.*

d. [4:30] **Public policy:** "An employer may not discharge an at will employee for a reason that violates fundamental public policy. This exception is enforced through tort law by permitting the discharged employee to assert against the employer a cause of action for wrongful discharge in violation of fundamental public policy." [*Stevenson v. Sup.Ct. (Huntington Mem. Hosp.)* (1997) 16 C4th 880, 897, 66 CR2d 888, 898—age discrimination may support claim for wrongful discharge in violation of public policy; see *Silo v. CHW Med. Found.* (2002) 27 C4th 1097, 1104-1105, 119 CR2d 698, 703-704—religious discrimination may support claim for wrongful discharge in violation of public policy; *Galeotti v. International Union of Operating Engineers Local No. 3* (2020) 48 CA5th 850, 854, 864, 262 CR3d 378, 380-381, 389 (claim for wrongful termination in violation of public policy, based on alleged violation of Penal Code extortion and theft statutes, for scheme demanding employee make $1,000 political contribution or be fired)]

Cross-refer: The tort of wrongful discharge in violation of public policy is discussed at ¶*5:40 ff.*

(1) [4:31] **Employee cannot be required to sign unlawful agreement:** An employer cannot lawfully make the signing of an employment agreement that contains illegal provisions a condition of employment (Lab.C. §432.5). Firing an employee for refusing to sign such an agreement contravenes fundamental public policy, even if the employment is at will, and gives rise to a tort cause of action. [*D'Sa v. Playhut, Inc.* (2000) 85 CA4th 927, 931, 102 CR2d 495, 498—agreement contained unenforceable covenant not to compete; *see discussions at* ¶*5:80, 5:123*]

(a) [4:32] **Not affected by severability or choice of law provisions:** It is *immaterial* that the employment agreement contained a severability provision (balance of agreement enforceable despite invalidity of any provision), or choice of law provision (calling for application of a different state's laws). That does not make it lawful for the employer to require the employee to sign the agreement. [*D'Sa v. Playhut, Inc.* (2000) 85 CA4th 927, 934, 102 CR2d 495, 500]

e. [4:33] **Promissory estoppel:** Where a newly-hired employee has relied to the employee's detriment upon a promise of employment, the employer may be estopped from discharging the employee before allowing the employee a good faith opportunity to demonstrate the ability to perform the services for which the employee was hired. [*Sheppard v. Morgan Keegan*