A New Ambush on At-Will Employment?

by: **Andrew K Jacobson, Bay Oak Law**

Once again, the turn of the new year brings new laws into existence. The newspapers focus on cross-cultural clashes like the banning of new sources of shark fins or partial bans on checking job applicants' and workers' credit reports. California has also created new penalties if a company willfully misclassifies an employee as an independent contractor. However, a new California law called the "Wage Theft Protection Act of 2011" requires that employers give most new employees a form at the beginning of employment. The laudable intent is to give valuable transparency to employees about their wages and about worker's compensation. However, the form released by the Labor Commissioner has a provision that is not required by the Labor Code and could lay the groundwork for lawsuits attacking at-will employment.

The Wage Theft Protection Act of 2011 is modeled after a similar bill in New York State. Governor Jerry Brown signed the bill into law on October 9, 2011, and it became effective on January 1, 2012. New California Labor Code § 2810.5 requires a non-governmental employer to provide a form to every new employee subject to the overtime rules, in the language commonly used at work, with the following information:

1. Rates of pay (whether by hour, shift, day, week, etc.), including overtime rates;
2. Any allowances claimed as part of the minimum wage;
3. The employer's regular designated payday;
4. The employer's name (including dba's);
5. The employer's physical and mailing address for the main office or principal place of business;
6. The employer's telephone number; and
7. Information about the employer's worker's compensation insurance carrier.

The Legislature directed the Labor Commissioner to "prepare a template that complies" with the above requirements, and the Labor Commissioner did so. However, the form includes a provision that the

Legislature did not require, requesting that the employer identify the "agreement" as being written or oral:

Employment agreement is (check box): ☐ Oral ☐ Written

AT-WILL EMPLOYMENT. Few employees subject to overtime rules – and therefore eligible to receive the new form – have written contracts. However, that does not mean that their agreements are "oral." Rather, the employment is "at-will" – either the employer or the employee can end the employment without notice or cause; see Cal. Lab. 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."

The trouble with marking the box for an "oral" agreement is that then there is the question of what the terms of the oral agreement are – and those terms could include no termination unless for good cause. See, e.g., *Foley v Interactive Data Corp.*, 47 Cal. 3d 654, 677 (1988): "Labor Code section 2922 establishes a presumption of at-will employment if the parties have made no express oral or written agreement specifying the length of employment or the grounds for termination. This presumption may, however, be overcome by evidence that. . . the parties agreed that the employer's power to terminate would be limited in some way, e.g., by a requirement that termination be based only on 'good cause.'"

The possibility of oral limits on at-will employment eviscerates employers' diligent attempts to keep employment at-will. At the very least, the employer is opening itself to the threat of litigation in the event of a termination, thereby requiring an expensive severance; at worst, the employer could also end up on the losing end of a lawsuit for terminating an employee in violation of an oral promise to terminate only for cause.

The Legislature did not require this information, and it is unclear why the Labor Commissioner added it. The form needs to be modified to make it clear that the employment is at-will – not oral, not written. The "Wage Theft Protection Act" should not be allowed to be used to destroy the presumption of "at-will"" employment; otherwise, a better title would be the "Wage Theft Guarantee Act."