“Employment at will” is an often repeated phrase that is, in many ways, as outdated as the factories of the late 1800s that spawned the legal doctrine.

The employment-at-will doctrine literally means that, unless you have a contract of employment providing job security rights, an employer may discipline or fire you for a good reason, a bad reason—even an immoral or unethical reason—or no reason at all. Thus, under this doctrine, an employer can lawfully fire an employee because of his race, his age, or any of the other exceptions discussed in this book.

First, it is beneficial to discuss what employment at will is not. The employment-at-will doctrine has nothing to do with unionized employees who have bargained for “just cause” protection against unfair employment decisions. Similarly, the term is often used erroneously to imply that nonunion employees have no rights against wrongful discharges. In addition, some people confuse the phrase “right-to-work state” with employment at will and incorrectly use the terms interchangeably. We will address “right to work” considerations later in this Chapter.

According to legal scholars, the policy of employment at will began to appear in the 1880s as part and parcel of the laissez faire philosophy of the times. Under the laissez faire approach, the federal, state, and local governments intervened very little in issues relating to business and commerce and instead allowed the free market to dictate employment policies. Adoption of the employment-at-will doctrine occurred during the second phase (the so-called Technological Revolution) of the Industrial Revolution, which ran from the late 1800s to World War I. This doctrine afforded mutual rights to employers and employees, in that employers could terminate employees at any time, and employees could quit whenever they saw fit to do so. Although employment
at will afforded employers considerable power over the fate of their employees, it also enabled employees to demand better treatment at times when laborers were scarce and employers couldn’t afford to lose them. The policy has since fallen out of favor with modern legal scholars, many of whom question the authenticity of the purported origins of the rule. For example, Peter Stone Partee noted in a 1991 “Special Project: Reversing the Presumption of Employment-At-will” explained as follows:

... no authority even had stated the at-will doctrine in its present form until 1877, when a treatise writer, Horace Gray Wood, announced the at-will doctrine as the “inflexible” American rule. Wood cited no cases actually supporting the doctrine ...

(Vanderbilt Law Review, 44 Vand. L. Rev. 689).

The employment-at-will policy was tolerable in the late nineteenth century because jobs in that era were less technical and required less education, meaning that employees could move easily from one job to another. Nonetheless, the doctrine implicitly encourages employers not to care or worry about the fairness of employment decisions.

The Historical Decline of Employment at Will

Not surprisingly, the adoption and expansion of employment at will coincided with the birth of the labor movement in the United States. Workers in various industries sought ways to band together to protect themselves from unfavorable treatment and arbitrary termination by employers. Unionization allowed individuals to unite in order to bargain for better working conditions and job protection, with the collective threat of a strike if fair terms could not be negotiated. The primary benefit of organizing employees was the effective abolishment of the employment-at-will policy in unionized workplaces. In contrast to the laissez faire right of a company to unilaterally terminate an employment relationship for any or no reason, unions won the right of job security for their members by requiring employers to show “just cause” before disciplining or firing any employee of the organized company.

Participation in unions has waxed and waned in the United States during the past century. According to the U.S. Census figures, 4.2% of nonagricultural workers were union members in 1900, with membership peaking at nearly 35% of the labor force by the mid-1950s. Union participation has declined steadily since that time, such that by 2014, only 11.1% of American workers belonged to unions. (Source: http://www.nytimes.com/2011/01/22/business/22union.html)

The decline in union membership has been most visible in private sector unions. According to a January 23, 2015 release by the U.S. Bureau of Labor Statistics, only 6.6% of private sector wage and salary workers were members of a union in 2011. Participation in public sector unions has remained stronger, as 35.7% of government employees were union members in 2014.
If you are employed in a unionized workplace, you likely have a grievance and arbitration process to challenge unfair discipline or discharge. This right is independent of most of the “rights” described in this book, so the union representing employees may choose to challenge discipline through the grievance and arbitration process, or, if unionized employees believe some unlawful motive exists for the company’s actions, they may also proceed through the judicial system to enforce their rights. Many employees can pursue both routes.

**Legislative Exceptions to Employment at Will**

Not coincidentally, as the doctrine of employment at will has diminished in recent years, legislation to protect employees’ rights has expanded. A host of laws has been developed to increase job security by prohibiting employer conduct that previously would have been perfectly acceptable under the employment-at-will doctrine.

Consider the following federal law exceptions to the employment-at-will doctrine:

- Title VII of The Civil Rights Act (1964)
- The Pregnancy Discrimination Act (1978)
- The Equal Pay Act (1993) and Lily Ledbetter Act (2009)
- Section 1981 of The Civil Rights Act (1866)
- The Age Discrimination in Employment Act (1967)
- The Older Workers Benefit Protection Act (1986)
- The Uniformed Services Employment and Retraining Act (1994)
- The Occupational Safety and Health Act (1970)
- The Americans with Disabilities Act (1990)
- The Rehabilitation Act (1973)
- The Family and Medical Leave Act (1993)
- The Fair Labor Standards Act (1938)
- The Worker Adjustment and Retraining Notification Act (1988)
- The National Labor Relations Act (1935)
- The Consumer Credit Protection Act (1968)
- The Juror Protection Act (1978)
- The Whistleblower Protection Act (1989)
- The False Claims Act (1863)
- The Sarbanes-Oxley Act (2002)
- The Dodd-Frank Act (2010)
- Environmental Whistleblower Laws (7 acts in various years)
- The Food Safety Modernization Act (2010)

Consider, also, that many states, either legislatively or judicially, have created exceptions to employment at will in the following areas:

- Sexual orientation and preference
- Transgender discrimination
• Breach of contract
• Promissory estoppel
• Breach of public policy
• Negligent or intentional interference with the employment relationship
• Defamation
• Intentional infliction of emotional distress
• False imprisonment
• Invasion of privacy
• Fraud
• Assault
• Negligence

As this list indicates, myriad laws address employment issues. Although the vast majority of these laws do not apply to every particular situation, evaluation of challenged employment decisions should include the possibility that one or more of the exceptions above, as well as others that are developing at the federal and state levels, might be applicable.

**Why Some Lawyers Still Invoke “Employment at Will”**

Unfortunately, even well-intentioned lawyers remember the employment-at-will doctrine from law school and still invoke it today without explaining the various exceptions:

• “You probably have no basis to challenge your termination because you work in an employment-at-will state.”
• “It’s likely you cannot do anything about your hostile work environment because you are employed at will.”

This kind of advice from a lawyer borders on malpractice, given the implication that somehow the employment-at-will doctrine is as alive and well today as it was during the Industrial Revolution of the nineteenth century. These lawyers—hopefully not employment lawyers—seemingly forget that Congress and the various states have enacted a plethora of exceptions to the doctrine.

Yes, it was legal during the early twentieth century to fire someone for trying to form a union, for being African American, for being “too old,” and so on. It was legal because “employment at will” meant you could be fired for a good reason, a bad reason, or no reason at all. This is hardly the case anymore and you should consult an employment lawyer—not a tax lawyer or an estate lawyer—if you have one or more questions about your rights.

Non–employment lawyers often fail to ask the right questions. They tend to ask about the stated reason for the company’s action and, perhaps, whether the client thinks he or she was treated in a discriminatory manner.

• “Did you do what they said you did?”
• “Do you think they committed [age, race, sex] discrimination?”

Although these are important questions, they only touch the surface.
More inquiry is necessary for two reasons. First, while the company’s articulated explanation is important when considered in a vacuum, even a good reason can be discriminatory or lead to some other exception to employment at will. If you are fired because you missed work without calling in to report your absence, this might sound like a good reason to justify the company’s actions. However, what if other employees were not fired for similar infractions? What if you had reported an OSHA violation recently?

The second reason is that you, like most people who believe they were treated unfairly, do not want to scream “discrimination,” but you believe that there are laws requiring just cause even in a nonunion context. Moreover, you likely do not know enough about possible legal theories to form a valid opinion as to whether some exception to the employment-at-will policy provides you with rights. Thus, simply asking, “Do you think you were fired because you are a woman?” will likely result in the answer “No.”

Instead, what you should examine is whether you were treated differently than others, or differently than company policy provides, or whether you were disciplined or fired after engaging in some type of “protected” activity that shields you from unlawful retaliation.

Everyone Is Protected by One or More Laws

The many exceptions to employment at will have effectively disabled and devoured the rule. You may believe you are employed at will if you aren’t protected by an individual employment contract or a union’s collective bargaining agreement, but everyone is protected to some degree against unfair, arbitrary, or capricious termination. It’s just that some people can utilize more of the exceptions to employment at will than can others.

The Limited Meaning of “Right-to-Work” Laws

“Right-to-work state” is a phrase that lawyers hear from nonunion employees, either as some sort of misquote of employment at will, or in the context of non-compete agreements the employee wants to negate.

• “I heard this is a right-to-work state and that I have no rights. Is that true?”
• “I signed a noncompete agreement when I was hired, but this is a ‘right-to-work’ state. So, I can go work for a competitor, right?”

Both are used in the wrong context and both assume the wrong answer.

“Right-to-work” laws are in place in 23 states, with Michigan in 2012 becoming the most recent state to enact such a law, and the first state to do so in more than a decade.
As a practical matter, right-to-work laws are only important to unionized workers, as they bar unions—in collective bargaining agreements negotiated with companies—from requiring nonunion members to pay fees for representation, even though the nonunion members are entitled to the benefits of the agreements. Right-to-work laws mean nothing beyond the issue of whether all unionized employees must pay union dues.

The phrase is also used erroneously by people who say, “I have a right to work and my former employer cannot deny me that right even though I signed a noncompetition agreement.” Although it is true that noncompetition agreements are often overly broad and may be subject to judicial modifications, they are almost always enforceable to some degree. They never totally deny you a right to find a job; they just limit the range of options in your job search. A right-to-work law has no relevance in the interpretation of a noncompetition agreement.

Simply put, right-to-work laws have nothing to do with job security or the enforceability of noncompete agreements. For unionized employees, they affect nothing other than the issue of whether you can be compelled to pay union dues.

Do not be dissuaded from pursuing an employment complaint because you live in a right-to-work state. The law simply applies to payment of union dues—nothing else.